



**"PARLIAMENTARY PRIVILEGE - PROTECTING:
THE EFFECTIVE FUNCTIONING OF DEMOCRACIES"**

**BY JUSTICE DR PATRICK MATIBINI, SC, MCI Arb, MP.
SPEAKER OF THE NATIONAL ASSEMBLY OF ZAMBIA.**

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1.0 The primary purpose of this presentation is to consider how parliamentary privilege can be employed to protect and promote the effective functioning of democracies. The question that falls to be addressed from the outset is this: What is parliamentary privilege? The word itself in the context of parliamentary affairs, is an unfortunate term as it implies a special advantage rather than a special protection. Yet the privilege of parliamentarians allows the Houses and their Members to perform their duties without outside threat or interference. These rights are absolutely essential for the execution of parliament's powers and functioning of democracies in general. There are two fundamental elements that comprise parliamentary privilege. These are freedom of speech and freedom of the House to regulate its own affairs. Additionally, parliamentary privilege is also said to include, the power to cite offenders for contempt, as well as freedom from arrest. These elements will be considered below.

1.1 FREEDOM OF SPEECH

Freedom of speech entails that a Member may state whatever he or she thinks fit in debate, without fear of being sued or prosecuted in the course of the proceedings of the House or indeed in any of the Committees. Thus the freedom allows a Member of Parliament to speak freely on behalf of his or her constituents without fear of facing any legal action or retribution of any kind. In the Zambian context, this freedom is protected or guaranteed by the National Assembly (Powers and Privileges) Act Chapter 12 of the Laws of Zambia, where it is provided in section 3 as follows: *“There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.”*

The preceding section, in effect, mirrors Article 9 of the Bill of Rights of 1689 when it provides:

“That the freedom of speech and debate or proceedings in parliament ought not to be impeached in any court or place out of Parliament.”

Article 9 was originally the first and much the most important of the parliamentary privilege claimed. But, I must hasten to add that this freedom of speech is limited to the proceedings in the House. Therefore, the freedom extends to anything said in debates on the floor or in Standing or Select Committees. It also includes anything put in writing that forms part of the proceedings such as the text of any question or Minister’s written answer, amendment or any document published by the order of the House. This element of privilege does not however extend to press conferences, letters to constituents or to Ministers on words said at ordinary public meetings.

To illustrate the application of this aspect of parliamentary privilege, we shall refer to a decision decided by the Supreme Court of Zambia, in the case of *Attorney General v The Speaker of the National Assembly of Zambia and Sondashi, (2003) Z.R. 42*. The brief facts giving rise to this appeal were that Dr Sondashi, a Member of Parliament then, was reported to have given an interview to a local tabloid where he was reported to have stated that *“Coups Can be Positive”*. As a result of this interview, a point of order was raised on the floor of the House as to whether or not Dr Sondashi had breached the Oath of Allegiance to protect the Constitution. In a ruling made by the Deputy Speaker, the matter was referred to the Standing Orders Committee. The Standing Orders Committee subsequently made a decision to suspend Dr Sondashi from sitting in the National Assembly, and from enjoying all the privileges attached to the office of a Member of Parliament of the National Assembly. Dr Sondashi aggrieved by the decision taken, applied for leave to apply for judicial

review. Eventually, the trial court entered judgment in his favour. Hence the appeal by the Attorney General; acting on behalf of the National Assembly of Zambia.

On appeal, the Supreme Court held that it was not prepared to accept that the Oath of Allegiance taken or subscribed to by a Member of Parliament entailed a derogation of their freedom of speech outside Parliament. That is, the taking of an Oath cannot constrain Members of Parliament from exercising their constitutional right of expression. Above all, the Supreme Court further held that the publication complained of had nothing to do with any proceedings in the National Assembly. The appeal by the Attorney General (on behalf of the National Assembly) was, therefore, dismissed.

1.2 POWER TO REGULATE INTERNAL PROCEEDINGS

The second major element in modern parliamentary privilege is the freedom of the Houses to regulate their own affairs. In the Zambian context, the freedom of Parliament to regulate its own affairs has its genesis or origin in the Constitution. Article 86(1) of the Constitution of Zambia provides as follows:

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

Additionally, Article 87(2) goes on to provide that the National Assembly and its Members shall have such privileges, powers and immunities as prescribed by an Act of Parliament. But the law and custom of Parliament of England may in default of the Act apply to the Zambian National Assembly with such modifications as may be prescribed by or under an Act of Parliament.

This freedom for Houses to regulate their own affairs is known as “*exclusive cognizance*”. Thus the learned authors of Erskine May,

Treatise on the Law, Privileges, Proceedings and Usage of Parliament, Twenty Fourth Edition (London, Lexis Nexis, 2011), state (at page 227), that by “exclusive cognizance” is meant the right of Houses to be the sole judges of lawfulness of their own procedures and to settle or depart from their own codes of procedure. This is mostly the case where the Houses in question are dealing with a matter which is finally decided by its sole authority, such as an order, resolution or a bill. This principle holds true even where the procedure of a House or the rights of its Members or officers to take part in its proceedings depends even on matters prescribed by statute.

To illustrate, in the English case of *Bradlaugh v Gosset* [1884] 12 Q.B.D. 271, a question arose whether Bradlaugh who had been returned a member had qualified himself to sit by making an affirmation instead of taking the oath. Later, he was prevented from taking the oath by an order of the House. In the course of the judgment to have the order declared void, Stephen J, declared that even if the House of Commons forbade a Member to do what statute required him to do and in order to enforce the prohibition, (excluded him from the House), the Court had no power to interfere. He went on to observe as follows:

“The House of Commons is not subject to the control of ... [the] courts in its administration of that part of the statute law which has relation to its own internal proceedings... Even if that interpretation should be erroneous [the] court has no power to interfere with it, directly or indirectly.”

In the Zambian context, the doctrine of exclusive cognizance was first applied in the case of *Re Nalumino Mundia* (1971) Z.R. 70. This was an application for leave to apply for an order of *certiorari* directed to the chairperson of the Standing Orders Committee of the National Assembly of Zambia requiring him to remove into the court for the purpose of having

it quashed, an order suspending the applicant, Nalumino Mundia, from the National Assembly of Zambia for a period of three months.

In delivering the judgment, Hughes, J, observed that the application raised an important constitutional issue regarding the extent of the High Court's jurisdiction in relation to the affairs of Parliament. In the course of the judgment, Hughes, J, observed that the question had led to considerable conflict in England in reconciling the law of privilege of the House of Parliament with the general law. Thus in resolving the matter, Hughes, J, relied on Erskine May Parliamentary Practice, 17th Edition, where it is observed at page 152 as follows:

“The solution gradually marked out by the courts is to insist on their right in principle to decide all questions of privilege arising in litigation before them with certain large exceptions in favour of parliamentary jurisdiction. Two of these which are supported by a great weight of authority are the exclusive jurisdiction of such House over its own internal proceedings and the right of either House to commit and punish for contempt.”

In a word, Hughes, J, concluded that the High Court has no power to interfere with the exclusive jurisdiction of the National Assembly in the conduct of its own internal proceedings.

In any event, in the Zambian context, the principle or notion of “exclusive cognizance” is encapsulated by section 34 of the National Assembly (Powers and Privileges) Act, which is expressed in the following terms:

“Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker or such

officer by or under the Constitution, the Standing Orders and this Act.”

Thus the National Assembly, the Speaker or an officer of the Assembly have exclusive cognizance or jurisdiction in the exercise of any power conferred on or vested in the Assembly, the Speaker or officer, by the Constitution, the National Assembly (Powers and Privileges) Act, and the Standing Orders of the National Assembly.

Therefore, while the National Assembly may, for instance, be amenable to judicial review in respect of the exercise of administrative discretion generally, section 34 ousts the jurisdiction of the courts in relation to the exercise of powers given to the National Assembly by the Constitution, National Assembly (Powers and Privileges Act), and Standing Orders – in relation to its internal proceedings or business.

The application of the doctrine of exclusive cognizance is also discernible in other Commonwealth jurisdictions (other than England of course), which practice constitutional democracy. A case in point is India. To illustrate, we shall refer to a few decided Indian cases. The first is the case of *Hem Chandra Sengupta Gupta and Others v The Speaker of the Legislative Assembly of West Bengal*, AIR 1956 CAL 378. The facts of the case were that, the Chief Minister of West Bengal had issued a notice to move a motion for the West Bengal Legislative Assembly, to approve a proposal for the union of the States of West Bengal and Bihar. Opposed to the merger, the petitioners sought to restrain the Chief Minister from pursuing the motion. The petitioners also sought to restrain the Union of India from bringing any Bill or legislation in Parliament aimed at uniting the two States. Thus the petitioners sought for a combination of prerogative writs of *mandamus* and *certiorari*, not only to restrain the Chief Minister from functioning or drawing his salary, but also to restrain the Speaker from

presiding over the Legislature. In resolving the issue whether court process could be used to stall an internal process of the Assembly, the High Court of Calcutta relied on the construction of Article 212 of the Indian Constitution, whose provisions coincidentally are similar to the provisions of section 34 of the Zambian National Assembly (Powers and Privileges) Act, albeit is more elaborate. Article 212 of the Indian Constitution provides as follows:

“212(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.”

Article 212(2) goes on to provide as follows:

“212(2) No officer or Member of the Legislature of a State in whom the powers are vested by or under this Constitution for regulating procedure or the conduct of business for maintaining order in the Legislature shall be subject to the jurisdiction of any court in respect the exercise by him of those powers.”

In construing the preceding provisions, the High Court made the following observation in paragraph 22 of the judgment:

“Under the rules of procedure framed by the Assembly under Article 208, a Member was at liberty to bring forward any resolution provided the rules were observed. It was for the Speaker of the House to allow or disallow such a resolution to be raised or discussed in the House. The courts could not at that stage seek to regulate the procedure of the House and arrogate to itself the powers of the Speaker. If however a law was passed or a resolution adopted or a motion carried, which was not in

accordance with the Constitution, such a law or resolution of motion could be declared invalid by the court.”

The High Court went on to observe at paragraph 23 of the judgment as follows:

“The Constitution lays down the respective jurisdictions of the Legislatures and the courts to make laws and the courts to administer them. The powers, privileges and immunities of the State legislature, and their Members have been laid down in the Constitution. Within the Legislature, Members have absolute freedom of speech and discussion (Article 194). Subject to the provisions of the Constitution, they can regulate their own procedure (Articles 208, 212) in such matters and within the allotted spheres, they are supreme and cannot be called in to account by the courts of the land. The courts are therefore not interested in the formative stages of any law. Even where a law has been promulgated, it is not the duty of the courts to act in a supervisory character and rectify the defects “suo motu”

It is noteworthy that in the *Gupta* case (referred to above), the High Court referred to and relied on the English case of *Queen v Lord Commissioners of the Treasury [1872] Q.B.D. 387*, where it was held that the Legislature had the exclusive cognizance to decide its own affairs. In this regard, the High Court in the *Gupta* case adopted the statement of Blackburn, J, as follows:

“I must observe in saying this that there is not the slightest intention on my part to question the exclusive prerogative of the House of Commons in voting the money. As long as the thing remain “in fieri,” a resolution in the House, it could not, I believe, be brought

properly before this court. But when the money has been voted, and the money has been granted, and an Appropriation Act has been passed, then it has become an Act of the Legislature, and we must construe it when it comes before us as we should do any other Act.”

The import of the *dicta* of Blackburn, J, cited above, is that no action can be commenced to challenge a decision of a Legislature before the decision is actually made. Any challenge must be mounted after a decision has been made.

To summarise, Harry Evans in his book entitled, Odgers Australian Senate Practice, Twelfth Edition (Canberra, Canprint Communications Pty Limited, 2008) (at page 3), observes that immunity of parliamentary proceedings from impeachment and question in the courts is the only immunity of substance protected by the Houses and their Member's Committees. He goes on to observe that there are two aspects of the immunity. First, there is immunity from civil or criminal action and examination in legal proceedings of Members of the House and of witnesses and others taking part in proceedings in Parliament. As pointed out earlier on, this immunity is known as freedom of speech.

Second, there is the immunity of parliamentary proceedings as such from impeachment or question in the courts. The immunity from impeachment or question in the courts, the learned author of Odgers Australian Senate Practice observes (at page 3) is in essence a safeguard of the separation of powers: it prevents the other two branches of government, the Executive and the Judiciary from calling into question or inquiring into the proceedings of the Legislature. We will consider this doctrine below.

1.3. DOCTRINE OF SEPARATION OF POWERS

The immunity of parliamentary proceedings from impeachment and question comes down to respect and promotion of the doctrine of separation of powers between the Executive and the Judiciary. The operation of the doctrine of separation of powers was in the Indian case of *State of Kerala v R Sudarsan Courts Bahu and Others AIR 1984 Ker 1*, explained by the Supreme Court of India in the following terms:

“... The Indian Constitution conceives the Judiciary and the Legislature as different organs of the State having independent specified functions. Just as it is within the power of the Legislature to exercise all functions conferred on it, there are functions conferred on the Judiciary by the Constitution which it is expected to perform in accordance with the Constitution. Immunity from action would be desirable if proper functioning is to be secured and such immunity has been conferred in the Legislature by Article 194 read with Article 212 of the Constitution, while immunity from discussion by the Legislature has been conferred by Article 211. True democratic spirit call for mutual respect by these institutions, and avoidance of trespass.”

Similarly, in the English case of *Hamilton v Al Fayed [1999] 3 ALL E.R 317*, Lord Wolf M.R., explained the doctrine of separation of powers in the following terms at page 333 of the judgment:

“...There is a long line of authority which supports a wider principle of which Article 9 is merely a manifestation, vis, that the courts and Parliament are both astute to recognize their respective constitutional roles. So far as the courts are concerned, they will not allow any challenge to be made what is said or done within the walls of Parliament in the performance of its legislative functions

and protection of its established privileges. As Blackstone said (IBI Com. 17th Edition) 163: The whole of the law and custom of Parliament has its origin from this one maxim, that whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere”.

Similar observations are echoed by the learned authors of M.N. Kaul and S.L. Shakdher, Practice and Procedure of Parliament, Sixth Edition (New Delhi, Metropolitan Book Company P.V.T. Limited, 2009) at page 239 as follows:

“Parliament is sovereign within the limits assigned to it by the Constitution. There is inherent right in the House to conduct its affairs without any interference from an outside body ... In the matter of judging the validity of its proceedings, the House has also collective privilege to declare what it will discuss and in what order, without any interference from a court of law ... The House is not responsible to any external authority for following the procedure it lays down itself, and it may depart from that procedure at its own discretion. The validity of any proceedings in Parliament cannot be questioned in any court on the ground of any alleged irregularity of procedure. No officer or Member of Parliament, in whom powers are vested for regulating the procedure on the conduct of business or for maintaining order in Parliament, is subject to the jurisdiction of any court in respect of the exercise of those powers.”

1.4. POWER TO PUNISH FOR CONTEMPT

The power to punish for contempt is generally considered to be a necessary incident of the austerity and functions of the Houses of Legislatures. And is also an essential aspect or dimension of

parliamentary privilege. Thus the Houses of Legislatures do not rely on courts to maintain the authority and dignity of the Houses, as well as the various privileges and immunities of the Houses. Apart from maintaining the authority and dignity of the House, the power of House to punish for contempt is also used to secure compliance with their orders such as for the attendance of witnesses or prohibition of interference with witnesses. The main powers employed in the exercise of penal jurisdiction of Houses historically, have been to imprison, fine, suspend, expel, or reprimand. The severest and historically most important is that of imprisonment. It is also known as commitment. And was once described as the keystone of parliamentary privilege. It is no longer so. A house can commit to prison in appropriate cases, those who challenge its authority, infringe its privileges or otherwise offend against it.

As the Houses have the power to punish those who offend against them – a power which the courts do not at any rate challenge – so it is competent for the Houses to define and decide on those actions which it may punish. In the Zambian context, a person may in terms of section 19 of the National Assembly (Powers and Privileges) Act, be held guilty for contempt in the following circumstances:

- (a) Having been called upon to give evidence before the Assembly or an authorized Committee, refuses to be sworn or make an affirmation; or
- (b) Being a witness misconducts himself; or
- (c) Causes an obstruction or disturbance within the precincts of the Assembly Chamber during a sitting of the Assembly or a Committee; or
- (d) Shows disrespect in speech or manner towards the Speaker; or
- (e) Commits any other act of intentional disrespect to or with reference to the proceedings of the Assembly or to any person presiding at such proceedings.

According to Robert Blackburn and Andrew Kennon, with Sir Michael Wheeler-Booth, the learned authors of Griffith and Ryle on Parliament Functions, Practice and Procedures, 2nd Edition (London, Thomson Reuters (Legal) Limited, 2010) (at page 137), the law of contempt is also grounded on the basic privilege of freedom of speech because contempt consist of any act or omission which obstructs or impedes the House in the performance of its functions or which obstructs any member or officer of such House in the discharge of his duty. Such obstruction or impedance essentially amount to restricting the freedom of speech in the House.

1.5 FREEDOM FROM ARREST

We pointed out earlier on that parliamentary privilege also includes the freedom from arrest. The principle upon which the privilege of freedom of arrest is based is the priority of attendance by Members. However, we must hasten to add that the freedom of arrest has never been allowed to interfere with the administration of criminal justice. Therefore, for all intents and purposes, this aspect of parliamentary privilege is of limited application. In the Zambian context, section 5 of the National Assembly (Powers and Privileges) Act, simply provides that for the duration of a meeting, members shall enjoy freedom from arrest for any civil debt except the contraction of which constitutes a criminal offence.

However, in all cases in which Members of Parliament are arrested on criminal charges, the convention which is usually applied is that the House must be informed of the cause for which Members of Parliament are detained from their service in Parliament. Such communications are also made whenever Members are in or have been committed to prison for any criminal offence by a court of law.

1.6 CONCLUSION

It is clear from the preceding discussion that all actions of Members of Parliament in the course of parliamentary proceedings are protected by parliamentary privilege. Parliamentary privilege underpins the status and authority of all Members. Without this protection, individual Members would be severely handicapped in performing their functions or duties.

Beyond facilitating the effective functioning of Members of Parliament, parliamentary privilege through the exercise of freedom of speech, also enables democracies to function effectively. Governance is through parliamentary privilege made more transparent, and accountable. Further, representative democracy is also enhanced by parliamentary privilege, because it is through Members of Parliament, that citizens are able to participate effectively in the affairs of the country. In a word, parliamentary privilege is an effective and essential tool that allows Members of Parliament to discharge their duties without let and hindrance.
