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2003

**DELEGATED LEGISLATION IN ZAMBIA: "THE  
EFFECTIVENESS OF CONTROLS ON  
DELEGATED LEGISLATION."**

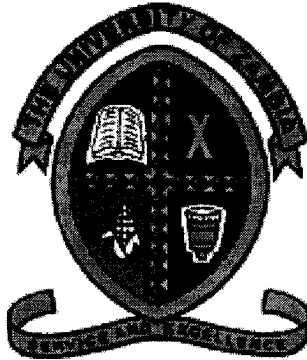
*By*

*Nyuma Kapampa Ng'ambi*

University of Zambia.

Lusaka,

November 2003.



**THE UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW**

I recommend that the directed research essay prepared under my supervision by **Nyuma Kapampa Ng'ambi** entitled:

**DELEGATED LEGISLATION IN ZAMBIA: "THE  
EFFECTIVENESS OF CONTROLS ON  
DELEGATED LEGISLATION."**

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(Supervisor)

21.11.2003

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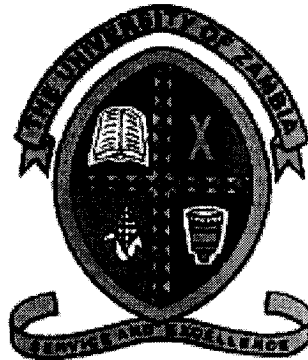
***By***

***Nyuma Kapampa Ng'ambi***

***Being a dissertation submitted in partial fulfillment of  
the requirement for a Bachelors of Laws Degree at the  
University of Zambia.***

**Lusaka, Zambia**

**November 2003.**



## DECLARATION

I **Nyuma Kapampa Ng'ambi**, Computer Number 97101745, do **HEREBY DECLARE** that the contents of this directed research paper are entirely based on my findings and that I have not in any respect used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions therein.

.....21-11-2003.....

Date

.....*Nyuma Kapampa Ng'ambi*.....

Signature

## QUOTATIONS

*"All hard work brings a profit, but mere talk leads only to poverty."*

**Proverbs 14:23.**

***And so in putting down this paper, it is recognized that;***

*"For everyone practicing evil hates the light and does not come to light, lest his deeds should be exposed. But he who does the truth comes to the light, that his deeds may be clearly seen, what they have done in God."*

**John 3:22-24.**

***Yet, the reality is that:***

*"In all government there is a perpetual intestine struggle, open or secret, between authority and liberty, and neither of them can ever absolutely prevail in the contest. A great sacrifice of liberty must necessarily be made in every government, yet even the authority which confines liberty can never, and perhaps ought never, in any constitution to become quite entire and uncontrollable ... it must be owned that liberty is the perfection of civil society, but still authority must be acknowledged essential to its very existence."*

**Gordon (Controlling the State)**

***And;***

*"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal control on government would be necessary. In framing a government that is to be administered by men, the great difficulty is this: you must enable the government to control the governed and in the next place oblige it to control itself."*

**James Madison (Federalist Paper No. 47.)**

***It is therefore true that,***

*"From time to time, it is necessary to subject the governmental process to acid analysis and to decide whether it is functioning efficiently to further the aims it has been designed to achieve."*

**Claire Palley.**

## *Preface*

It is recognised by authors and intellectuals everywhere that although the legal source of administrative powers may be found either in Common Law or in statutes, the great bulk of domestic administration is today carried on under statutory powers. Measured merely by volume, more Legislation is produced by the executive government than by the legislative. All the orders, rules and regulations made by ministers, departments, and other bodies owe their legal force to mostly, Acts of Parliament. This is simply because, Parliament is obliged to delegate very extensive law – making powers over matters of detail and to content itself with providing a framework of more or less permanent statutes.

Most delegated legislation is made in the form of statutory instruments and one of the functions of such legislation is to create the organs that are necessary if the tasks of government are to be performed for example, by creating a new public institution, providing for the appointment of its members and laying down the financial rules for the operation of the service.

Thus, As parliament thrusts ever greater responsibilities onto the executive, and social and other regulatory services are constantly multiplying, delegated legislation is increasing simply as a function of the growth of discretionary Power. The time constitutional problem presented by delegated Legislation is not that it exists, but that its enormous growth has made it difficult for parliament to watch over it. For the most part, however, administrative legislation is governed by the same legal principles that govern administrative action generally. However, the effectiveness of these controls is the subject of this research paper.

There are various mechanisms put in place to check and control delegated legislation. This dissertation reviews the effectiveness of these mechanisms practically. For instance, in the Zambian set up and by the provisions of the Interpretation and General Provisions Act, Cap 2 of the laws of Zambia, all instruments that result from delegated legislation, except the rules of the court have to be laid before Parliament. Also, a valuable security against hasty and unreasonable legislation is a provision, which is sometimes inserted in statutes giving legislative powers, requiring that, before the powers are actually exercised, persons interested shall be notified and given the opportunity to make objections or suggestions, and in some cases requiring public inquiries to be held. In addition, The Zambian Constitution, which is the supreme law of the land, requires that all statutory instruments be published in the Government Gazette within fourteen days of being made or approved. Further still, any form of subordinate legislation is liable to questioning the Courts on the grounds that it is ultra vires, that it goes beyond the powers conferred by the enabling statute on the rule- making agency.

This dissertation considers possible ways of making controls on delegated legislation more effective, because it has been concluded that without controls on delegated legislation, people are most likely to be subjected to arbitrariness and subsequently, bad governance.

**LUSAKA**  
**November 2003.**

**Nyuma Kapampa Ng'ambi.**

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## ***DEDICATION***

***To my mom and dad for loving me and encouraging me all the way and for molding me into the person that I am.***

***And***

***To my sisters and brothers in-law who have inspired me with their oneness and willingness to support me thus making my life much easier.***

***And***

***To my lovely girlfriend, Vyatowa, whose love and support has made this piece of work a reality.***

***And***

***To my brother, Wiza, for always being in front of me. Thank you very much for your support.***

## ***ACKNOWLEDGEMENTS***

First and foremost, I would like to thank and glorify my heavenly father for making this seemingly far reaching dream a reality and for being true and merciful to me. I'm truly indebted to you. Thank you for your love and guidance.

Secondly, I would like to express my thanks to my supervisor. Mr. S. Kulusika. Sir, you have been everything a student can look for in a supervisor. Thanks for your excellent and unfaltering guidance, for helping me put my rudimentary ideas with respect to this work in a more refined manner and express it in the way that I have. May God bless you.

To Mr. Hambokoma, a senior research fellow at the National Assembly for warmly welcoming me and allowing me to use the National Assembly library. Thank you very much sir for your assistance. Also to Mrs. Sikatele for assisting me with Reports on the Committees on Delegated Legislation, which were so valuable to this dissertation and for further, guiding me on the operation of the committee.

To mom and dad for loving and supporting me. To my sister Mrs. M. Yoyo, for financing this projects' printing and binding. A lot of thanks also goes to my other sisters and brothers in law; Mrs. Viyuyi, Mrs. Yombwe, Mrs. Lungu, Mrs. Chama, Mrs. Chaandula, Mrs. Kalamba and Mrs. Gondwe for being there for me when in need and for thus helping me through University. Wiza thanks for being a brother and for giving me a fair competition and encouragement. I wish you God's blessings.

I would further like to thank our coordinator, Dr. Munalula for her determination and efforts in providing us with the necessary guidance in putting this dissertation together and thus ably pushing me to put down this almost professional work.

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Lastly, I would like to thank Mr. Sangwa for the guidance in coming up with this research topic and Professor Mvunga for the guidance on internal procedures of the National assembly. I would also like to thank my course mates and friends especially those that I shared good and bad times with. May God richly bless you.

Nyuma Kapampa Ng' ambi.

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## *Abstract*

In Zambia, being a society that has undertaken the positive task of providing welfare services for the community, it was long realised that there is a need for the legislature to delegate power to the executive or other agencies to make rules having a legislative character. The grant of such powers however have not strictly adhered to the principle that they should be within the narrowest possible limits and that they should carefully define the extent and purpose of delegated legislation and should provide for the procedure by which they can be brought into effect.

Consequently, fundamental human rights have been abrogated by means of delegated legislation and the acts of the executive have been seen to directly and injuriously affect the person or property or rights of individuals in society.

Further, the enactments which result from legislative delegated powers in Zambia have operated in such a manner that they are seen not to be fair and reasonable and in some instances, for example, sub-delegated legislation, are not drafted in clear form. They at times also deviate from general principles of legislation or from the directions laid down by the legislature.

Though control mechanisms such as the Constitution, publication before coming into operation, consultation of interests and judicial review exist to check delegated legislation, their effectiveness has in many instances been doubted. For instance, statutory instruments through exclusion clauses have effectively been held by the court to take away its jurisdiction in controlling executive action. Sub-delegated legislation has also on many occasions persistently overlooked the need for publication yet instruments such as byelaw and orders directly affect the individual. Antecedent prescribed procedures of hearing, enquiry or consultation have been ignored or where implemented, only been restricted to persons mentioned in the enabling Act. This perpetuates unlawful or unreasonable executive action, as parties whose rights and interests are affected are not consulted. From inception, some procedures in the Zambian Constitution originally intended to deal with delegated legislation have to date shown no record of ever being invoked thus rendering them ineffective.

In the light of all the above mentioned irregularities plus many others, there is urgent need for policy formulation as well as strict adherence to existing delegated legislation control procedures to facilitate a reasonably human rights conscious environment. This would be in line with the rule of law principles that require that an individual should not be subjected to unknown laws and should not be subjected to injurious and unlawful actions of the executive.

## **CHAPTER ONE**

### **INTRODUCTION**

*“Everywhere in our statute book, the same process is visible. The action of the Act of Parliament grows more and more dependent upon subsidiary legislation. More than half our modern Acts are to this extent incomplete statements of law. If anyone opened at random a recent annual volume of public general statutes, he will not have to turn many pages before finding a provision that some public body may make rules or regulations, contributing some addition to the substance or the detail of the work of the particular Act.”*

Cecil T. Car.

## CHAPTER ONE

### ***1.0 INTRODUCTION***

*“The power to legislate for the country is supposed to be exclusively vested in the legislature. But the developments of the past centuries have shown that this is not possible. A trend has emerged marked by the legislature delegating the responsibility to make laws to a number of executive bodies.”*

All the orders, rules, and regulations made by ministers, departments and other bodies owe their legal force to Acts of Parliament. Parliament is obliged to delegate very extensive law making power over matters of detail and to content itself with providing a framework of more or less permanent statutes.

During the nineteenth century when the aftermath of the industrial revolution brought the period of laissez faire to an end, Parliament in Britain was obliged to surrender a power to make detailed administrative rules to the newly created central government department, setting the pattern for the intense activity, especially in the social field of the twentieth century.<sup>1</sup>

Further, the introduction of the welfare state after the Second World War yet accelerated and increased this process. Though it was originally accepted that the doctrine of separation of power demanded that policies be formulated by the executive branch of government and that laws be made by the legislature through parliament; it was quite impossible for Parliament itself to provide all the details of the economy, town and country planning, road traffic control and the legal aid scheme. This saw the increased use of delegated legislation.<sup>2</sup>

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<sup>1</sup> J.F.Garner (1974), at page 51.

<sup>2</sup> Ibid at page 52.

The phrase “*delegated legislation*” covers every exercise of power to legislate conferred by an Act of Parliament and is not a term of art. It is also not a technical term and has no statutory definition. In determining whether or not the exercise of legislative power results in “*delegated legislation*”, we have to ask whether it is delegated power that is being exercised and whether its exercise is legislative. It follows therefore that Acts of Parliament make up primary legislation. Delegated legislation is however at times referred to as “*subordinate legislation*”.

D.M. Walker, defines delegated legislation as legislation made not by Parliament, but by persons or bodies on whom Parliament has conferred power to legislate on specified subjects and the aim being that the resultant instrument should be of legislative and not executive force. Power is commonly conferred on ministers of state, public corporations and boards, local authorities, courts, universities and other bodies and this power is exercised by departmental rules, regulations and orders, public corporation or local authority bye-laws, rules of the supreme court, university ordinances and under other names.<sup>3</sup>

Subordinate legislation has, if validly made, the full force and effect of a statute and this is so whether or not the statute under which it is made provides expressly that it is to have effect as if enacted therein.<sup>4</sup> Thus, if an instrument made in the exercise of delegated powers directs or forbids the doing of a particular thing, the result of a breach thereof is, in the absence of provision to the contrary, the same as if the command or prohibition had been contained in the enabling statute itself. To the same effect, Lord Alverstone, CJ in *Willingale v Norris* (1909) 1 K.B 57 at page 63, held that a penalty imposed by one

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<sup>3</sup> D.M. Walker.1980,at page 347.

<sup>4</sup> *Institute of Patents Agents v Lockwood* [1894] A.C 347, at pp.360 and 361.

statute for breach of any of the provisions was applicable to breach of regulations made under an earlier statute with which it was to be construed as one.<sup>5</sup>

It has been observed that the main feature of a modern government is the shift from a trusting government to the objective accountable, effective and efficient government. The result of this shift is the increase in rule making, rule application and rule adaptations both in primary and secondary legislation.

Presently, authors and intellectuals worldwide recognize that although the legal source of administrative powers may be found either in common law or in statute, the great bulk of domestic administration is today carried out under statutory powers. The *Halsbury's Laws of England*, provide that;

*"in volume, though not in significance, subordinate legislation is today unequalled by any other branch of the written law. Much of it is written by executive authorities, the granting of powers to whom was long accepted by parliament as inevitable in cases of national disaster, where speedier remedies are called for other than it is itself able to provide, and, since Parliament has neither the time nor, in all cases, sufficiently expert knowledge itself to formulate all the matters of detail with which modern legislation must be concerned, has now come to be regarded as a day to day inevitability."*<sup>6</sup>

In order to understand the concept of delegated legislation, it is important to distinguish between primary and secondary legislation. Primary legislation at times is referred to as supreme legislation because it is enacted by a supreme legislative authority in the state and is passed as Acts of Parliament, which are intended to be enforced. Secondary legislation or subordinate legislation on the other hand is the work of subordinate authorities and springs from delegation of power by Parliament.

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<sup>5</sup> S.G Edgar (1971), at page 484.

<sup>6</sup> *The Halsbury's Laws of England* (1961), Vol.36 at page 477.

Primary legislation is concerned with the carrying down of the general policy that may be implemented through a proclamation or an order of an executive authority. Secondary legislation takes the form of statutory instruments. Under *section 3 of the Interpretation and General Provisions Act (CAP 2)* of the Laws of Zambia, a statutory instrument is “*any proclamation, regulation, order, rule, notice or other instrument (not being an Act of parliament) of legislative as distinct from an executive character.*”<sup>7</sup> From this definition, it is clear that a proclamation, order etc, may be both legislative and executive in nature. An order is legislative if it lays down the general policy regarding the objects for which it is created; it is however executive in nature where it purports to implement policy.

### **1.1 NEED FOR DELEGATED LEGISLATION**

*“Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But this is an old-fashioned view, for in reality; it is no more difficult to justify it in theory than it is possible to do without it in practice. There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading.”*<sup>8</sup>

In the period after 1918, many lawyers in Britain became aware for the first time of the wide legislative powers of the government departments. The Committee on Ministers’ Powers concluded that unless Parliament was willing to delegate law-making powers, it would be unable to pass the kind of quantity of legislation which modern public opinion required. In its report, the ‘committee on ministers’ powers’ acknowledged the fact that delegated legislation had come to stay.<sup>9</sup>

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<sup>7</sup> Interpretation and General Provisions Act, Cap 2. Section 3.

<sup>8</sup> H.W. Wade. (1988), at page 847.

<sup>9</sup> E.C.Wade and G.Phillips (978), at page 566.

Few statutes form a detailed code of their subject and therefore in order to understand, it is necessary to include the relevant delegated legislation.

*“The increasing complexity of modern administration, and the increasing difficulty of passing complicated measures through the ordeal of Parliamentary discussion, have led to the increase in the practice of delegating legislative power to executive authorities.”<sup>10</sup>*

Thus as long ago as 1878, it was stated,

*“Legislation, conditional on the use of particular power, or on the exercise of a limited discretion, entrusted on the legislature to persons in whom it places confidence is no uncommon thing and in many circumstances it may be highly convenient.”<sup>11</sup>*

The arguments commonly put forward in favour of subordinate legislation, by way of extenuation and starting from the assumption that Parliament should be directly responsible for all legislation, may be summarized as follows:

#### **1.1.1 PRESURE UPON PARLIAMENTARY TIME.**

If Parliament attempted to enact all legislation itself, the legislative machine would break down.<sup>12</sup> Given the social demands of our time and the fact that Parliament has other functions to run for example, budget functions, control functions, ratification functions and registrative functions; and that the procedure through which the bills must pass before coming a law are long, parliament does not have the time to make the demanded laws. For example, before a proposal becomes law, the bill is first introduced into the house, then members debate generally, a committee or the whole house examines it then reports back to the house, the house approves the bill and finally the President signs the bill after which it becomes law or Act of Parliament.<sup>13</sup>

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<sup>10</sup> S.G Edgar (1971), at page 291.

<sup>11</sup> *R v Burah (1878)* 3 App. CAS. page 906.

<sup>12</sup> Ibid.

<sup>13</sup> The National Assembly, (2001), at page 8.

Although many statutory instruments are laid down before Parliament, only rarely do they give rise to matters which need the consideration of the house, and in practice, Parliament spends a very small proportion of its time on business connected with them. Thus in the United Kingdom, for example, the House of Commons and its Committee spent 1187 hours on government bills (594 hours in the house itself) and the House spent 105 hours debating statutory instruments.<sup>14</sup>

The practicality of the above justification in Zambia can be found in the Ministry of Finance and National Planning – statutory instrument No. 16 of 2002. The Taxation (Provisional Charging) Order 2002 was issued in support of the 2002 Budget announced by the Minister of Finance and National Planning on 11<sup>th</sup> March, 2002. It was necessary to allow provisions of the Custom and Excise (Amendment) Bill, 2002 have the force of law before the same became enacted into law.<sup>15</sup>

The instrument, because of its nature and the urgency with which it needed to be implemented did not pass through the cumbersome procedure of Parliament, thereby saving time and also at the same time, operated to increase the efficiency of government.

### **1.1.2 TECHNICALITY OF SUBJECT MATTER.**

Legislation on technical topics necessitates prior consultation with experts and interests concerned. The giving of legislative power to ministers facilitates such consultation. For example, the Donoughmore Committee's Report, at page 23, quoting Sir Cecil Carr's Delegated Legislation (1921), provided that such matters as

*“patents, copyrights, trade marks, designs, poisons, legal proceedings, intricacies of Finance, scientific research the pattern of miner's safety lamps, wireless telegraphy and the heating and lighting values of gas need prior consultation before their determination. Otherwise, if rushed to Parliament*

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<sup>14</sup> E.C.S. Wade and G. Phillips (1978), at page 566.

<sup>15</sup> Committee on Delegated Legislation Report (2002), 13<sup>th</sup> March.

*would be rubber stamped by lay members of the house and would result in ineffective laws and regulations.*"<sup>16</sup>

An example of a technical matter requiring expert consultation is to be found in the Ministry of Finance and National Planning – statutory instrument No. 15 of 2002- The Customs and Excise (General) (Amendment) Regulations, 2002. The statutory instrument was issued in order to introduce a number of procedural changes to maximize the benefits from the advanced computerized system called ASYCUDA++, which facilitated Direct Trade input (DTI) of “entry” data electronically, thereby minimizing the processing time of customs declarations.<sup>17</sup>

Here the result of consultation is that the legislative power is handed over to computer and programmes experts are well equipped with the knowledge of implementation and effect of such programmes. The effectiveness, efficiency and success of such a technical subject matter depend on expert advice and the Minister is usually in a better position than Parliament to consult.

### **1.1.3 THE NEED FOR FLEXIBILITY.**

The law must be capable of rapid adjustment to meet changing circumstances. In an official minute in 1893, Sir Henry Jenkyns, First Parliamentary Council, Wrote:

*“Statutory rules are in themselves of great public advantage because the details...can thus be regulated after a Bill passes into an Act with greater care and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides, they mitigate the inelasticity which would otherwise make an Act unworkable and are susceptible of modification...as circumstances arise.”*<sup>18</sup>

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<sup>16</sup> J.F. Garner (1974), at page 53.

<sup>17</sup> Op-cit.

<sup>18</sup> S.G. Edgar (1917), page 291.

When a major new social service is being established, it is not possible to foresee every administrative difficulty that may arise, nor to have frequent recourse to Parliament for Amending Acts to make adjustments that may be called for after the scheme has begun to operate.<sup>19</sup> Again, Parliament is not continuously in session and its process involve delay, so that any rapid adjustment of the law by direct legislation to meet unknown future conditions is not normally feasible.

*“The method of delegated legislation permits of the rapid utilization of experience and enables the results of consultation with interests affected by the operation of new Acts to be translated into practice.... it also permits of experiment being made and thus affords an opportunity, otherwise difficult to ensure, of utilizing the lessons of experience.”*<sup>20</sup>

Ministers have therefore been given extensive powers under enabling Acts to deal with several changes that are brought about by the social economic climates in a state.

The Ministry of Labour and Social Security- Statutory Instrument No. 2 and No. 3 of 2002 is an example. The Minimum Wages and Conditions of Employment (General) Order, 2002, and The Minimum Wages and Conditions of Employment (Shop Workers) Order, 2002. The instrument was issued to adjust upwards the minimum wages and conditions of service for some categories of workers, in order to give substantial meaning to their incomes and benefits in real terms owing to escalating inflation coupled with the devaluation of the Kwacha over the past years.<sup>21</sup>

Thus, the device of subordinate legislation enables a minister to manipulate controls of various kinds with flexibility greater than could ever be possible if he had to obtain a new statute every time he wished to make a change of detail. Changes in social habits, for example, the increased use of cars, and technological developments, also make necessary

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<sup>19</sup> E.C.Wade and G.Phillips (1978), at page567.

<sup>20</sup> Op-it Sir Cecil Carr in ‘Concerning Administrative Law’ (1942), at pp.33, 34.

<sup>21</sup> Committee on Delegated Legislation, 13th March 2002.

continual amendment of the law. this promotes efficiency, effectiveness and accountability in the government departments.

#### **1.1.4 IN A STATE OF EMERGENCY OR DISASTER.**

*“It is important to pass an Act of parliament to control an epidemic of measles or an outbreak of foot and mouth disease as and when it occurs, and such measures as the Public Health Act must be differently applied in different parts of the country.”<sup>22</sup>*

In times of emergency a government may need to take action quickly and in excess of its normal powers. Subordinate legislative powers can allow more prompt reaction to unforeseen circumstances. Legislative powers may be needed by executive bodies to permit rapid response to emergencies of various kinds –for example natural disasters, strikes, and economic crises. It is also convenient to allow periodic responses to inflation.<sup>23</sup>

An example in Britain is section 1 of the emergency Powers (Defense) Act 1939 in which his Majesty was empowered by Order in Council to,

*“Make regulations as appear to him to be necessary or expedient for securing the public safety, the defense of the Realm, the maintenance of public order, and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.”*

Thus many constitutions include provisions in times of emergency for the suspension of formal guarantees of individual liberty. This is seen as a necessity to contain the situation at hand.

Having looked at the foregone, there is now general agreement over the necessity for delegated legislation; however, the real problem today is how this legislation can be reconciled with the processes of democratic consultation, scrutiny and control. Since the

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<sup>22</sup> J.F.Garner, (1974), at page 53.

<sup>23</sup> B.L. Jones, (1989), at page 55.

process of subordinate legislation differs significantly with that of legislation by bill, there is need to have effective forms of control. The conclusion is therefore that in modern conditions and in particular in societies, which have undertaken the positive risk of providing welfare services for the community, for example Zambia, it is recognized that legislatures may find it necessary to delegate power to the executive or other agencies to make rules having a legislative character.

***CHAPTER TWO***

**METHODOLOGY**

## **CHAPTER TWO**

### **2.0 METHODOLOGY**

The time constitutional problem presented by delegated legislation is not that it exists, but that its enormous growth has made it difficult for parliament to watch over it. However, it is noted that there are controls put in place to check.

#### **2.1 RESEARCH OBJECTIVES**

The general objectives of this dissertation may be said to be to investigate the effectiveness of controls on delegated legislation in Zambia and there upon develop policy recommendations on ways of making the controls more effective.

The specific objectives of this paper however, are;

1. To look into the justification of delegated legislation generally and in Zambia and its purpose
2. To look at the dangers of delegated legislation
3. To critically analyze the control mechanisms established to check delegated legislation in Zambia.
4. To analyze the effectiveness of these control mechanisms in practice and,
5. To suggest possible ways of making the controls more effective.

The methodology or research shall be achieved by;

#### **2.2 DATA COLLECTION**

The collection of information vital to this dissertation mainly relied on the following;

**2.2.1 Books-** all books and literature necessary for the research were consulted and especially administrative law books most especially those written by American and British authors. However, only those that were accessible were used.

**2.2.2 Survey Reports-** survey reports made available in books and other materials such as the Committee on Minister Powers Report, 1932, of England was considered together with reports on the Committee on Delegated Legislation Reports of 1996, 1997, 1998, 1999, 2000, 2001 and 2002, from the National Assembly of Zambia were also considered.

**2.2.3 Statutes and Cases** - Zambian as well as other statutes and cases provided valuable information and were used extensively in this research. This came as way of evidence of delegated legislation and how it operates in practice.

**2.2.4 Unpublished Documents** - some very crucial material were found in documents that are unpublished. For instance, documents prepared by Mr. John Sangwa of Simeza-Sangwa and Company, and lecturer at the University of Zambia, Law School, provided very crucial material. In addition, other material was found in unpublished documents of Stanley Mumba (deceased) former lecturer in the school of law.

**2.2.5 Interviews** - interviews were conducted with the following persons; Professor P. Mvunga, lecturer in the school of law, UNZA, Mr. John Sangwa, lawyer and lecturer in the School of law, UNZA and Mrs. Sikatele, advocate at National Assembly of Zambia and working in the 'delegated legislation' department.

### **2.3 LIMITATION OF RESEARCH**

In this research, there has been only one related topic written on the subject and this was by Joseph Mlelwa in 1977. He wrote on delegated legislation in Zambia.

## **CHAPTER THREE**

### **DELEGATED LEGISLATION IN ZAMBIA**

*“Successive sessions of the House since independence have witnessed increased volume of legislative business, indicating the pace at which our nation is progressing and the complexity which this progress has brought in its train. Parliament is the supreme legislative body in our nation and the annual legislative programme has forced it to have morning and afternoon sessions. This has doubled the number of hours devoted to parliamentary work in order to solve the problems affecting the masses. So as the volume of work increases, there will be need for delegation...”*

**Dr. Kenneth Kaunda.**

## CHAPTER THREE

### 3.0 DELEGATED LEGISLATION IN ZAMBIA

The delegation by Parliament of law-making power to other bodies or persons is no new practice in Zambia, although it has greatly increased in frequency and importance today. Since independence, work of legislation has increased because of the government's commitment to provide for a welfare state that is the provision of more jobs, better working conditions, schools, hospitals, roads and other related schemes for the benefit of the Zambian people.

The former Zambian President Dr Kenneth Kaunda, during his tenure of office acknowledged the fact of the increased volume of work in the National Assembly. He said then that...

*“Successive sessions of the House since independence have witnessed increased volume of legislative business, indicating the pace at which our nation is progressing and the complexity which this progress has brought in its train. For every aspect of development requires legal protection. Parliament is the supreme legislative body in our Nation. Our annual legislative programme and enlightened active participation of the nation's lawmakers in deliberations on national issues forced Parliament to have morning and afternoon sittings. Thus doubling the number of hours devoted by Parliament to problems affecting the masses. This is only the beginning. As the rural reconstruction programme succeeds and our industrial development programme expands, so will the volume of Parliamentary business increase...”<sup>24</sup>*

The nature and scope of delegated legislation as defined by statute is wide and varied. The language used to confer the power to make subsidiary legislation is also wide and varied. The *Constitution* of Zambia defines, “statutory instruments as ‘...any

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<sup>24</sup> Presidential address to Parliament on the opening of the fourth session of the Third National Assembly dated 7<sup>th</sup> January 1977 at page 1.

Proclamation, Regulation, Order, Rule, Notice or other instrument (not being an Act of Parliament) of a legislative as distinct from an executive character.”<sup>25</sup>

Parliament in Zambia has therefore had the problem of increased legislative work in the face of limited time. The same reasons that call for delegation of power to legislate as discussed in the foregone chapter are existent in Zambia and justify delegated legislation. In trying to reduce this pressure of work and time on Parliamentary procedure, the House has increasingly made use of and concerned itself with laying down bare principles and leaving matters of detail to subordinate authorities. For example, section 18 of the *Explosives Act, Cap 115* of the laws provides that...

*“18(1) The Minister may, by statutory instrument, make regulations for the better carrying into effect of this Act.*

*(2) In particular, and without prejudice to the generality of the power conferred by sub-section (1), regulations made there under may provide for: -*

*(a) The regulation of the importation, exportation and transportation of explosives, by inland waterways, rail and road;*

*(b) The regulation of the storage and use of explosives;*

*(c) The regulation of the construction of explosives factories and magazines;*

*(d) The regulation of all sales and possession of explosives; or direction made under this Act, and prescribing procedures for dealing summarily with such contravention or failure to comply with any order given or direction made and to impose summary fines therefore.”*

Thus the definition includes not only delegated legislation made by ministers under various Acts, but also any rules of procedure made by the chief justice or any other authority to regulate procedure in proceedings before such bodies as courts,<sup>26</sup> the Commission for Investigations,<sup>27</sup> or a commission of inquiry.

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<sup>25</sup> Cap 1, Article, 139(1).

<sup>26</sup> As are to be found in the “High Court Rules” made by the High Court Rules Committee Under section 45 of the High Court Act. These provide procedure for running and managing the High Court.

<sup>27</sup> The Commission for Investigations Rules, 1974.

One has to examine the text of the empowering legislation to determine the scope of delegated legislation. The definition does not however include rules or regulations, which are not made under statute (that is under some specific statutory provision which empowers or requires some authority to 'make rules'). Therefore, general orders, (these are administrative rules of practice which regulate procedures in the civil service) National Assembly Standing Orders, (these are rules made by the standing orders committee of the National Assembly to regulate the 'internal proceedings of the house' as defined in *The People v The Speaker of National Assembly, Ex-parte Nkumbula* (1970) Z.R at p.97<sup>28</sup> and rules of private organisations such as clubs are not statutory instruments.

There are however, a number of different forms of delegation of legislative powers to administrative bodies, which can be identified. Some statutory provisions do expressly vest the rule making power in a specified person or administrative agency for the purpose of carrying out the purpose of the Act. For instance, section 124 of the *Banking and Financial Services Act*<sup>29</sup> empowers the Minister of Finance, on recommendation of the Bank of Zambia to make regulations for or with respect to any matter that is required by the Act or permitted to be prescribed by regulation or that is necessary or convenient to be so prescribed for carrying out or giving effect to the Act.

Another kind of delegated legislation exists where there is legislation by way of a schedule or appendix. The statute confers power to add to the appendix or schedule given in the Act. This is called skeleton legislation and an example is the *British Acts Extension*

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<sup>28</sup> (1970) Z.R at Page 97.

<sup>29</sup> The Banking and Financial Services Act, Cap.387, Section 20.

*Act*<sup>30</sup>, which gives the relevant authority power to add to the given Acts. The principal of delegating legislative authority to administrative authorities to make statutory instruments is contained in Article 80(1) of the *Constitution* of Zambia, which says; “Nothing in Article 62 shall prevent Parliament from conferring on any person or authority power to make statutory instruments.”<sup>31</sup>

The above provision supports the statement that primarily, the function of enacting legislation in Zambia is a prerogative of Parliament. Article 62 of the constitution vests the ‘legislative power of the Republic’ in the Parliament of Zambia consisting of the President and a National Assembly. This power, it is recognised, is exercised by bills passed by the National Assembly and assented to by the President,<sup>32</sup> after which they become ‘Acts’.<sup>33</sup> From what has been discussed above, it can be concluded that delegated legislation is always exercised through statutory instruments.

As an example of Article 139(1) of the *Constitution* of Zambia, different statutes may refer to delegated legislation made under them by different names such as by-laws, (District Councils), regulations, proclamations<sup>34</sup> or rules.<sup>35</sup> This, it must however be noted is a matter of nomenclature and has no bearing on the general legal principles relating to procedures, control and interpretation of delegated legislation.

Usually, the power to make delegated legislation is exercisable by a single authority. Occasionally however, Parliament provides that certain delegated legislation is not to

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<sup>30</sup> British Extent of Application Act, Cap.11.

<sup>31</sup> The Constitution of Zambia, Cap 1. Article 80(1).

<sup>32</sup> Ibid. Article 78(1).

<sup>33</sup> Ibid. Article 78(6).

<sup>34</sup> Ibid. article 29(1).

<sup>35</sup> Rules made under the High Court Act, Cap 27, s.44.

come into force until another authority has confirmed it, or that its delegate shall only make delegated legislation in consultation with another authority.

The constitution requires all statutory instruments to be published in the government Gazette not later than 28 days after it is made. But in the case of instruments, which will not have the force of law until approved by some body or authority, and such instrument must be published not later than 28 days from the date of its approval.<sup>36</sup> Statutory instruments that are not so published become *void ab initio*.

The constitution is however silent on the question of when a statutory instrument comes into force. The *Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia*, enacts as follows;

*“The date of commencement of a statutory instrument shall be the date of its publication in the Gazette or, where a later date is specified, such later date.”*<sup>37</sup>

Other than statutory instruments, there are other instruments, which have the force of law such as By-laws. These have been defined as rules made by some authority subordinate to the legislature for the regulation, administration or management of a certain district, property or undertaking. They are an example of delegated legislation in Zambia and can be found for instance in section 76 of the Local Government Act, which confers powers on the councils to make by-laws. Section 76 provides as follows...

*“76. (1) Subject to the provisions of this Act, a council may make by-laws for the good rule and government of its area and, more particularly-*  
*(a) For controlling any of the things which, and any of the persons whom, it is empowered by or under this Act to control;*  
*(b) For prohibiting any of the things which it is empowered by or under this Act to prohibit;*  
*(c) For requiring or compelling the doing of any of the things which it is empowered by or under this Act to require or compel;*

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<sup>36</sup> Op-cit. article 80(2).

<sup>37</sup> Sectins19 (1)(9).

*(d) For providing for the issue or supply of licenses, permits, certificates and other instruments and documents.*”<sup>38</sup>

The essence of delegating such power to councils is to make them efficient and effective so that they may deliver quality services to the people.

Another example of delegated legislation in Zambia is to be found in circulars. These are communications of which copies are sent to several persons mostly in government departments. A circular may however contain advice as to the exercise by the recipient of some powers. It may however go further than this and confer powers or impose duties, which may give it the force of law. Failure to abide by the provisions of a circular renders such acts void for want of authority. The *Ministry of Local Government and Housing Circular No. 2 of 1996 of 2<sup>nd</sup> May 1996* is a good example of a Circular. It has the force of law equated to any Act of Parliament as failure to abide by it renders the whole transaction void ab initio. This Circular was made in conformity to section 67(1) of the *Local Government Act No.22 of 1991* which provides that...

“...67(1) *Subject to the provisions of this section, a council may sell, let or otherwise dispose of any property of the council.*”<sup>39</sup>

Failure to follow the laid down procedure in the circular is ground on which the sale of the house in issue can be declared null and void.

As to the legality of delegated legislation in the form of Statutory Instruments in Zambia, the case of *Feliya Kachasu v Attorney General* settles the matter. In that case, the question was raised as to whether Regulations 25 and 31(1)(d) of the *Education (Primary and Secondary Schools) Regulations, 1966* were valid and within the rule

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<sup>38</sup> The Local Government Act, Cap.281 of The Laws of Zambia.

<sup>39</sup> Local Government Act, No.22 of 1991.

making powers conferred by section 12 of the *Education Act*, 1966 and it was held that the Regulations were intra vires the Act and the *Constitution*.<sup>40</sup>

A further example of the force of law that statutory instruments possess may be found in the *Preservation of Public Security Act, cap 112 of the Laws of Zambia* in which section 5(1) provides that “ any regulations made under this Act may be made to apply to Zambia or to any part thereof, and to any person or class of persons or to the public generally.”<sup>41</sup> In addition, by section 21 of cap 2,

*“Any reference to a written law in any other written law shall include a reference to any Statutory Instrument, made under the written law to which reference is made.”*<sup>42</sup>

This chapter has endeavored to show that subordinate legislation is used most frequently in Zambia, and that that Statutory Instruments have the general force of law. This development denotes that the frequent use delegated legislation renders scrutiny by Parliament difficult, as it normally does not have sufficient time. Sub-delegation, which springs from delegating legislation, also adds on to the confusion as it becomes difficult to keep abreast of all delegated legislation.

It is therefore true to say that delegated legislation is inevitable in Zambia and is very much necessary for the administration and running of the country, but nevertheless, it must be watched with misgiving.

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<sup>40</sup> (1967) Z.R, 145 at page...

<sup>41</sup> Cap 112, of the Laws of Zambia, s.5 (1).

<sup>42</sup> The Interpretation and General Provisions Act, Cap 2.

## **CHAPTER FOUR**

### ***INHERENT DANGERS IN DELEGATED LEGISLATION: THE ZAMBIAN EXPERIENCE.***

*“The principle that the exercise of political power shall be bounded by rules which determine the validity of legislation and executive action by prescribing the procedure according to which it must be performed or becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by wielders of political power and to the extent that within forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty.”*

S.A. De Smith.

## CHAPTER FOUR

### **4.0 INHERENT DANGERS IN DELEGATED LEGISLATION: THE ZAMBIAN EXPERIENCE.**

*“The principle that the exercise of political power shall be bounded by rules which determine the validity of legislation and executive action by prescribing the procedure according to which it must be performed or becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by wielders of political power and to the extent that within forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty.”<sup>43</sup>*

The above quotation simply signifies that there is a danger in delegating powers to legislate to persons such as ministers. The danger lies in the fact that such delegated authority may be abused and on several occasions have been abused and mainly leads to the taking away of people’s property or even liberty. There is a clear threat of Parliamentary government if power is delegated to legislate on matters of general policy, or if so wide a discretion is conferred that it is impossible to be sure what limit the legislature intended to impose.

It is therefore the intention of this chapter to bring out the dangers in delegated legislation generally and in Zambia in particular.

In all instances of presumed abuse of delegated legislation, the primary question to be asked is whether a particular person or body with delegated law making powers had acted *intra vires* or *ultra vires*, and whether the law making process by such a person or body entailed abiding by the provisions of the Parent Act. Generally, the electorate is comfortable having it’s laws passed by parliament as opposed to individuals as is the case in delegated legislation.

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<sup>43</sup> S.A De Smith, “Constitutionalism in the Commonwealth Today”, *Malaysia Law Review*; at P.205.

In Britain, the responsibility for the economy exercised by the government today has made it necessary for parliament to delegate certain Taxing powers to government. In particular, the working of a tariff system has been found impracticable without delegation of power to vary and impose import duties from time to time.<sup>44</sup> Sometimes however, a power to make charges for services is given in such wide terms that it is in effect a taxing power.

The House of Lords in its judgment in the case of *Daymond v Plymouth City Council* (1976). A.C at page 609, criticized the provisions of *The Water Act, 1973*, which empowered the water authorities to levy such charges as they think fit for services performed, facilities provided or rights made available, holding that such wide language must be given a limited construction, so that sewerage charges cannot be imposed on properties not served by sewers.<sup>45</sup>

Under the *Taxation (Provisional Charging) Act, Cap 364* of the Laws of Zambia,

*"2. The Minister may by statutory order provide that, on or after the publication in the Gazette of a bill (being a bill approved by the President) that it is proposed to introduce into the National Assembly providing for the imposition or alteration of taxation, such provisions of the bill as may be specified in the order shall, until the bill becomes law and subject to the provisions of this Act, have the force of law."*<sup>46</sup>

Sometimes, power is delegated to modify a statute. In Britain, some statutes have 'Henry VIII clauses', which allow primary legislation to be amended or repealed by secondary legislation without parliamentary scrutiny; for example, The Criminal Justice Bill 1990, which allowed criminal offences to be added or removed by instrument. Other Henry VIII bills include the Child Support (1991), and Education (Student Loans) (1990)

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<sup>44</sup> E.C. Wade & G.Philips, (1977), at P.568.

<sup>45</sup> H.W.R. Wade (1988), at page 852.

<sup>46</sup> The Taxation (Provisional Charging) Act, Cap 364.section 2.

Bills. Henry VIII Clauses "... a provision in a bill which enables primary legislation to be amended or repealed by subordinate legislation with or without further Parliamentary scrutiny" The clauses were so named from the Statute of Proclamations 1539, which gave King Henry VIII power to legislate by proclamation.<sup>47</sup>

This procedure is now embodied extensively in the powers given to Ministers under various Zambian Statutes. The danger in such clauses is where the minister tries to alter the provisions of the enabling Act and this usually happens when the enabling Act provides, for example that the minister may do anything expedient or necessary to effect or bring the Act into operation.<sup>48</sup>

By *section 51 of the Value Added Tax Act, Cap 331* of the laws of Zambia;

*"51. (1) The Minister may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed, or that is necessary or expedient to be prescribed for carrying out or giving effect to this Act.*

*(3) The Regulations may create offences, and prescribe penalties not exceeding ten thousand penalty units, for any contravention of the regulations or of the rules made under this Act."*<sup>49</sup>

The provisions of the above section qualify to be considered as encompassing a 'Henry VIII clause' because for instance, the words '...is necessary or expedient to be prescribed for carrying out or giving effect to this Act,' would help a minister provide pompous and assuming rules by altering the provisions of the parent Act in order to confer power on himself.

Bweupe, J. in *Attorney General v The Local Government Election Commission* (1990-1992) ZR at page 182, found that using a provision such as above and by passing

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<sup>47</sup> Op-cit.

<sup>48</sup> Op-cit.

<sup>49</sup> The Value Added Tax Act, Cap 331 of The Laws of Zambia, S.51.

Regulation SI No.111 of 1992 re 10, the commission abused their power in making literacy a condition for candidacy.<sup>50</sup>

Sub-delegation is another aspect of delegated legislation that poses danger of possible and proven abuse of political power by its wielders. Sub-delegation has been criticized and condemned as tending “to postpone the formulation of an exact and definite law” and as encouraging the taking of powers meanwhile in wider terms than may ultimately be required. In *Patchett v Leathem* (1949) 65 LTR 69 at page 70, Streatfeild J. castigated a particular Circular made under sub-delegation as being...

*“at least four times cursed. Firstly, it has seen neither House of Parliament; secondly it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; thirdly it is a jumble of provisions, legislative, administrative or directive in character, and sometimes difficult to disentangle one from the other; and fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council but in more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction.”<sup>51</sup>*

The meaning of the above quotation is that delegation of power may lead to arbitrariness, which has grave consequences on the members of the public as legally, Orders, and regulations that emanate from sub-delegated legislation have the same force of law as Acts of Parliament. Such sub-delegated power is thus most likely to be misused and results in making a government inefficient and ineffective. In addition, where the initial delegation of the power to legislate carries with it the power to authorize the making of other categories of instruments by the relevant Minister or by other bodies, control by ordinary constitutional methods becomes difficult.<sup>52</sup>

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<sup>50</sup> (1990-1992) ZR at page 182.

<sup>51</sup> (1949) 65 TLR 69 at page 70.

<sup>52</sup> Op-cit.

Section 3 of the *Environmental Protection and Pollution Control Act, Cap 204* of the Laws of Zambia creates the Environmental Council and section 6(4) provides for sub-delegation of powers by the minister. The section provides that;

*"6. (1) Subject to the other provisions of this Act, the functions of the Council shall be to do all such things as are necessary to protect the environment and control pollution, so as to provide for the health and welfare of persons, animals, plants and the environment.*

*(2) Without prejudice to the generality of subsection (1), the Council may- Carry out any other activities relating to the protection of the environment and the control of pollution, which are necessary or conducive to the better performance of its functions under this Act.*

*(3) The Council may, subject to such terms and conditions as it considers fit, delegate in writing any of its functions under this Act to the Director, any member, the Inspectorate or the Secretary.* <sup>53</sup>

The provisions of the preceding section are so general that several actions can be done by the council or such a person to whom the council may further delegate its duties that in the end, the citizens are subjected to arbitrariness and uncontrolled power.

The other danger in delegating power to legislate is that Parliament may delegate power to amend statutes. For example, the National Insurance Act of 1911 in Britain provided that if any difficulty arose in bringing one part of the Act into operation, the insurance commissioners with the consent of the Treasury might do anything that they thought necessary or expedient for that purpose, and might modify the provisions of the Act, provided that they acted before the end of 1913.

The *Food and Drug Act, Cap 303* of the Laws of Zambia,

*"34. The Minister may, by statutory order, amend the Schedule. The schedule includes; Pharmacopoeia Internationalis, The British Pharmacopoeia, The Pharmacopoeia of the United States of America, Codex Francais, The Canadian Formulary, The British Pharmaceutical Codex, The National Formulary and British Veterinary Codex.)"*<sup>54</sup>

<sup>53</sup> The Environmental Protection and Pollution Control Act, Cap 204. S.6 (4).

<sup>54</sup> The Food and Drug Act, Cap 303. S.34.

This leaves the minister with the power to add to the above schedule without being challenged even if it is done in furtherance of personal activities outside the scope and purpose of the enabling Act.

*It is also common for statutes to come into operation on a date to be fixed by ministerial Order. Cases have occurred where the commencement order deliberately omitted some provision of the Act, thereby in effect repealing it administratively. See R v Home Secretary Ex parte Anosike (1971) 1 WLR 1136, where the right of appeal under the Immigration Appeals Act 1969 was not brought into force because of the afore mentioned reason.*<sup>55</sup>

In another incident of delegated legislation, the King in Counsel in Britain was empowered to make defense regulations, being such regulations “as appear to him to be necessary or expedient for securing the public safety, the defense of the realm, the maintenance of public order and the efficient prosecution of any war in which his majesty may be engaged, and for maintaining supplies and services essential to the life of the community.”<sup>56</sup>

By the provisions of the *Preservation of Public Security Act, Cap 112* of the Laws of Zambia;

*“3(2) The President may, for the preservation of public security, by regulation-*

*(a) Make provision for the prohibition of the publication and dissemination of matter prejudicial to public security, and, to the extent necessary for that purpose, for the regulation and control of the production, publishing, sale, supply, distribution and possession of publications; (b) make provision for the prohibition, restriction and control of assemblies;*

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<sup>55</sup> (1971) 1 WLR 1136.

<sup>56</sup> H.W.R. Wade, (1988), at page 855.

(c) make provision for the prohibition, restriction and control of residence, movement and transport of persons, the possession, acquisition, use and transport of movable property, and the entry to, egress from, occupation and use of immovable property; (d) make provision for the regulation, control and maintenance of supplies and services; or (e) make provision for, and authorize the doing of, such other things as appear to him to be strictly required by the exigencies of the situation in Zambia.

(3) If the President is satisfied that the situation in Zambia is so grave that it is necessary so to do, he may, by statutory instrument, make regulations to provide for- (a) the detention of persons; (b) requiring persons to do work and render services.

5. (1) Any regulations made under this Act may be made to apply to Zambia or to any part thereof, and to any person or class of persons or to the public generally.<sup>57</sup>

On authority of provisions such as the foregone, delegated legislation has been responsible for taking away citizen's liberties, property and mostly their enshrined human rights. For instance, in earlier cases of Joyce Banda v Attorney General (1978) ZR at page 23<sup>58</sup>; in Re Seegers (1976) ZR at page 117<sup>59</sup> and another case of Valentine Shula Musakanya v The Attorney General (1981) ZR at page 188;<sup>60</sup> the President is empowered by the law to detain people for preservation of public security. The regulations 33(1) and 33(6) were used by the president and his delegates to imprison people, take away their property and for many other purposes contrary to the provisions of the constitution.

In addition, by not according citizens an opportunity to challenge the legality of regulations or orders of a Minister under certain statutes, democratic governance and the rule of law are threatened. Despite the fact that it is well known that the jurisdiction of the

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<sup>57</sup> Ss.3, 4 and 5 of The Preservation of Public Security Act, Cap 112 of The Laws of Zambia.

<sup>58</sup> (1978) ZR at page 23.

<sup>59</sup> (1976) ZR at page 117.

<sup>60</sup> (1981) ZR at page 188.

courts is confined to declaring delegated legislation ultra vires, whether on grounds of substance or procedure, the ministers and other bodies with delegated power in enacting orders, regulations and statutes usually exclude the jurisdiction of the court.<sup>61</sup> The doctrine of the rule of law suggests that it should never be for a Minister to determine the limits of his own powers, as he is likely to abuse them.

The *Citizenship of Zambia Act, Cap 124* provides in section 9 that: -

*“9. The Board shall not be required to assign any reason for the grant or rejection of any application under this Act, and the decision of the Board made under and in accordance with the provisions of this Act shall be final and shall not be subject to appeal or review in any court.”*<sup>62</sup>

Thus, while control over the merits of delegated legislation is a matter for ministers and Parliament, the possibility of control by the courts is important and should not be excluded.

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<sup>61</sup> Ibid.

<sup>62</sup> The Citizenship of Zambia Act, Cap 124 of The Laws of Zambia, S.9.

## **CHAPTER FIVE**

### **CONTROL OF DELEGATED LEGISLATION IN ZAMBIA.**

*“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal control on government would be necessary. In framing a government which is to be administered by men, the great difficulty is this: you must enable the government to control the governed and in the next place oblige it to control itself.”*

James Madison.

## **CHAPTER FIVE**

### **5.0 CONTROL OF DELEGATED LEGISLATION IN ZAMBIA.**

There is now general agreement over the necessity for delegated legislation; the problem is how this legislation can be reconciled with the process of democratic consultation, scrutiny and control. The process of subordinate legislation differs significantly from that of legislation by Bill; it is equally important that there should be effective forms of control. Thus the existing means of control will be described under four headings: (1) Parliamentary procedures; (2) control through consultation of interests; (3) publication and (4) challenge in the courts as to the validity of delegated legislation.

#### **5.1 PARLIAMENTARY CONTROL**

To maintain control over the delegated lawmaking process, and oversee it, scrutiny committees have been established in every Australian Parliament and Territory Assembly. In Victoria, under the Subordinate Legislation Act, the Scrutiny of Acts and Regulations Committee has the task of scrutinising statutory rules. It inherited a fine set of precedents from the now defunct Legal and Constitutional Committee.<sup>63</sup>

Under the Subordinate Legislation Act, the committee's duties and scrutiny commence only after regulations are made and in operation. The subcommittee has 18 parliamentary sitting days from the date regulations are tabled in Parliament in which to review the rules. Departments and Agencies must send explanatory documents,

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<sup>63</sup> Mallory, J.R (1972), pages 30-42.

Regulatory Impact Statements (RIS), submissions and other relevant documents to the subcommittee.<sup>64</sup>

Sometimes, the subcommittee invites departmental officers to appear before it in order to provide information about complex statutory rules. On other occasions, the subcommittee has asked for an explanation as to the best way to rectify flawed regulations. An example of this type of consultation involved representatives from the Department of Conservation and Environment and the Parks Regulations 1992.<sup>65</sup>

The original provision provided for:

*12. Games and activities*

*A person must not in a park –*

- (a) Roll or throw a stone, missile or other substance; or*
- (b) play a game or take part in any activity which is likely to cause inconvenience, danger, disturbance or annoyance to other persons.*

*Penalty: 5 penalty units.*

Conceivably, a child throwing a beach ball at Wilson's Promontory could have been guilty of an offence. After discussions and approval by the Minister, the Hon Mark Birrell, a new regulation was made to: -

*12. Games and activities*

*A person must not in a park throw a stone or missile, play a game or take part in any activity that is likely to cause danger, disturbance or annoyance to other persons.*

In the Zambian set up and by the provisions of the *Interpretation and General Provisions Act*,<sup>66</sup> Cap 2 of the laws of Zambia, all instruments that result from delegated legislation, except the rules of the court have to be laid before Parliament. This section

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<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> The Interpretation and General Provisions Act, CAP 2 of the Laws of Zambia.

acts as an authority for Parliamentary supervision and scrutiny of subordinate legislation.

In particular, section 22(1) and (2) of the Act provide as follows;

*22. (1) All rules, regulations and by-laws shall be laid before the National Assembly as soon as may be after they are made, and, if a resolution is passed within the next subsequent twenty-one days on which the National Assembly has sat after any such rule, regulation or by-law is laid before it that the rule, regulation or by-law be annulled, it shall thenceforth be void but without prejudice to the validity of anything previously done there under, or to the making of any new rule, regulation or by-law.*

*(2) The reference to rules in subsection (1) shall not include a reference to rules of court.<sup>67</sup>*

As a result of the provisions of section 22 of the *Interpretation and General Provisions Act, Parliament on authority of Standing Order No. 143(2)* of the laws put in place a Committee on Delegated Legislation. The Standing Order Provides that the Committee shall scrutinise and report to the House, through Mr Speaker, whether the powers to make orders, regulations, rules, sub rules, and by-laws delegated by Parliament are being properly exercised by any person or authority within such delegation.<sup>68</sup>

The Standing Orders further provide that as the machinery of delegated legislation is dealt with under the heading “statutory instruments”, the instruments must:

- (a) be in accord with the constitution or statute under which they are made;*
- (b) not trespass unduly on personal rights and liberties;*
- (c) not make the rights and liberties of citizens depend upon administrative decisions; and*
- (d) be concerned only with administrative detail and not amount to substantive legislation, which is a matter of Parliamentary enactments.<sup>69</sup>*

If the Committee is further of the opinion that a Statutory Instrument should be revoked wholly or in part or should be amended in any respect, it reports that opinion and the

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<sup>67</sup> Ibid, section 22(1) and (2).

<sup>68</sup> Standing Order No.143 (2) of the Laws.

<sup>69</sup> Ibid.

ground thereof to the House, and any such debate is subject to a motion in the National Assembly which, if carried, would have the effect of the House.

The Committee on its first session of the ninth National Assembly appointment on 13<sup>th</sup>, March 2002 scrutinised the Ministry of Tourism-Statutory Instrument No. 78 of 2001- The Mulobezi Site and Ancillary Railway Lines (Provisional Monument) (Declaration) Order, 2001 and concluded in its observation and recommendations.

“Your Committee observed that, under the enabling Act, The National Heritage Conservation Commission Act, section 27, which gives power to the Minister of Tourism to declare a site a National Monument, requires that notice be issued to interested parties to afford them an opportunity to lodge objections, if any. The explanatory memoranda lacked this information.”<sup>70</sup>

The committee thus ensures that relevant guidelines for making statutory instruments as provided in the enabling Act are followed.

The Committee in 1995 scrutinized a total of seventy-four statutory instruments while in 1997, while being guided by Standing Order No.148 (3), the Committee held eight meetings.<sup>71</sup> In the year 2000, the Committee again held eight meetings and considered explanatory memoranda submitted by controlling Officers from various government ministries and departments and in total, considered forty-two statutory instruments. In the year 2002, the Committee only reviewed twenty-eight Statutory Instruments.

## **5.2 CONSULTATION OF INTERESTS.**

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<sup>70</sup> Report on Committee on delegated legislation, “First Session of the Ninth National Assembly Appointed on 13<sup>th</sup>, March 2002” Lusaka: National Assembly at page 9.

<sup>71</sup> Reports of The Committees on Delegated Legislation, 1995, 1997 and 2000.

In Britain at one time, the Rules Publication Act 1893 required that 40 days notice be given in the London Gazette of a proposal to make rules of a permanent character. But with the coming of the Statutory Instruments Act 1946, which repealed the former Act, there is no general requirement of prior publicity, and a ordinary member of the public has little chance of getting to know about proposed Statutory Instruments.<sup>72</sup>

However, by an almost universal practice, the department proposing to make a new Statutory Instrument takes steps to ensure that the various interests particularly affected by the proposal are consulted. Some Acts of Parliament in Britain make this obligatory.

*“By the Police Act 1969, s.4; chapter 20, before making regulations dealing with the pay and pensions of the police the Home Secretary must take into account any recommendations made by the Police Council for the United Kingdom and must furnish the council with draft regulations. The Social Security Act 1975, ss.138 and 139, provide that National Insurance regulations must be submitted in draft to the National Insurance Advisory Committee, whose disagreements, if any, with the Secretary of State must be reported to Parliament along with the regulations.”<sup>73</sup>*

Where it is required by the Statute consultation must be genuine, and if it is not adequate, it seems that any delegated legislation subsequently made would be invalid as having been made in a manner contrary to that provided for in the enabling statute.

It was held in *R v Brent London Borough Council ex parte Gunning* (1985) 84 L.G.R.168, that consultation should start when the mind has been made up; the Minister should give sufficient reasons for the proposal to enable interested parties to give reasonable consideration of it; adequate time must be allowed for consultation and that at least most of the views expressed by interested parties must be incorporated into the proposal.<sup>74</sup>

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<sup>72</sup> E.C.S. Wade and G. Philips (1977), page 571.

<sup>73</sup> Ibid at page 571.

<sup>74</sup> [1985] 84 L.G.R. 168 at 175.

An unfair consultation process can also lead to the instrument being quashed, as in *R v Secretary of State for Health, ex parte U.S. Tobacco International Inc.* (1992),<sup>75</sup> where a ban on oral snuff was held illegal as during the consultation process the company were not given the scientific grounds on which the ban was made.

In Zambia, a valuable security against hasty and unreasonable legislation is a provision which is sometimes inserted in statutes giving legislative powers, requiring that, before the powers are actually exercised, persons interested shall be notified and given the opportunity to make objections or suggestions, and in some cases requiring public inquiries to be held.

By the provisions of the Environmental Protection and Pollution Control Act, CAP 204 of the Laws of Zambia, the examples given above would apply if the Minister failed to consult as provided by section 96 of the Act. The section provides that;

*“96.the Minister in consultation with the Council, may, by statutory instrument make regulations for anything which has to be prescribed under this Act, for the protection of any aspect of the environment and for the control of pollution in the environment.”*<sup>76</sup>

Other regulations that require consultation before being made by the minister include; *The University Act, CAP 136, section 52 and the Medical and Allied Professions Act, CAP 297, section 67* of the laws of Zambia.<sup>77</sup> Failure to consult provides the ground for nullifying the regulations so made. Such consultation as above helps to ensure that the contents of subordinate legislation are as acceptable as possible to the interests concerned, and also secures the benefits of specialised knowledge from outside government.

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<sup>75</sup> [1992]

<sup>76</sup> CAP 204 of the Laws of Zambia, section 96.

<sup>77</sup> CAP 136 and 297 of the Laws of Zambia ss. 52 and 67, respectively.

### 5.3 PUBLICATION.

*“By section 3(2) of the Statutory instruments Act 1946 of the United kingdom, it is a defense in proceedings for contravention of a Statutory Instrument to prove that it had not been issued by the Government Statutory office at the date of the alleged contravention, unless it is shown by the prosecutor that reasonable steps have been taken to bring the purport of the instrument to the notice of the public or of persons likely to be affected by or of the person charged. Thus in (1974) 37 M.L.R. 150, D.J. Lanham argued that at common law delegated legislation must be published before it can come into force and he relied on the decision in Johnson v Sargent (1918) 1 K.B. at page 101<sup>78</sup> in reaching his decision.”<sup>79</sup>*

The Zambian Constitution, which is the supreme law of the land, requires that all statutory instruments be published in the Government Gazette within fourteen days of being made or approved. The exact wording of the Act is to be found in Article 80(2) and provides that;

*“Every statutory instrument shall be published in the Gazette not later than twenty-eight days after it is made or, in the case of a statutory instrument which will not have the force of law unless it is approved by some person or authority other than the person or authority by which it was made, not later than twenty-eight days after it is so approved, and if it is not so published it shall be void from the date on which it was made.”<sup>80</sup>*

The effect of the above provision is that Statutory Instruments, which are not so published, become void ab initio.

Section 18 of the *Interpretation and General Provisions Act, Cap 2* of the laws of Zambia also provides that every Statutory Instrument shall be published in the Gazette and that it shall then be judicially noticed.<sup>81</sup> Thus the statutory provision would not permit a Statutory Instrument to have the force of law until it has been published. In the same vein, the constitutional provision contemplates that a Statutory Instrument could not

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<sup>78</sup> (1918) 1 K.B at page 101.

<sup>79</sup> E.C.S. Wade and G.Phillips. (1977) at pages 577 and 578.

<sup>80</sup> The Constitution, Cap 1 of The Laws of Zambia, Article 80(2).

<sup>81</sup> The Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia, s.18.

According to J.F.Garner (1985) at page 104, the jurisdiction of the courts in reviewing actions is ‘inherent’ and does not owe its origin to statute. It is a general power to review the legality of the exercise or non-exercise of any statutory functions and simply emphasises the notion that persons or bodies given limited statutory powers must be subject to challenge before the courts if they misuse them.<sup>84</sup>

In Zambia, the constitution has conferred upon the High Court original and unlimited jurisdiction to hear and determine any issue, as conferred on it by article 94. However it was held in Maxwell Mwamba and Stora Solomon Mbuji v The Attorney General (1993) Supreme Court of Zambia judgement No. 10, that two aspects of public interest, namely, “desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private “Attorney Generals” to move the courts in matters that do not concern them”<sup>85</sup> had to be satisfied in every judicial review case.

Ngulube C.J in the case of Derrick Chitala v Attorney General (1995-1997) ZR 91(SC) at page 97 had this to say of judicial review; <sup>86</sup>“It is trite that judicial review has supplanted the old proceedings for the prerogative writs of mandamus, prohibition and certiorari. These orders can now be obtained under order 53 as can an injunction to restrain a person from acting in an office to which he is not entitled or a declaration and/or injunction in any matter of a public nature suitable for judicial review. Rather than look at the prerogative remedies in the old classical style, it is, in our considered opinion, preferable to adopt the current trends as proposed by cases such as Council of Civil Service Unions and Others v Minister for the Civil Service. A formulation which has

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<sup>84</sup> J.F.Garner. (1985), at page 104.

<sup>85</sup> (1993) SCZ judgement No. 10.

<sup>86</sup> (1995-1997) ZR 91 (SC) at page 97.

gained much acceptance in the Commonwealth was that proposed by Lord Diplock who said, from letter d at page 1026 to letter b at page 1027 ---<sup>87</sup>

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety".<sup>88</sup>

In practice, judicial control of delegated legislation in Zambia may be invoked in various ways including; by application for judicial review as described above, by the special procedure provided for by article 28 of the *Constitution*, or through the normal course of litigation or criminal proceedings. Proceedings in judicial control may further be instituted either directly by the aggrieved person or in the name of the Attorney General at the relation of another person.

Mainly, the basis of challenge in the courts as explained above is on grounds of procedural ultra vires or substantive ultra vires and unreasonableness. Procedural ultra vires is used in challenging delegated legislation on the ground that the procedures laid down in the enabling Act for producing the delegated legislation have not been followed. To that effect, in *Agricultural, Horticultural and Forestry Training Board v Aylesbury Mushrooms Ltd* (1972), an order was declared invalid, as the requirement of consultation had not been met.<sup>89</sup>

In *R V Local Government Board* (1882) 10 Q.B.D 309, Brett L.J said: “whenever the legislature entrusts to any body of persons other than to the superior courts the power of

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<sup>87</sup> (1985) AC at pages 376 to 377.

<sup>88</sup> Ibid.

<sup>89</sup> [1972] 1 All E.R at page 280. See also *Padifield v Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R at 694.

imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling these bodies.”<sup>90</sup>

In the *Minister of Health v R, ex parte Yarfe* (1931) A.C 494, the Housing Act, 1925, empowered the Minister of Health to make an order to confirm, with or without modifications improvement schemes made under the Act. The Corporation of Liverpool made one such scheme and the Minister confirmed it. Two house owners applied for certiorari to quash the Minister’s order because, they argued, it was not an improvement scheme, it not having accompanied by a layout plan. Viscount Dunedin said in dicta: “...if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad, and that can only be gone into by way of proceedings in certiorari.”<sup>91</sup>

The Statutory Instrument Act, 1946, of the United Kingdom and its Zambian counterpart, the *Interpretation and General Provisions Act, CAP 2* are the best examples of Statutes which contain procedural requirements which apply generally to all Statutory Instruments. Bweupe, J, on authority of CAP 2 quashed Statutory Instruments made by the defendant Board because they had not been published in the government Gazette as required by the Statute.<sup>92</sup>

In the *People v Luanshya Municipal Council, ex parte Chendaeka* (1969) Z.R at 69, the applicant applied for the orders of Certiorari and Mandamus against the refusal by the Municipal Council to grant him a license to operate a market stall, under the *Trades Licensing Act (CAP 707, s.15 (1) and 15(2))*. He argued that he had not been given an

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<sup>90</sup> [1882] 10 Q.B.D 309 at page 321. (Application for prohibition refused).

<sup>91</sup> [1931] A.C 494, per Viscount Dunedin at page 503.

<sup>92</sup> (1973) HP at page 949.

opportunity to present his case. The High Court found that there had been a breach of natural justice.<sup>93</sup>

In another Zambian High Court decision, (*The People v Minister of Information and Broadcasting Services ex parte Francis Kasoma* (1995)), an order of certiorari was issued to quash the decision of the Minister to create a statutory body known as Media Council of Zambia.<sup>94</sup> The decision was quashed on the premise that it was made in bad faith, and that the rules of natural justice were never observed in that the people who were to be affected by the decision were never heard before the decision was made.<sup>95</sup> Unreasonableness was thus the ground on which the Minister's decision was challenged.

Substantive ultra vires is used to challenge a power exercised by a particular authority or person purportedly under statute if the measures under review go beyond the powers granted under the enabling Act.

“The acts of a competent authority must fall within the four corners of the powers given by the Legislature.” Per Lord Greene, M.R in *Carltona Ltd v Commissioner of Works* [1943] 2 All E.R. 560 at page 564.<sup>96</sup> Thus in *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* (1997), under the Asylum & Immigration Appeals Act 1993, asylum seekers were allowed social security benefits while awaiting their applications or appeals to be decided at a cost of over £200 million to the taxpayers.<sup>97</sup>

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<sup>93</sup> (1969) Z.R 69 at page 76.

<sup>94</sup> (1995) HP at 2959.

<sup>95</sup> Ibid.

<sup>96</sup> [1943] 2 All E.R. 560 at page 564.

<sup>97</sup> [1997] 1 W.L.R 275 at 280.

In an attempt to prevent “economic” asylum seekers rather than those genuinely fleeing persecution the Secretary of State for Social Security passed delegated legislations limiting asylum seekers rights to benefits. The Joint Council for the Welfare of Immigrants challenged this claiming that they fell outside the powers granted by the enabling Act and their claim was upheld. The 1993 Act was clearly intended to give asylum seekers rights which they did not have previously and the new regulations had the effect of taking these rights away again, as without benefits they would have no means to live and would have to return to the countries from which they fled.<sup>98</sup>

Parliament could not have intended to give the Secretary of State powers to take away the rights given under the 1993 Act. This could only be done by Parliament passing a new Act. Therefore, the regulations were ultra vires.

The leading case in Zambia on the power of the court to review delegated legislation is *Attorney General v Local Government Election Commission* (1990-1992) ZR 182 (HC).<sup>99</sup>The Attorney-General sought an order that regulation No.10 of the Local Government Election Regulations contained in Statutory Instrument No. 111 of 1992 and providing that all election candidates should have attained an education level of Grade VII or equivalent, was ultra vires the Local Government Elections Act which determined the qualifications for standing. At issue was (1) the interpretation of the extent of the Local Government Election Commission's powers to legislate and (2) the relationship between subsidiary legislation and the enabling Acts of Parliament.

“I see it the power to make regulations conferred by section the Act, in the instant case, applies only to matters of procedure and ss. 16 and 17 of the Act deal with matters of substantive law. The jurisdiction of the commission is to regulate on mere matters of procedure and conduct of the election. The

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<sup>98</sup> Ibid at page 275.

<sup>99</sup> (1990-1992) ZR page 182 (HC).

requirement of educational qualification of Grade 7 or its equivalent is a matter of substantive law, which falls within the province of ss. 16 and 17 of the enabling Act.

It is my view that where a statute confers a power and particularly one that may be used to deprive the subject of the individual franchise rights, the Court will confine those exercising the power to the strict letter and spirit of the statute. In this view I am reinforced by section 2 (4) of the Interpretation and General Provisions Act, cap 2 which states that any provision of a Statutory Instrument which is inconsistent with a provision of an Act, Applied Act or ordinance shall be void to the extent of the inconsistency.

*The Commission's requirement of education qualification of Grade 7 does not exist anywhere in the enabling Act. This can certainly not be supported by the Court for the power to regulate implies the continued existence of that which is to be regulated. For the reasons aforesaid I would declare that portion of regulation 10(3) of the Local Government Election Regulations Statutory Instrument 111 of 1992 that stipulates educational standard as a pre-requisite for qualification ultra vires and is of no legal effect.*<sup>100</sup>

In addition to what has been provided above, it is relevant to point out that article 27 of the *Constitution* provides some mechanism for ensuring that the provisions of statutory instruments remain intra vires the *Constitution*. Members of Parliament, not later than 30 in number, may request a report on a statutory instrument from the authority that originated it within 14 days from the date of its publication. The Chief Justice can appoint a tribunal to investigate the constitutionality of the statutory instrument. The tribunal is under obligation to submit a report on the matter to the President stating, in its opinion the provisions of the statutory instrument, which are inconsistent with the Constitution.

Where the report of the tribunal is that the statutory instrument is in conflict with the *Constitution*, the tribunal will state the grounds of that belief. On the whole, once the tribunal has reported that the statutory instrument is in conflict with the provisions of the constitution, the President may annul such instrument.<sup>101</sup>

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<sup>100</sup> Per Bweupe J, (1990-1992) ZR at pages 188-189.

<sup>101</sup> The Constitution of Zambia, CAP 1 Article 27.

**CHAPTER SIX**

***THE EFFECTIVENESS OF CONTROLS ON DELEGATED  
LEGISLATION IN ZAMBIA.***

***“From time to time it is necessary to subject the governmental process to acid analysis and to decide whether it is functioning efficiently to further the aims it has been designed to achieve”.***

***Claire Palley.***

## **CHAPTER SIX**

### **6.0 THE EFFECTIVENESS OF CONTROLS ON DELEGATED LEGISLATION IN ZAMBIA.**

In the preceding chapter, we have examined the various non-judicial and judicial arrangements in Zambia designed to control subordinate legislation. However, it is not enough that they are in place for their effectiveness has to be considered. It is the gist of the present chapter to investigate the effectiveness of these controls.

#### **6.1 THE EFFECTIVENESS OF PARLIAMENTARY CONTROLS**

As has been noted from the preceding chapter, Parliamentary control on delegated legislation is a complicated subject and process and involves technical questions of procedure. This creates loopholes in the system, which compromises its effectiveness.

By the provisions of the *Interpretation and General Provisions Act, CAP 2* of the Laws of Zambia, section 22(1) and (2),<sup>102</sup> the ordinary reader would suppose this to mean that the instrument does not take legal effect until it has been 'laid' as directed. It is not so however. The provision is purely directory and not mandatory. It only becomes mandatory if the enabling Act says so and very few have such provisions. This simply means that failure by the responsible authority to 'lay' does not suspend the legal effect of the instrument, but merely amounts to a breach of duty by the person responsible.

Though the Committee on Delegated legislation has on occasion effectively controlled delegated legislation<sup>103</sup> through its scrutiny procedure, it has not been very

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<sup>102</sup>The Interpretation and General Provisions Act, CAP 2 of the Laws of Zambia, section 22(1) and (2).

<sup>103</sup> It recommended that Statutory Instrument No.77-The Chiefs (Recognition) (No.3) Order, 2000 be revoked because it gave recognition to a person on grounds, which were afterwards proved to be false. (Report of The Committee on Delegated Legislation, 5<sup>th</sup> Session of 8<sup>th</sup> National Assembly at p.32.)

effective as a means of control. It merely advises and has no power of sanction.<sup>104</sup> Its powers do not go further than making recommendations. It is fair to say, however, that the procedure serves to keep the National Assembly informed on how its delegates are exercising powers.

In relation to Parliamentary procedure in controlling subordinate legislation, and in particular to the provisions of procedure in Article 27 of the *Constitution*, it is unclear why such a cumbersome procedure has been provided for. Up to the time of this research, there is no record of this procedure ever having been invoked. It may conceivably be an attempt by the executive to shield itself from “unnecessary” Parliamentary scrutiny. Whether because of this or for some other reason, this procedure has never been used.

## **6.2 THE EFFECTIVENESS OF CONSULTATION**

By section 4 of the (American) Administrative Procedure Act, any governmental agency that has (as required by the Act) given notice in the Federal Register of some proposed rule-making, must afford interested persons “an opportunity to participate in the rule making”, and the agency must consider all the relevant matter presented; it is contemplated that in certain circumstances the agency may give the interested persons an opportunity to appear at a hearing held by the agency.<sup>105</sup> In a few cases, such as under the ‘special regulations under the Factories Act, 1961, there must be an inquiry into any objections before the regulations or order is made.

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<sup>104</sup> In its report (Op-cit) at page 16, it noted “occasional instances, for example, Statutory Instrument No. 20. The Income Tax (Transfer Pricing) (Regulations, 2000) and Statutory Instrument No. 58. The National Service (General) (Amendment) Regulations 2000 where a Statutory Instrument was issued twenty years after regulations had been effected. As a result, because of the issuance of the Statutory Instrument was delayed, regulations that they designed to implement had already come into force, or departments had been temporarily acting without Statutory authority.” It had no power to issue sanctions against such authorities.

<sup>105</sup> J.F. Garner. (1974), at page 74.

“ Consultation “ in Zambia just like in the United Kingdom does not yet extend as of right to any persons who may consider themselves to be interested; the persons who are consulted are either specified in the enabling Act, or they are confined to persons whom the Minister considers to be interested.

In practice, even if the Minister does not consider the views and recommendations of interested parties or those that have not been consulted, such parties cannot complain or challenge the validity of the regulation or orders. The direct control affected by this device of consultation may therefore be worthless but on the whole few Ministers would attempt to ignore valid recommendations of interested parties.

### **6.3 THE EFFECTIVENESS OF PUBLICATION**

Public information of Statutory Instruments depends on the speed with which they are put forth in print, and it is thus easily possible for anybody to contravene a recent order or regulation of which he had no knowledge and could hardly be expected to have any. Sub-delegated legislation poses another problem of control as most of the time, it is not even published.

In *Blackpool Corporation v Locker*, [1948] 1 K.B at page 349<sup>106</sup>, Scott L.J commented severely on the lack of Publicity for sub-delegated legislative powers; but in *Lewisham Borough v Roberts* [1949] 2 K.B at page 608<sup>107</sup>, it was held, with express dissent from Scott L.J, that the powers there in question were not legislative but merely administrative, and that the Minister was entitled to delegate them as he did.

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<sup>106</sup> [1948] 1 K.B at page 349.

<sup>107</sup> [1949] 2 K.B at page 608.

Whichever decision is right, it is undoubtedly a great embarrassment in the whole sphere of administration that powers, whether they be technically described as executive, legislative, or judicial, are deputed (against rules of Publication) by means which persons affected thereby cannot know or be expected to know. This is usually by 'confidential' circulars to local authorities and sometimes even by word of mouth as was the case in *Falmouth Boat Construction Ltd v Howell* [1951] A.C at page 16.<sup>108</sup> Though there are no Zambian authorities in point, this is the case in Zambia.

#### **6.4 THE EFFECTIVENESS OF CONTROLS BY THE COURTS**

It is a principle of justice and the rule of law that public bodies are required to act within the scope of the powers allocated to them by Parliament and that in the event of non-compliance to these principles, judicial review should lie to correct the situation. However, the legal framework operates to observe that there must be a balance between interests of individuals and those of government. Thus, restrictions are imposed on who can bring an action in judicial review in court. These restrictions are very rigid and lack flexibility.

Yardley. (1981) at page 135 commented that though judicial review as a principle upholds the values and standards of governance, rule of law and even constitutionalism, the procedure laid down in Order 53 of the Rules of the Supreme Court is long and complex (for an ordinary Zambian going by standards of education). It is noted that though an aggrieved party may be well entitled to move the court by way of judicial review, many times, they have failed to satisfy the conditions of Order 53.<sup>109</sup>

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<sup>108</sup> [1951] A.C at page 16.

<sup>109</sup> D.C.M. Yardley. (1981), at page 135.

An example of a case in point being Maxwell Mwamba and Stora Mbuji v the Attorney General (1993) SCZ Judgement No. 10<sup>110</sup> in which the Zambian courts have shown hesitation in determining the issue of standing. Musumali JS. limited the liberal position of locus standi to constitutional issues. This is not helpful if statutory instruments are to be effectively checked because the majority of issues arising from delegated legislation do not touch on the constitution. The view in Zambia on standing is further that if the courts took a liberal stand, a flood of frivolous actions would overwhelm them. The position of Zambia therefore does not support the relaxation of the rules on standing.

In a country where the vast majority of the people have no disposable income and do not have enough to eat, they cannot be expected to meet the cost of litigation, which is often very high. This affects the effectiveness of controls of delegated legislation in court. Even if every person has the right to institute proceedings in any court on his own behalf, the complexity of the nature of law, the legal process and legal procedures (locus standi as provided by *Order 53 of the High Court*) makes it very difficult for unqualified persons to appear in court without counsel.

As contrasted to the Zambian set-up, “it has been the boast of Englishmen that their laws are administered upon the basis of equality irrespective of class, creed or political opinion. The omission from the catalogue of the factor of finance resources will be regarded by future historians as surprising...”

Statutes in relation to internal proceedings of the National Assembly and all industrial matters have excluded the jurisdiction of the courts. For instance, by *CAP 12* of the Laws of Zambia, section 34<sup>111</sup>, internal proceedings of the National Assembly cant be

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<sup>110</sup> SCZ Judgement No. 10 of 1993 at page J4.

<sup>111</sup> The National Assembly (Powers and Privileges) Act, CAP 12 of the Laws of Zambia, section 34.

reviewed by any court. The courts have to that effect already conceded that their jurisdiction has been effectively excluded by this clause. They have no power to review decisions of the National Assembly or any of its Sessional Standing Committees if such decision relates to the internal proceedings of the house.

In *Re Nalumino Mundia* (1971) Z.R at page 71<sup>112</sup>, the petitioner applied to the High Court for an order of certiorari directed to the Chairman of the Standing Orders Committee of the National Assembly of the Republic of Zambia requiring him to remove into court, for the purpose of having it quashed, an order suspending the applicant from the National Assembly in violation of its own standing orders. Hughes J. held that the High Court did not have power to interfere with the exercise of the jurisdiction of the National Assembly in the conduct of its own internal proceedings.<sup>113</sup>

In another case of *ZNPF Board v A - G and Others and in The Matter of Industrial Relations Courts Decision dated 29<sup>th</sup> October, 1982 and an Application for Certiorari* (1983) ZR at page 140,<sup>114</sup> it was held that section 101 (3) of the Industrial Relations Act<sup>115</sup> is an effective ouster clause, and that it excludes the power of the High Court to issue orders of certiorari removing the proceedings or decisions of the Industrial Relations Court into the High Court for purposes of quashing the same.<sup>116</sup>

It suffices to mention that though the various mechanisms put in place to check delegated legislation are operational and to some extent do control subordinate legislation, they are neither totally efficient nor effective. There is therefore need to reform the control mechanisms to make them effective.

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<sup>112</sup>(1971) Z.R at page 71.

<sup>113</sup> Ibid.

<sup>114</sup> (1983) ZR at page 140.

<sup>115</sup> CAP 269 of the Laws of Zambia.

<sup>116</sup> Ibid.

## **CHAPTER SEVEN**

### **CONCLUSION AND RECOMMENDATIONS.**

***“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal control on government would be necessary. In framing a government which is to be administered by men, the great difficulty is this: you must enable the government to control the governed and in the next place oblige it to control itself.”***

**James Madison.**

## ***CHAPTER SEVEN***

### **7.0 CONCLUSION**

From the forgone, it may be concluded that in modern conditions and in particular in societies like Zambia, which have undertaken the positive task of providing welfare services for the community, it is inevitable that the legislature may find it necessary to delegate power to the executive or other agencies to make rules having a legislative character.

In doing so, it has been observed that at no time, or in no event shall fundamental human rights be abrogated by means of delegated legislation and that it must be insured that the extent, purpose and procedure appropriate to delegated legislation are observed; it is thus subject to various methods of control.

Judicial review of subordinate legislation has therefore been supplemented by procedure for supervision by the legislature or by a Committee or by other independent authority either before or after such delegated legislation comes into effect. Such procedure includes; publication, consultation, subjection to Committee on Delegated legislation, judicial review and to some extent by the constitution. These procedures have been found not to be very effective.

It has been noted that the laying of statutory instruments before Parliament is merely directory and not mandatory thus creating loopholes and situations where instruments go into effect without being 'laid.' Consultation in Zambia does not extend as of right to any persons who may consider themselves to be interested. Instead, the minister chooses who he considers to be interested. This has been found to perpetuate the abrogation of fundamental human rights by subordinate legislation.

Though ignorance of the law is no defense in Zambia, sub-delegated legislation appears to be effected without fulfilling the requirement of publication. ‘Confidential’ circulars from councils or local authorities go about unchecked as they are rarely published. In addition, it has been found that the rules of standing in judicial review cases are not clear. The courts have not specified exactly who is entitled to commence proceedings and this has been made worse by the complicated procedure in *Order 53 of the Supreme Court Rules*. The cost of litigation is also high and no ordinary Zambian can afford the process fees. In spite of the provisions of article 94(1) of the *Constitution* on jurisdiction, it appears that the courts have conceded in having its jurisdiction limited or ousted by ouster clauses.

## **7.1 RECOMMENDATIONS.**

To prevent any possible development of abuses, it is recommended that;

(1) The precise limits of the law-making power which Parliament intends to confer on a minister should always be expressly defined in clear language by the statute that confers it: when discretion is conferred, its limits should be defined with equal clearness.

(2) The use of so called ‘Henry VIII Clause’, conferring power on a Minister to modify the provisions of Acts of Parliament (hitherto limited to such amendments as may appear to him to be necessary for the purpose of bringing the Statute into operation), should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the proposed Statutory Instrument.

(3) The ‘Henry VIII clause’ should

(a) Never be used except for the sole purpose of bringing a Statute (an Act) into operation.

(b) Be subject to a time limit of one year from the passing of the Act.

It therefore follows that the delegation of powers to the executive should be within the narrowest possible limits and should carefully define the extent and purpose of delegated legislation and should provide for the procedure by which it can be brought into effect.

(4) The use of clauses designed to exclude the jurisdiction of the courts to inquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the proposed Statutory Instrument.

Exclusion clauses have evidently been incorporated in Zambian statutes rather arbitrarily and there has not been any clear, deliberate policy on such matters as what form such clauses ought to take (either absolute or time limited). The courts in Zambia ought to insist on preserving their supervisory Jurisdiction in the face of such devices as exclusion clauses. The Courts in Zambia have a constitutional obligation (Article 94) to inquire into any action taken by Parliament both in dealing with its internal affairs and in the discharge of its legislative functions. Holding otherwise is akin to advocating that the judicature in Zambia has no obligation to ensure that there is compliance by Parliament with the *Constitution* and to make such orders as may be necessary to secure enforcement and enjoyment of the rights guaranteed by the *Constitution*.

However, since allowing the courts to interfere with the internal affairs of Parliament may not be helpful in ensuring legislative autonomy as is itself provided by the *Constitution*, it is recommended that Parliament should adherently stick to the procedures of scrutiny of subordinate legislation already provided. It should not be reluctant in ensuring that statutory instruments are scrutinized and in line with the enabling Act. For example, where ministers do not submit memoranda or reasons for enactment of certain rules to the Committee on Delegated Legislation, such instruments should not come into force until the requirements are met.

(5) Except where immunity from challenge is intentionally conferred, there should not be anything in the language of a statute even to suggest a doubt as to the right and the duty of the courts of law to decide in any particular case whether the Minister has acted within the limits of his power. Thus, a citizen who suffers injury as a result of illegal acts of the executive should have an adequate remedy either in the form of proceedings against the state or against the individual wrong doer, with the assurance of satisfaction of judgment in the later case or both.

(6) Irrespective of the availability of judicial review to correct illegal action by the executive after it has occurred, it is generally desirable to institute antecedent procedures of hearing, enquiry or consultation through which parties whose rights or interests will be affected may have an adequate opportunity to make representations so as to minimize the likelihood of unlawful or unreasonable executive action. The enabling statutes should thus provide for procedure for consultation and what follows if not effected.

In addition, individuals who had made representations, which have not been followed, should be informed of the reasons why their representations were rejected. This

would mean that those parties who have been consulted can complain or challenge the validity of an order if their views, expressed in the course of such consultation, are not accepted by the minister and this should be made mandatory and expressed in clear terms. In order for the foregone to be effected, the enactments by which legislative powers are delegated should carefully define the extent, purpose and where necessary duration of delegated legislation and should provide for the procedure by which it can be brought into effect.

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