

A SEQUEL TO Mr. MUSHAYA wa MUSHAYA's ARTICLE: PARLIAMENT AND THE COURTS

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In a recent article in an online publication Mr. Mushaya wa Mushaya wrote to support the ruling by the speaker of the National Assembly in a matter relating to the power of the courts and parliament. In support of the Speaker's ruling he argued that under the separation of powers doctrine Parliament is given freedom to debate matters according to its own rules and procedures and does not get orders from any institution including the courts and as such cannot be interfered with by a court of law. In his view Parliament can ignore an order of the court because the court cannot interfere in the affairs of Parliament. He stated further that at the heart of the doctrine of separation of powers is the understanding that no arm of government should interfere with the constitutional exercise of the powers of the other arms of government. In support of his position he cites the Canadian Supreme Court decision in *Canada (House of Commons) v. Vaid* (2005). A close examination of this decision reveals that it deals with parliamentary privilege and does not support Mr. Mushaya's arguments.

Mr. Mushaya, s legal reasoning is deeply flawed and lacks a basic understanding of constitutional theory, constitutionalism and the difference between a parliamentary democracy and a constitutional democracy. The questions that arise in this matter are simple and can be stated as follows: (a) is it lawful for the executive and parliament to deal with matters that are pending before the courts without encroaching into the sphere of the judiciary? (b) What is the legal status of parliamentary procedures *vis a vis* constitutional provisions? and (c) what does supremacy of the constitution mean? In

the following pages I will show that there is abundant case law to support the view that in a constitutional democracy no institution of state is above the constitution.

It is important first to establish the legal status of parliamentary rules. Parliamentary rules are made under the authority of the Constitution. The Zambian constitution in article 86 provides that “*Subject to the provisions of this constitution, the National Assembly may determine its own procedure.*” In the Zimbabwean case of *Biiti and another v. Minister of Justice, Legal and Parliamentary Affairs and another* (2002), the court ruled that the standing orders have the status of and force of law and must be complied with. However given the fact that parliamentary rules are created under the Constitution (in case of Zambia under article 86); they do not and cannot have the same status as constitutional provisions. It would be illogical and legally unsound to suggest otherwise.

Whether the judiciary can interfere in the internal processes of Parliament depends on whether the country is a parliamentary or constitutional democracy. In a parliamentary democracy the essence of such a democracy is the supremacy of parliament above the constitution or any other law. On the other hand, in a constitutional democracy, the constitution prescribes the manner and limits within which the powers of government may be carried out. The constitution is the supreme law of the land which cannot be subordinated to any other law, convention, regulation, precedent or practice. The Zambian Constitution in article 1 provides that “*This constitution is the Supreme law of Zambia and if any other law is inconsistent with this constitution, that law shall to the extent of the inconsistency, be void.*” The power to determine whether legislation is inconsistent with the constitution is vested in the courts (article 91). In a constitutional democracy, there is therefore no doubt that authority to interpret the law as well as Parliamentary rules vests in the judiciary. Parliament must therefore observe the *sub judice* rule and its violation is a disregard of the judiciary and the constitution.

The doctrine of separation of powers is a key element in a constitutional dispensation. It needs to be properly understood and applied. The doctrine requires that state institutions are separated from each other with distinct powers and functions. The exercise of these powers is subject to the constitution the source of authority from which these institutions obtain their distinct powers and characteristics. The executive and the legislature must act within the limits imposed by the provisions of the constitution. There is abundant case law from Commonwealth jurisdictions to support this view. In a Zimbabwean Case, *Smith v. Mutasa and Anor* (1989) the late Chief Justice Dumbutshena stated: “*The constitution is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds of authority prescribed to it by the constitution. The difference between the power of the House of Commons and our House of Assembly is that the Constitution of the United Kingdom does not permit the Judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the constitution and all legislation. In Zimbabwe the judiciary is the guardian of the constitution and the rights of the citizens.*” Similarly in the case of the *Chairman, Public Service Commission and Ors v. Zimbabwe Teachers Association and Ors* (1996) the court held: “*We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centerpiece of our democracy is not a sovereign parliament but a supreme law (the Constitution).*”

Courts in Ghana have similarly ruled. In *Ghana Bar Association vs. Attorney-General [1995-96]* Justice Edward Wiredu JSC stated “*The scope and extent of the doctrine of separation of powers ... under the 1992 Constitution, is to ensure that each arm of state in the performance of its duties within the framework of the 1992 Constitution, is to act independently and should not be obstructed in the exercise of its legitimate duties or be duly interfered with. In other words, all arms of the State are answerable or*

*responsible to the Constitution. It is also to ensure the smooth administration of the judicial, legislative or executive governance of the State whilst checks and balances are provided to ensure strict observance by each arm of state of the provisions of the Constitution."* The court added that, "with the coming into force of the 1992 Constitution, parliamentary sovereignty was ousted." The Court continued: "Thus parliamentary sovereignty as practiced in Britain where no act or action of the parliament can be questioned in court is expelled and in its place we are now in an era of constitutional supremacy where acts (parliamentary) which are contrary to the provisions of the constitution can be effectively challenged in court and their validity or otherwise pronounced upon."

In another Ghanaian case *JH Mensah vs. Attorney-General* [1996-97], where the Attorney-General had raised a preliminary objection to the plaintiff's action on the grounds, inter alia, that: the process, by which Parliament exercised its powers such as approval of ministerial nominations, could not be questioned by the courts. The Supreme Court in a unanimous decision Stated "...the Standing Orders of Parliament, dealing with its own internal procedures, must be in conformity with the spirit and letter of the Constitution or, as Nana Akufo-Addo, counsel for the plaintiff rightly put it, 'run the risk of being struck down as unconstitutional, and accordingly null and void.'

In South African likewise the courts have ruled that all branches of government including Parliament are subject to scrutiny by the courts. In the South African case of *De Lille and Anor v. Speaker of the National Assembly & Ors* (1995) Justice Hlope ruled: "*The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the constitution and the bill of rights. Parliament can no longer claim supreme power subject to limitations imposed by the constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statues, which are not in conflict with the Constitution. It follows, therefore, that Parliament may not confer itself or any of its*

*constituent parts, including the National Assembly, any powers not conferred on them by the constitution expressly or by necessary implication.”*

The cases I have cited prove beyond doubt that courts in commonwealth jurisdictions have consistently ruled that although parliamentary business is a closed book, the courts will not sit idle when such business is conducted in a manner that is inconsistent with the constitution. The Courts have the constitutional authority to strike down procedures and actions that violate the constitution as null and void. This is one of the most important principles of democracy and it is rooted both in the doctrine of separation of powers and in the principle of checks and balances. It is also the bedrock of constitutionalism. If the courts do not have the power and authority to prevent parliament from overstepping its' bounds, then Parliament would become autocratic. The law was ably articulated by the South African Constitutional Court in the case involving a challenge to the Presidential appointment of Simelane as head of the South African National Prosecution Authority- *Democratic Alliance V. The President of South Africa and Others*, (2011) the constitutional court quoted the late Chief Justice Mahomed's of South Africa who stated:

“The legislature has no mandate to make a law which transgresses the powers vesting in it in terms of the Constitution. Its mandate is to make only those laws permitted by the constitution and to defer to the judgment of the court, any conflict generated by an enactment challenged on constitutional grounds. If it does make laws which transgress its constitutional mandate or if it refuses to defer to the judgment of the court on any challenge to such laws, it is in breach of its own mandate. The court has a constitutional right and duty to say so and it protects the very essence of a constitutional democracy when it does. A democratic legislature does not have the option to ignore, defy or subvert the court.”

Parliament acting on its own initiative, cannot pronounce on whether an order of the court is regular or irregular. If the Speaker or Parliament felt that a court order was irregularly issued because

Parliamentary business was immune from court processes, the proper thing for the speaker or Parliament to do would be to instruct the Attorney-General to apply to the same court or a higher court to vacate the said order as being irregularly issued. As Mr. Mushaya rightly suggested in his article, the business of parliament is to make laws and the judiciary is to arbitrate disputes and interpret the laws. The Speaker or Parliament has no business setting aside court orders or refusing to obey court directives. This sets a dangerous precedent and equally undermines constitutionalism and the doctrine of the separation of powers and goes against the tenet of the words to be found in the very authority Mr. Mushaya wa Mushaya wrongly quoted in support of his arguments which state that "it is a wise principle that the courts and parliament strive to respect each other's role in the conduct of public affairs."