DRAFTING PRIVATE MEMBERS' BILLS

What is a private member's Bill?

A private member's Bill is a Bill introduced into Parliament by a private member, i.e. by a Member of Parliament who is not a government Minister. I use the term here in contradistinction to a government Bill, which is a Bill introduced by a government Minister on behalf of the government.

There is a distinction between public and private Bills, explained in Erskine May[1] as follows:

> "Bills are divided into two main classes of public and private bills. The former relate to matters of public policy and are introduced directly by Members of the House. Private bills are bills for the particular interest or benefit of any person or persons, public company or corporation, or local authority, and are promoted by the interested parties themselves by means of petitions deposited in accordance with the standing orders relating to private business."

Private Bills are introduced through a special procedure laid down, in Zimbabwe, by the Private Bill Procedure Act [*Chapter 2:07*], involving public hearings conducted at the expense of the people who are promoting the Bills.

Private members' Bills, on the other hand, relate to matters of public policy even though they are introduced by private Members of Parliament. So they are classified as public Bills.[2]

So, rather confusingly, a private members Bill can be defined as a public Bill which is introduced by private Member of Parliament.

Importance of private members' Bills

Most legislation that passes through Parliament in Zimbabwe and elsewhere in Africa is government legislation, i.e. Bills that are drafted by government lawyers and introduced into Parliament by government Ministers. This is inevitable because governments are elected in order to govern, and the passing of legislation is a necessary part of government – to give effect to new policies, to raise revenue and so on.

At the same time legislatures must not become mere rubber-stamps for government legislation. The constitutional doctrine of separation of powers envisages a degree of separation between the Executive and the Legislature, so Parliament must have some independent power to approve government legislation, to amend government legislation – and to pass its own legislation. Members of Parliament, whether they belong to the governing party or the opposition, must examine all legislation critically and be ready to propose changes where they believe it necessary.

So readiness to pass private members' Bills is an indication of parliamentary independence, a sign that the separation of powers is alive and well.

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[1] Erskine May *Parliamentary Practice* 23rd ed page 533.

[2] As a matter of interest, the Standing Orders of the National Assembly of Zimbabwe defines the term "public Bill" without reference to whether the Bill is introduced by a government Minister or a private Member: "Every Bill which in the opinion of the Speaker has as its object the alteration of the statute law or the common law in the public interest must be treated in the House as a public Bill." (SO 141).

In Zimbabwe our record on private members' Bills has been rather poor. So far as I can remember none were passed after Independence in 1980 until last year, when a private member was given leave to introduce an Institute of Chartered Loss Control and Private Security Management Bill, which sets up an institute to regulate the profession of loss control and private security management – whatever that may be. The Bill was passed and is now Act 2 of 2023. This year another private member's Bill was introduced, to abolish the death penalty in Zimbabwe. During its passage through the National Assembly the Bill was taken over by the government and piloted through its remaining stages by the Minister of Justice, Legal and Parliamentary Affairs. I am happy to say the Bill has passed through the National Assembly and is likely to be passed by the Senate in the near future.

Limitations on private members' Bills : Money Bills

Although private members must have power to introduce Bills, they cannot have complete freedom, because it is an important constitutional and parliamentary principle that no public charge (i.e. a charge on public funds or a tax on the general public) can be incurred except on the initiative of the government.

Various constitutions express the rule differently but they are all the same in substance: private members cannot introduce Money Bills.

The South African Constitution:

> **55. Powers of National Assembly**.-(1) In exercising its legislative power, the National Assembly may—
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> (a) …
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> (b) initiate or prepare legislation, except money Bills.

The Constitution of Kenya:

> 109.(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114 *[i.e. only on the recommendation of a parliamentary committee taking into account the views of the Cabinet Secretary (Minister) responsible for finance]*

The Constitution of Zimbabwe (Fifth Schedule):

> "4. (1) Except on the recommendation of a Vice-President, Minister or Deputy Minister, neither House of Parliament may—
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> (a) proceed upon any Bill, including an amendment to a Bill, which, in the opinion of the President of the Senate or the Speaker, as the case may be, is a Money Bill;

The term "Money Bill" is defined differently in different constitutions, but essentially it means a Bill that raises or alters taxes or imposes obligations on the central government fund (the Consolidated Revenue Fund, in the case of Zimbabwe).

The definition in the Zimbabwe constitution is:

> "Money Bill" means a Bill that makes provision for—
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> (a) imposing, increasing or reducing a tax for the benefit of the State;
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> (b) appropriating money from, or imposing, increasing or reducing any charge on, the Consolidated Revenue Fund or any other fund vested in or controlled by the Government;
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> (c) compounding or remitting a debt due to the State;
>
> (d) condoning a failure to collect a tax due to the State; or

(e) condoning unauthorised expenditure by the Government.[3]

Technicalities aside, the broad rule to remember is that private members' Bills must not contain provisions appropriate to a Money Bill: they must not impose a fiscal obligation on the Government, whether directly or indirectly, and must not raise, lower or alter taxes or duties.

It is most important to remember this rule and be alert to spot provisions in private members' Bills which impose fiscal obligations on the Government. For example, if a provision creates a public office, the holder of that office will have to be paid by the State, even if Bill does not say so expressly, so the provision will be inappropriate for a private member's Bill.

Aside from that restriction, private members' Bills can deal with any subject that can be covered by an Act of Parliament: amending statutes, reforming the law, even amending the Constitution. That is the theory anyway; in practice there is much less scope for private members' Bills. Private Members are politicians, after all, and politics is the art of the possible. However strongly they may feel about a particular issue they must remember that if they want legislation on that issue to be enacted they will have to persuade their colleagues to pass it.

That is why most parliaments have procedures to ensure that private members' Bills which have no hope of passing are not introduced.

Procedure for passing private members' Bills

The procedure for passing private members' Bills varies from country to country and is usually regulated in standing orders. In the UK, for example, the time allotted for private members' Bills is severely limited and members are allocated precedence for their bills through a ballot.

In Zimbabwe a private member cannot introduce a Bill unless the House has given him or her leave to do so. Hence before introducing a Bill the member has to move a motion seeking leave. If the House grants leave (i.e. passes the motion) the Bill is ordered to be brought in and the member must bring a copy of the Bill to the parliamentary clerks at the table in front of the Speaker.[4]

Legal counsel who drafts a private member's Bill will be expected to draft the motion seeking leave to introduce it. Counsel should not however draft the private member's speech introducing the motion.

Points to remember in drafting private members' Bills

Drafting private members' Bills is essentially the same as drafting any other piece of legislation:

- The drafter must obtain clear instructions about what the draft Bill is to contain.
- The drafter must explain the law to the private member who is instructing him or her.
- The provisions of the draft Bill must be as clear as possible and unambiguous.
- The style of the draft Bill must follow the style of the country's legislation.

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[3] Paragraph 1 of the Fifth Schedule to the Constitution.

[4] National Assembly Standing Order 142(4) & (5).

- The drafter must explain the contents of the draft Bill to the private member who has instructed him or her, to ensure that the member understands it completely and that the Bill will what he or she wants.

And so on.

Some points are particularly important with private members' Bills:

- While legal counsel to Parliament should be as helpful as possible, they must maintain their professional independence; they must not get personally involved in the success or failure of the Bill.
- The private member must be made to understand the limitation about not imposing fiscal obligations on the government.
- The private member should also be told about the need to get leave before introducing the Bill.