UNIVERSITY OF KWAZULU-NATAL

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TENSIONS BETWEEN THE POWERS OF PARLIAMENT AND THE PRIVILEGES AND IMMUNITIES OF PARLIAMENTARIANS IN SOUTH AFRICA.

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For the degree of Master of Laws

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Table of Contents

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To my Heavenly Father, God Almighty I honour you for the Grace you have enabled me to pursue this degree. I remain most grateful for the strength and wisdom you have given me to complete this dissertation. You have demonstrated your Word as true and a living testimony in my life, as stated in James 1: 5-6 ***"if any of you lacks wisdom, you should ask God, who gives generously to all without finding fault, and it will be given to you."*** I bless your Holy Name and I highly exalt the name above all names, the name Jesus.

Secondly, I would also like to extend my profound appreciation to my wife and children who have been my pillar of support and encouragement during these demanding times in my academic career. I appreciate all the fervent prayers you made on my behalf during my study in this esteemed University, today this dissertation is a product of such prayers.

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ABSTRACT

The doctrine of parliamentary privilege is a global phenomenon. It has its genesis in the English history. It came about as a result of confrontations between the monarch and Parliament. Parliamentarians fought for the right to criticize the king in Parliament and for protection against summary arrest. South Africa, like most other Commonwealth countries, inherited the doctrine of parliamentary privileges from England.

The Constitution of the Republic of South Africa enshrines parliamentary privileges in sections 57, 58, 70, 71 and 117. The national legislation dealing with privileges and immunities of Parliament, parliamentarians and its members is the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004.

The dissertation outlines the evolution of the concept of parliamentary privileges against the history of South Africa before the attainment of democracy. It also compares approaches adopted by British, Canadian and French jurisdictions on parliamentary privileges and further outlines the model of parliamentary privilege adopted by South Africa.

The dissertation critically analyses the position of parliamentary privilege in South Africa and assesses whether it promotes free speech in Parliament. It also discusses judicial scrutiny in measuring the scope of the regulation of autonomy of the National Assembly. The scope of the dissertation is limited to the National Assembly during the 26th Parliament. It also examines whether the Privileges Act is effectively implemented in addressing the regulation of the autonomy of the National Assembly or whether the Act is used selectively as a tool by the ruling party to assert its vested interests and silence opposition in the National Assembly(NA).

The dissertation examines the constitutional mandate of the office of Speaker of the National Assembly and discusses how the political affiliation to party politics adversely affects the Speaker in impartially applying the doctrine of parliamentary privilege and holding the Executive accountable. The dissertation also calls for legislative intervention to resolve the selective implementation of the law of parliamentary privilege

CHAPTER 1. INTRODUCTION

1.1 The Application and extent of the doctrine of Parliamentary Privilege within the South African Parliament

The constitutionally enshrined doctrine of parliamentary privilege has seen some challenges in South Africa's 26th Parliament.[1] This Parliament first convened on 21st May, 2014 to elect Jacob Zuma as the fifth democratically elected President of the rainbow nation.[2] Thirteen political parties were represented in this Parliament.[3] The majority party was the African National Congress (ANC). The Speaker of the National Assembly (NA), Baleka Mbete of the ANC, was elected on 21st May 2014 by members of parliament.[4] Mmusi Maimane was elected parliamentary Leader of the Opposition in a Democratic Alliance (DA) election in May 2014.[5]

Amongst the thirteen political parties represented in the South African National Assembly, was the Economic Freedom Fighters (EFF), whose party leader was Julius Malema, the erstwhile youth leader of the African National Congress Youth Wing.[6]

The constitutional atmosphere in the 26th parliament regarding the law of parliamentary privilege, went through drastic developments in the National Assembly, through the control or lack thereof, and/or management of parliamentary debates on issues of national interests since the advent of democracy.[7]

The Constitution enshrines parliamentary privileges in sections 58, 71 and 117. [8] Each of these provisions will be examined in *seriatum.* Section 58 deals with cabinet members and members of the National Assembly. This provision gives them freedom of speech in Assembly and its Committees, subject to the rules and orders of the House. The provision further confers non-liability in relation to civil or criminal proceedings, arrest, imprisonment or damages for anything that members have said

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[1] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 214.

[2] E Ferreira 'Chief Justice Swears in Fifth Parliament's MPs' Mail & Guardian, 21st May 2014 at 3.

[3] Ibid.

[4] E Ferreira 'Baleka Mbete Sworn in as Speaker of the House' Mail & Guardian, 2nd May 2014 at 4.

[5] E Ferreira 'Mmusi Maimane's Parliamentary Leader Acceptance Speech' Mail & Guardian, 29th May 2014.

[6] E Ferreira supra note 2 above.

[7] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters In South Africa's National Assembly: The Aftermath of the 7th of May 2014 National Elections', (2016) (2) *De Jure,* page 214.

[8] Constitution of the Republic of South Africa, 1996 (hereafter referred to as 'The Constitution').

in, produced before or submitted to the Assembly or any of its Committees.[9] Other privileges and immunities of the National Assembly, Cabinet Members and Members of the Assembly may be prescribed by national legislation.[10]

The constitutional provision under section 71 grants delegates to the National Council of Provinces (NCOP), freedom of speech in the Council and its Committees, subject to its rules and orders.[11] Paragraph (b) of the above constitutional provision confers immunity to members from civil or criminal proceedings, arrest, imprisonment or damages for anything said, produced before or submitted to the Council or any of its Committees. The provision also further grants immunity to members or delegates for anything revealed as a result of anything that they have said, produced before or submitted to the Council or any of its Committees.[12] Sub-section (2) of the above constitutional provision states that other privileges and immunities of the N COP, Delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.[13]

The Constitution[14] also provides, under section 117, that members of a Provincial Legislature and the Provinces' permanent delegates to the NCOP have freedom of speech in the legislature and in its committees, subject to its rules and orders. The provision further provides for immunities to members and delegates for non-liability for civil or criminal proceedings, arrest, imprisonment or damage for anything revealed as a result of anything that members or delegates have said in, produced before or submitted to the legislature or any of its committees. Subsection (2) of this provision states that other privileges and immunities of a Provincial Legislature and its members may be prescribed by national legislation.[15] The national legislation applicable in all the above three provisions, is the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004.[16]

[9] Constitution of the Republic of South Africa, 1996, section 58 (1) (a) and (b).
[10] Constitution, section 58 (2).
[11] Constitution, section 71 (1) (a).
[12] Constitution, section 71 (1) (b).
[13] Constitution, section 71 (2).
[14] Constitution of the Republic of South Africa, 1996.
[15] Constitution, section 117 (1) (a), (b) and (2).
[16] Powers, Privileges and Immunities of Parliament and Provincial Legislature Act No.4 of 2004.

1.2 Origins of the law of parliamentary privilege.

Parliamentary privilege is a global phenomenon. The characteristics and scope of privilege and immunities vary from state to state.[17] The Members of Assemblies of many former British colonies derived their parliamentary privileges from relatively broad constitutional and statutory provisions referencing the United Kingdom House of Commons. South Africa, like most other commonwealth countries, inherited the doctrine of parliamentary privilege from England. Parliamentary privilege has its genesis in the English history. The concept of parliamentary privilege originated as a result of confrontations between the monarch and parliament. The turning point was the invasion of the House of Commons by King Charles I. In the ensuring confrontation between the King Charles 1st and the members of the House of Commons, Speaker Lenthall replied as follows to the King's demand for information about four 'rebels' he wished to arrest: 'May it please your Majesty, I have neither eyes to see nor tongue to speak in this place, but as the House is pleased to direct me. Who servant I am here'. As the King departed the House of Commons, its members shouted 'Privilege, privilege, privilege'.[18] Parliamentarians fought for the right to criticize the king in Parliament and for protection against summary arrest.[19] A tradition started to develop as early as in the 14th century that members of parliament should be free to discuss and deliberate without interference from the Crown.[20] In 1689 this principle was affirmed in the Bill of Rights, which states in Article 9, that 'the freedom of speech and debate or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament'.[21] There was also a tradition developed on that members of parliament should have at least some 'freedom from arrest', in particular

[17] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto, available at https://tspace.library.utoronto.ca/bitstream/1807/18827/Langlois_colette_m_200911_LM_thesis.pdf, accessed 20 July 2019, Chapter 2 page 17-22.

[18] Ibid, 162.

[19] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page 6-7.

[20] Ibid, 7.

[21] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page 8.

in civil cases. Members further enjoyed special protection on their travels to and from parliament, so that the Crown could not stop parliament from meeting.[22]

The historical background illustrates that the concept of parliamentary immunity has developed and spread to most of the rest of the world and is still dominant today.[23] One of the most important development is that of modern democracy, which in many countries have eliminated the threat of undue harassment of parliament by the executive power.[24] Mr V White MP, further argues that the rise of party politics also means that there will be a strong link between the government and the members of the governing party in parliament.[25] Thus the parliamentary opposition, mostly the minority parties, might be in danger of undue pressure from the executive and therefore be in need of special protection. The rules on parliamentary immunity today function as a minority guarantee.[26]

[22] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page 8.

[23] Ibid, part I page 9.

[24] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page 13.

[25] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page 14.

[26] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page 16.

1.2.1 Definitions of parliamentary privileges

According to Erskine May[27], parliamentary privilege is defined as "the sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions…certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its members and the vindication of its own authority and dignity".

Ntlama, crystalizes the definition as "…the constitutional and legal basis for the protection of institutional status and members of Parliament and its Committees from any action, legal or otherwise, that could arise from an opinion expressed in the House. It entails the personal and institutional independence that is enjoyed by Parliament and its members in the performance of their duties without fear of intimidation or any barriers that may impede the fulfilment of their functions".[28]

Mr White, MP of the Canadian House of Commons, i.e. the lower democratically elected Chamber of the Canadian Parliament and Chairperson of the Standing Committee on Rules, Procedures and Rights of Parliament in this country,[29] also notes that, it is well recognized that both Houses of Parliament must have the exclusive right to control and regulate their internal affairs, particularly with respect to their own debates and proceedings as they relate to their legislative and deliberative functions. This is part of the fundamental doctrine of separation of powers which is an integral part of the Canadian Constitution as it is of ours. He, further notes that democratic Parliaments in general need to regulate such aspects of their own affairs including determining their own procedures as a legislative body, determining whether there has been a breach of its procedures and determining how to deal with such breaches. This element also includes the right of Parliament to discipline its own members for

[27] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997) 69.

[28] Ntlama op cit note 1 at 215.

[29] White op cit note 21; Part III at 38.

misconduct and to mete out punishment to members and non-members for interfering in a substantial way with the proper conduct of Parliament.[30]

Some academic commentators, namely Ntlama,[31] Mathenjwa,[32] Botha[33] and Devenish,[34] have argued that in the South African context, the evolution of the concept of parliamentary privilege should be understood against the history of the country before the attainment of democracy. These academic commentators further aver that privileges of parliament, parliamentarians or members of legislatures, are considered necessary for the dignity and proper functioning of Parliament to ensure that both law making and executive government action is subjected to critical deliberation, known as oversight, by all role players in Parliament, but particularly those members of political parties that are in opposition to the government of the day. The mechanism of political oversight is enabled by the entrenched legislation that embodies the doctrine of parliamentary privilege,[35] as well as case law authority on the interpretation of such legislation. In the Westminster and particular the mother of Parliament, at Westminster itself in London, the system of parliamentary privilege is supplemented by the conventions of the Constitution,[36] which over time can develop in other countries. This has to some extent occurred in the United States.

1.3 The statement of purpose.

The purpose of this dissertation is to discuss and critically analyse the tensions between the Powers of Parliament and the Privileges of Parliamentarians. This dissertation will also examine how the powers of Parliament and the privileges of parliamentarians are balanced within the South African context.

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[30] White (note 21 above; Part III page 39).

[31] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 215.

[32] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, 387.

[33] J Botha 'The State of Parliamentary Free Speech- Democratic Alliance V Speaker of the National Assembly' (2016) 38 *Obiter*.

[34] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*, 167.

[35] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 215).

[36] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*, 167.

The dissertation will also discuss the evolution and development of the law of parliamentary privilege within the South African context. A comparative analysis will be drawn from foreign jurisdictions such as Britain, Canada and France with regards to the application of the doctrine and model of parliamentary privilege. Further, the dissertation will critically analyse how South Africa has dealt with the problem of the tensions between the powers of Parliament and privileges of parliamentarians.

The dissertation will also discuss the legislative measures with regards to the doctrine of parliamentary privileges in South Africa, in particular the Privileges and Immunities of Parliament and Provincial Legislature Act, 2004,[37] and the Rules of National Assembly 9th Edition. This dissertation will also examine the scope of parliamentary privilege in light of the constant increase of political contestations within the National Assembly, particularly from members of the Economic Freedom Fighters. It will also examine judicial pronouncements, through cases which have been brought before courts on elements of privileges, involving the National Assembly.

The dissertation will focus particularly on the National Assembly. The study will also reveal that robust opposition is silenced by the majority party under the guise of disciplinary measures against some members of the prominent opposition party, particularly members of the Economic Freedom Fighters (EFF).

1.4 Contribution of the study.

This dissertation will identify a lacuna in the constitutional functions of the office of Speaker by analysing the role of this important official and how the political affiliation of such official, allegedly, compromises the constitutional role of this important office. It is submitted that the compromised role in the Speaker's office acts as a catalyst in perpetuating the tensions between the powers of Parliament and the Privileges of the Parliamentarians. The dissertation will argue that the impartiality and objectivity posture when regulating the internal processes and procedures of the Assembly, and when holding the Executive accountable and transparent, in line with the doctrine of parliamentary privilege, is highly necessary for the Legislature to carry out its core constitutional mandate. The dissertation will also expose that the implementation of the Parliamentary Privileges Act, referred to above, is selectively implemented largely to silence opposition in the National Assembly. This will provide a basis for making

[37] The Powers, Privileges and Immunities of Parliament and Provincial Legislature Act No.4 of 2004.

recommendations on how the problems could be resolved, that is, by reviewing the relevant legislation and rules of the National Assembly.

1.5 Research Questions

As outlined in the above introduction, the purpose of this dissertation is to set out, discuss and critically analyse the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004. The main research question in this dissertation is what are the tensions between the Powers of Parliament and the Privileges of Parliamentarians and how are they are applied and balanced in the South African context? In order to address this question, this dissertation will examine, the following sub-questions:

(a) What is the origin and history of the concept of parliamentary privilege within the South African context?

(b) How did Parliamentary Privilege develop in the South African context?

(c) What is the current position on parliamentary privilege in South Africa?

(d) How have the courts manage the tensions between the Powers and Privileges? and

(e) What is the position adopted by the United Kingdom, Canada, and France on parliamentary privileges.

1.6 Research methodology

The research method used in this dissertation will be a desk-based study. It can be described as a qualitative analysis of legal material to critically analyse the doctrine of parliamentary privilege and its application within the South African context. Data will be collected from primary and secondary sources. The following primary sources will be analysed, The Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004, the Rules of Debate of the National Assembly, 9th Edition and the Constitution of the Republic of South Africa 1996. Case law will be discussed and analysed.

The dissertation will also analyse the relevant books, journal articles, discussion papers, Committee Reports, newspaper articles and online sources.

1.7 The structure of the dissertation

This dissertation is divided into five (5) chapters, including this introductory chapter, which sets out the application and extent of the doctrine of the parliamentary privilege within the South African Parliament. The chapter also briefly highlights the origins of the law of parliamentary privilege and the definitions of parliamentary privileges. It also seeks to answer sub-question (a) above. This chapter also sets out the statement of purpose, the research questions, research methodology of the study and lastly the structure of the dissertation.

Chapter two outlines and discusses the historical developments of parliamentary privilege within the South African context pre-1994. This chapter shall also outline the current position of parliamentary privilege and how courts have managed the tensions between the powers and privileges. This Chapter also seek to deal with sub-questions (b), (c), and (d) above.

Chapter three will examine the different approaches adopted by the British, Canadian, and French jurisdictions. These approaches will be compared to the approach adopted in South Africa in respect of parliamentary privileges, immunities, and the judicial review of the internal affairs and processes of the Legislature. This Chapter will deal with sub-question (e).

Chapter four will discuss and critically analyse whether the prevailing position governing parliamentary privileges promotes free speech in Parliament. This chapter will also discuss the measures adopted by South Africa in dealing with the problem of the tensions between political power on the one hand and privileges of Parliament on the other.

Chapter five will contain the conclusion and recommendations which are the proposed answers to the main research question. This chapter shall discuss how South Africa can manage and balance the tensions between the powers of parliament and the privileges of Parliament.

CHAPTER TWO: THE HISTORICAL DEVELOPMENTS OF PARLIAMENTARY PRIVILEGE WITHIN THE SOUTH AFRICAN CONTEXT IN THE PRE-DEMOCRATIC PERIOD BEFORE 1994.

Introduction.

The purpose of this chapter is to set out and discuss the origin of the doctrine of parliamentary privilege within the South African context predating the year 1994, during the years of minority white rule. More particularly, the purpose of this chapter is to set out and discuss the development of the doctrine of parliamentary privilege in South Africa leading to the repeal of the Powers and Privileges Act of 1963.[38] This chapter will also look briefly into the amendments of the Powers and Privileges Act of 1963, made during 1984 and 1985, respectively, to bring the Act in line with the Tricameral Constitution of 1983.[39] Finally the court judgment of *Speaker of National Assembly v Patricia De Lille*[39] will be examined as a catalyst for the enactment of the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004.

2.1 Parliamentary privilege prior to 1994.

As outlined in chapter one, it has been suggested that some academic commentators have argued that in the South African context, the evolution of the concept of parliamentary privilege should be understood against the history of the country before the attainment of democracy. As a starting point, this dissertation will focus on the South African Act that united the British colonies of the Cape, Natal, Transvaal, and Orange River, which established the Union of South Africa on 31 May 1910.[40] Section 57 of this Act[41] enshrined the provision of parliamentary privileges. The above provision stated that

> …[t]he powers, privileges and immunities of the Senate and the House of Assembly and of the members and committees of each House shall, subject to the provisions of this Act, be such as are declared by Parliament, and until

[38] Powers and Privileges Act of 1963 Act No. 91 of 1963 as amended (hereinafter referred to as the 1963 Act).

[39] Tricameral Constitution Act No.110, 1983 Republic of South Africa Constitution Act, 1983.

[39] *Speaker of National Assembly V De Lille MP and Another* (297/98) [1999] ZASCA 50, [1999] 4 ALL SA 241 (A)

[40] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*, 167.

[41] The South Africa Act, 1909.

declared shall be those of the House of Assembly of the Cape of Good Hope and of its members and committees at the establishment of the Union.

In 1910, shortly after the establishment of the Union of South Africa,[42] the Union Parliament passed legislation encapsulating the powers and privileges of the Union Parliament.[43]

The legislation contained very strong elements of English constitutional and parliamentary law. These influences greatly contributed to the formulation and adoption of such legislation for the erstwhile Union of South Africa Parliament, which was a dominion of the British Empire at the time. It concomitantly corresponded to the powers and privileges of those of the Imperial British Parliament, the mother of Parliaments at Westminster in London.[44]

The Powers and Privileges of Parliament Act under section 10, conferred specific powers, privileges and immunities to the Union Parliament and its members.[45] The 1911 Act also conferred power to punish for contempt and the sanction for such contempt was imposition of a fine, fees or both.[44] The 1911 Act also granted Parliament the latitude to stipulate and declare any contempt from time to time in any standing order of Parliament.[45]

2.2 The repeal of the privileges Act of 1911 by the 1963 Act.

The reasons of the above change could be traced back in the constitutional order of the Union of South Africa.[46] The striking feature of the union of South Africa was that it was governed under a form of constitutional monarchy, the crown being represented by a governor-general.[47] Parliamentary supremacy was the most basic feature or *grundnorm* (basic norm or law) of the British Constitution at Westminster, which became operative after the Glorious Revolution of 1689 and the Act of Settlement of

[42] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 168).
[43] Powers and Privileges Act No. 19 of 1911.
[44] Powers and Privileges Act No. 19 of 1911, Section 10.
[45] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*;170).
[46] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 171).
[47] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*, 171).

1701. By virtue of the South Africa of 1909, the Union Parliament was not sovereign like the Imperial Parliament, sovereignty from 1910 to 1931 for this Parliament vested with the former. The Union Parliament only attained sovereignty with the famous Statute of Westminster of 1931 of the British Parliament. This was endorsed by the Status Act of the Union Parliament in 1934.

The turning point in the South African constitutionalism came about during 1948 when the National party came into power.[48] Devenish argues that the National party viewed Queen Elizabeth II, as a relic of British imperialism.[49] The Nationalist party government subsequently organised the referendum on whether the Union of South Africa should become a republic, the vote being restricted to whites only.[50] The Republic of South Africa was constituted on 31 May 1961.[51] The Constitution of the Republic[52] introduced the State President who was a ceremonial head of state, who replaced the British monarch and her representative in South Africa, the Governor-General.[53] The Republic of South Africa Constitution of 1961 also brought about a change in the law of parliamentary privilege.[54] It should be noted that the Republic of South Africa Act 32 of 1961 did not bring about independence or establish the sovereignty of Parliament. This was done by the Statute of Westminster of the British Parliament and Status Act of 1934 of South Africa, as explained above.

Although in 1963 the Powers and Privileges Act[55] repealed the 1911 Act, but left most of the sections virtually unchanged.[56] The law of parliamentary privileges has seen some changes within the South African context up until the final Constitution of 1996.[57] The Tri-cameral Constitution of 1983[58] was South Africa's third Constitution. The

[48] Ibid, page 148.
[49] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 175).
[50] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 175.
[51] Hahlo and Kahn (note 58 above; 154).
[52] Republic of South Africa Constitution Act No. 32 of 1961.
[53] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*,172).
[54] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 172).
[55] Powers and Privileges Act, No. 91 of 1963.
[56] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 172).
[57] Constitution of the Republic of South Africa, 1996
[58] Republic of South Africa Constitution Act No.110 of 1983.

creation of the 1983 Constitution was spearheaded by then Prime Minister P.W. Botha.[59] The striking controversial provisions was the establishment of the Tricameral Parliament.[60] Another notable feature was the abolition of the office of Prime Minister in favour of an Executive State Presidency.[61] The Constitution of 1983[62] repealed the Republican Constitution of 1961[63] and was in force for ten years before it was superceded by the Interim Constitution, of 1994.[64]

The law on parliamentary privilege also evolved to be brought into line with such constitutional developments.[65] The Powers and Privileges Act of 1963 was amended numerous times since its enactment in 1963.[66] The amendments in 1984 and 1985 respectively, were aimed at bringing the Act in line with the Tricameral Constitution of 1983.[67]

2.3 The salient provisions of the Powers and Privileges Act 1963.

Section 2 of the Act[68] provided the following-

> '(1) There shall be freedom of speech and debate in or before Parliament and in any committee, and such freedom shall not be liable to be impeached or questioned in any court or place outside Parliament.
>
> (2) Anything said by any member in or before Parliament or a committee, whether as a member or as a witness, shall be deemed to be a matter of privilege as contemplated in section 5.

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[59] D Welsh 'Constitutional Changes in South Africa' (1984), Vol 83 *African Affairs Journal of the royal African Society* 148.

[60] D Welsh 'Constitutional Changes in South Africa' (1984), Vol 83 *African Affairs Journal of the royal African Society,* page 150-151 (a legislative arrangement that would permit the coloured and Indian race groups to be represented in parliament on a segregated basis).

[61] D Welsh 'Constitutional Changes in South Africa' (1984), Vol 83 *African Affairs Journal of the royal African Society,* page 151.

[62] Republic of South Africa Constitution Act No.110 of 1983.

[63] Constitution of 1961.

[64] Constitution of the Republic of South Africa Act No. 2000 of 1993.

[65] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 178- 179).

[66] Devenish (note 38; 173).

[67] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 179-180).

[68] Powers and Privileges Act No. 91 of 1963.

(3) The provisions of subsection (1) shall not apply to any person, other than a member, giving evidence before Parliament or any committee.[69]

Devenish argues that, parliamentary privileges may be classified into two groups. Those that are inherent in the House themselves,[70] otherwise commonly known as corporate privileges, these involve the control of internal meetings and members, inquisitorial power, publication of debates and documents and punishment for contempt or breach of privilege.[71] The other classification are those that are primarily held by members themselves, which are commonly referred to as individual privileges, such as freedom of speech and freedom from arrest.[72] Members of Parliament (MPs) enjoy complete freedom of speech within the House, subject only to the rules of debate.[73] A further privilege enjoyed by MPs is that, no member can incur civil or criminal liability for anything said in Parliament or a committee.[74] These privileges are necessary to ensure accountable and transparent government so that the government of the day in the form of the members of the Executive and their departments of state, can be subject to oversight, in a system of responsible government, which is a fundamental character of the Westminster model or paradigm of government.

2.4 Breaches of parliamentary privilege.

According to May, 'generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt'.[75]

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[69] Section 2 (1) – (3) of Act No. 91 of 1963.

[70] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 168).

[71] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 169).

[72] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 169).

[73] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*; 388).

[74] Mathenjwa (note 37 above; 389).

[75] May (note 31 above; 108).

May, further contends that 'any disorderly, contumacious or disrespectful conduct in the presence of either House or a committee will constitute a contempt…'. He further asserts that in case of contempt committed against the House of Commons by Members, or where the House considers that a Member's conduct ought to attract some sanction, two penalties may be additionally available, which are suspension from the service of the House and expulsion.[76]

The Powers and Privileges of Parliament Act No. 91 of 1963 under section 10 provided elaborate mechanisms to discipline and punish members of the Assembly. Section 10 (3) referred to thirteen (13) different forms of contempt which Parliament can punish. Section 10 also provided for punishment in the form of a fine and detention where such fine had not been paid.[77] The Powers and Privileges of Parliament Act No. 91 of 1963 codified what the different forms of contempt were, and how they ought to have been punished.[78] Whenever there is an allegation of a breach of parliamentary privilege, the Act[90] stipulated, as read with the Standing Orders of the House, that a parliamentary select committee may, at the discretion of the Speaker, be set up to investigate and adjudicate on the alleged breach.[79]

As stated above, that the 1983 Tri-Cameral Constitution was in place for ten years until it was super-ceded by the Interim Constitution of 1994. This Constitution brought about South Africa's advent to democracy. The Interim Constitution ushered in democracy and was drawn up through negotiations among various political parties at the Convention for Democratic South Africa (Codesa) which culminated in the country's first non-racial elections on 27 April 1994.[80] The Interim Constitution brought about a change in the South African legal and political landscape.[81] The Interim Constitution had provisions which guaranteed and

[76] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997), page 139.
[77] Powers and Privileges of Parliament Act No. 91 of 1963.
[78] Powers and Privileges of Parliament Act No. 91 of 1963, Section 10.
[90] The Powers and Privileges of Parliament Act no.91 of 1963.
[79] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 172.
[80] 'South Africa First 20 Years of Democracy (1994-2014)' *South African History online towards a people's history* available at *http://www. sahistory.org.za/article/South-Africa-first-20-years-democracy-1994-2014*, accessed on 23 May 2019.
[81] Ibid.

protected the Bill of Rights and it also had a supremacy clause, which marked an end to parliamentary supremacy.[82]

The Powers and Privileges of Parliament Act 91 of 1963 has also been in operation for over four (4) decades until it was repealed by the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act.[83] The reasons for the repeal were partly sparked by the Supreme Court of Appeal judgement in *Speaker of the National Assembly v Patricia de Lille MP.* [84]

2.5 The current constitutional framework and the development of the law of parliamentary privileges after the judgement in *Speaker of National Assembly V Patricia de Lille and Another.*

Botha argues that the South African courts have consistently confirmed that the goal of the Constitution is to lay the foundation of an open and democratic society.[85] In the case of *Doctors for Life International v Speaker of the National Assembly*[86] Ngcobo J stated that

> …the constitutional commitment to the principles of accountability, responsiveness and openness demonstrates that South Africa's constitutional democracy is both representative and participatory, and that the 'basic objective' of the constitutional scheme 'is the establishment of a democratic and open government'. Parliament must therefore conduct its business in accordance with the tenets of the democracy to ensure meaningful parliamentary deliberation during debates and law-making, and to allow the citizenry the opportunity to be and 'to feel themselves to be' part of the political process.[87]

From the above quotation it follows that there are two important constitutional rights that underpin the principle of an open, representative and participatory parliament

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[82] 'South Africa First 20 Years of Democracy (1994-2014)' *South African History online towards a people's history* available at *http://www. sahistory.org.za/article/South-Africa-first-20-years-democracy-1994-2014*, accessed on 23 May 2019.

[83] Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004.

[84] *Speaker of National Assembly v De Lille MP and Another* (297/98) [1999] ZASCA 50, [1999] 4 ALL SA 241 (A).

[85] J Botha 'The State of Parliamentary Free Speech- *Democratic Alliance v Speaker of the National Assembly*' (2016) 38 *Obiter*; 194.

[86] 2006 (6) SA 416 (CC) paragraph 110-111.

[87] 2006 (6) SA 416 (CC), paragraph 110.

as stated by Ngcobo J. These are the protection of freedom of speech in Parliament and the promotion of public involvement in the parliamentary process.[88]

Due to the constitutional developments as enunciated above within the South African context, courts have a legitimate role to play in developing the law of parliamentary privilege within the constitutional democracy which was brought about by the new constitutional order ushered in by the Interim Constitution. In the case of *Speaker of the National Assembly v Patricia de Lille*[89] it was settled position that courts have jurisdiction to inquire whether privilege exists and to determine its scope and extent.[90]

2.6 *Speaker of the National Assembly v Patricia de Lille.*

2.6.1 Brief background.

Patricia de Lille, an erstwhile ordinary MP in the NA during a debate in the Assembly on 22nd October 1997, stated that the Pan Africanist Congress of Azania, had information pertaining to twelve members of the African National Congress (ANC) who had been accused of having been "spies for the apartheid regime."[91] These remarks provoked a furore in the in the NA, giving rise to various interventions in the Chamber. As a result she was challenged to give the names of those who were alleged to be "spies". She eventually mentioned the names of eight persons including some who were not members of the Assembly. The Speaker of the Assembly ruled that it was unparliamentary for the MP to use the word "spies" in referring to members of the Assembly and naming such members. She was asked to withdraw this part of her statement in the Assembly. She eventually withdrew her statement.[92]

Later on 27th October 1997 , an ANC MP in the House proposed a motion to appoint an "ad hoc committee to report to the House…on the conduct of Mrs Patricia de Lille, in making serious allegations without substantiation …".[93] The *ad hoc* committee was duly appointed, and after its inquiry into this matter, it made some

[88] 2006 (6) SA 416 (CC), paragraph 110-111.
[89] [1999] 4 ALL SA 241 (A).
[90] [1999] 4 ALL SA 241 (A).
[91] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A).
[92] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A), page 3.
[93] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A), page 3.

recommendations to the House that Mrs Patricia de Lille; be directed to firstly apologize by means of a letter addressed to the Speaker, and secondly that she be suspended for fifteen parliamentary working days. The recommendations were duly adopted by the Assembly on the 25th November 1997.[94]

Ms de Lille was aggrieved by the above decision and she launched an application in the Cape High Court.[95] The Cape High Court issued an order declaring void the relevant resolutions of the Assembly regarding Ms Patricia de Lille. As a result of decision of the High Court, the Speaker of the NA noted an appeal to the Supreme Court of Appeal (SCA).

2.6.2. Issues before SCA.

The paramount issue before the SCA was whether or not the NA had any lawful authority to take any steps to suspend Ms Patricia de Lille from Parliament.[96] The consideration of the above issue concomitantly places heavy reliance of the Constitution,[97] as the supreme authority was not Parliament. Section 2 of the constitution expressly provides that law or conduct inconsistent with the Constitution is invalid. The Court noted that "…it follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances…"[98]

The Speaker of the National Assembly placed reliance on the constitutional provisions of section 57.[99] The contention being that the NA "may determine and control its internal arrangements, proceedings and processes". This in a nutshell is the institutional protection of the internal arrangements, proceedings and processes of the House, earlier pointed out by Devenish, that such are inherent in

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[94] *Speaker of the National Assembly v De Lille MP and Another [*1999] 4 SA 241 (A), page 3.

[95] *De Lille and another v Speaker of the National Assembly* 1998 (3) SA 430 (C). [108]
Supreme Court of Appeal Case No. 297/98.

[96] Supreme Court of Appeal Case No. 297/98, page 5-6.

[97] The Constitution of the Republic of South African , 1996

[98] *Speaker of the National Assembly v Patrcia De Lille MP and Another* [1999] 4 SA 241 (A). page 5.

[99] Constitution of the Republic of South Africa 1996.

the House as such, otherwise commonly known as corporate privileges.[100] The SCA conceded that this authority is wide enough to enable the NA to maintain internal order and discipline in its proceedings. Such Court further elaborated that

> .. this would include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impairing unreasonably its ability to conduct its business in an orderly or regular manner acceptable in a democratic society.

The SCA then criticized and censured the conduct of the NA in suspending the MP from the tenets of the above constitutional provision. The SCA stated that

> …but it did not follow from this that the Assembly necessarily had the Constitutional authority to suspend the respondent (Ms de Lille) from its proceedings in the circumstances…it is clear that the respondent was not suspended because her behaviour was obstructing or disrupting or unreasonably impeding the management of orderly business within the Assembly, but as some kind of punishment for making a speech in the Assembly some days earlier which did not obstruct or disrupt the proceedings in the Assembly at the time….[101]

The SCA further made a pertinent observation on the constitutional provisions of section 58. It was the considered view of this Court that section 58 (1) expressly guarantees freedom of speech in the Assembly subject to its rules and orders. The threat that a MP may be suspended for something said in the NA, inhibits freedom of expression in the Assembly and must therefore adversely impact on that guarantee.[102]

Another equally paramount issue for determination by the SCA was whether the Appellant (Speaker of the National Assembly) action may be justified by virtue of the provisions of section 10 of the Powers and Privileges of Parliament Act.[103] The above section provided very elaborate mechanisms to discipline and punish

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[100] G E Devenish 'The Imperical Presidency and The Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*; 169.

[101] *Speaker of the National Assembly v Patrcia De Lille MP and Another* [1999] 4 SA 241 (A), page 9.

[115] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A), page 9.

[103] Powers and Privileges of Parliament Act, No. 91 of 1963.

members of the Assembly. Section 10 (3) referred to thirteen (13) different forms of contempt which Parliament can punish. The above section also provided for punishment in the form of a fine and detention where such fine has not been paid.[104] The SCA noted that the above Act contained no provision for suspension as a form of punishment for a member who is guilty of contempt.

2.6.3 Relief.

The SCA held that

> …there is nothing which provides any constitutional authority for the Assembly, to punish any member of the Assembly, for making any speech, through an order suspending such member from the proceedings of the Assembly. The right of free speech in the Assembly protected by section 58 (1) is a fundamental right crucial to representative government in a democratic society…

The respondent (Ms de Lille) was entitled to an order declaring her purported suspension to be void.[105] There was also non-compliance with the rules of natural justice such as the rule prohibiting bias.[106]

2.7 Developments of the Law of Parliamentary Privilege after the De Lille Judgement.

During the Supreme Court of Appeal Case of de Lille,[107] the National Parliament of South Africa was relying on the 1963 Act,[108] pertaining the law of parliamentary privilege. This Act incorporated centuries of British parliamentary common law into South African Law.[109] This hardly meets the needs of a young Parliament in a new democracy.[110] The judgement of the SCA ensures that sanctions imposed by the legislature do not limit representative democracy unnecessarily. The above case signalled clearly that the law (then) of parliamentary privileges and the power of

[104] Powers and Privileges of Parliament Act No. 91 of 1963 under Section 10.
[105] *Speaker of the National Assembly v Patrcia De Lille MP and Another* [1999] 4 SA 241 (A), page 22.
[106] GE Devenish et al Administrative Law and Justice in South Africa (2001) pages 33-34.
[107] *Speaker of the National Assembly v Patrcia De Lille MP and Another* [1999] 4 SA 241 (A), page 22.
[108] Powers and Privileges of Parliament Act, 1963.
[109] J Botha 'The State of Parliamentary Free Speech- Democratic Alliance v Speaker of the National Assembly' (2016) 38 *Obiter*; 194); 201).
[110] J Botha 'The State of Parliamentary Free Speech- Democratic Alliance v Speaker of the National Assembly' (2016) 38 *Obiter*; 194); 201).

the legislature to manage its internal arrangements needed to be revisited and changed to meet the needs of the new democratic era, involving a constitutional democracy, provided for by the Constitution.

The Powers, Privileges and Immunities of Parliament and Provincial Legislature Bill (as it was by then) was a response to the issues identified in the above as set out in the SCA's judgement relating to Patricia de Lille. The Bill (now an Act of Parliament) sought to settle some of the problems amongst which were the disciplinary powers of legislatures and further brought a new approach to the way in which legislatures deal with offences by non-members, which now is operative.

2.8 Conclusion.

In summary, it is important to understand the evolution of the law of Parliamentary privilege within the South African context. Some scholars have rightly pointed out that the historical origin of parliamentary privileges has to be understood in light of the unique historical background of the South African constitutionalism and the developments of the law of parliamentary privilege. During the ushering in of liberal democracy by the Interim constitution it is also important to note the significant changes within the country's legal and political landscape which also had a bearing to the specific problems of parliamentary privileges within the constitutional democracy now prevailing in South Africa.

CHAPTER THREE: APPROACHES ADOPTED BY BRITISH, CANADIAN AND FRENCH JURISDICTIONS ON PARLIAMENTARY PRIVILEGES, IMMUNITIES, AND THE JUDICIAL REVIEW OF THE INTERNAL AFFAIRS AND PROCESSES OF THE LEGISLATURE.

3.1 Introduction.

In the new South African constitutional democracy, there has been a growing trend to seek judicial review of the decisions of the Speaker of the NA.[111] Mathenjwa argues that cases that have come before courts in the main involve the infringement of the privileges and immunities of Parliament, based on MPs claims that the freedom of speech in Parliament has been infringed.[112] This chapter aims to determine the scope of the parliamentary privileges and immunities as enshrined in the Constitution of the Republic of South Africa.[113] In this chapter there will also be a comparison made with foreign jurisdictions such as Britain, Canada and France. Lastly, the chapter will discuss how the doctrine of parliamentary privileges and immunities has evoked interest in the legal circles and how the courts have pronounced on extent and scope of parliamentary privileges and immunities under the constitution.

3.2 Comparing Approaches to Privilege.

As was outlined in chapter two, parliamentary privileges and immunities have their origins from the British parliamentary and political tradition which evolved after a protracted struggle for supremacy, that Parliament in Great Britain being sovereign is master of its own proceedings and affairs in the sense that it enjoys certain powers, privileges and immunities.[114] In English constitutional and parliamentary history there were three institutions that vied for sovereignty, the monarch, the common law and Parliament. After the events, as explained above, of the Glorious

[111] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, 387.

[112] Ibid, 388.

[113] The Constitution of the Republic of South Africa, 1996

[114] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*, 185.

Revolution of 1689, the Bill of Rights of 1690 and the Act of Settlement of 1701, Parliament emerged sovereign.

In South Africa, Parliament is no longer sovereign in the contemporary democratic era, as it was to a greater or lesser extent in the pre-democratic era, from 1910 to 1994, when on 27 April 1994, the Interim Constitution of 1994 came into operation. This impacted on the operation and status of the powers and privileges of Parliament, with the introduction of the Interim Constitution, referred to immediately above. The sovereignty of Parliament has been replaced by the supremacy of the Constitution, in section 2 of *grundnorm* (basic norm). This has impacted on the powers and privilges of Parliament, from the *De Lille* judgements in the Western Cape High Court[115] and the SCA.

3.2.1 The Position of Parliamentary Privileges and Immunities in Britain.

The two scholars, namely, Okpaluba and Mathenjwa both share the same sentiments that the doctrine of parliamentary privilege in Great Britain originated in the House of Commons early in its history. Both authors further assert that the fullest form of parliamentary privilege and immunity is laid down in the Bill of Rights Act[116] which provides that 'the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament'.[117]

The position of Article 9 was further buttressed by Lord Coleridge CJ in the case of *Bradlaugh V Gossett.*[118] In this case, Bradlaugh, though duly elected member for a Borough, was refused by the Speaker to administer an oath and was excluded from the House by the sergeant at arms. He challenged the action. The Court of the Queens Bench, held that the matter related to the internal management of the House of Commons and this Court had no power to interfere. Lord Coleridge stated that

> …there is another proposition equally true, equally well established, which seems to me decisive of the case before us. What is said or

[115] *De Lille v Speaker of NA* 1998 (3) SA 430 (C) and *Speaker of NA v De Lille*[1999] 4 AII SA 241
[116] Bill of Rights Act 1689.
[117] Bill of Rights Act, 1689, Article 9.
[118] *Bradlaugh v Gossett* (1884) 12 QBD 271, 32 WR 552, 53 LJQB 209, 50 LT (1884) EWHC 1 (QB).

> done within the walls of parliament cannot be inquired into a court of law…the jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.[119]

Stephen J further stated that;

> …I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute which has relation to its own internal proceedings…[120]

The above cited case clearly illustrates that activities of Parliament are accepted in general and are not to be subjected to judicial review.

Okpaluba further observes that parliamentary privilege as a concept has developed in scope and extent and the principle has found expression in many common-law constitutions ostensibly to strengthen by emerging doctrine of the supremacy or sovereignty of the Parliament, separation of powers and the independence of both the legislature and judiciary.[121] It should be noted that the situation is fundamentally different where Parliament is sovereign as in Great Britain, and where the Constitution is supreme as is in contemporary South Africa, according to section 2 of the 1996 Constitution. This is clearly demonstrated by the *De Lille* case, referred to above.

The position of article 9 of the Bill of Rights was further strengthened in the case of *Church of Scientology of California v Johnson-Smith.*[122] The plaintiff church sued the defendant, a MP, for remarks made by the defendant in a television programme. He pleaded fair comment and the plaintiff replied with a plea of malice, relying on statements made in Parliament. The question arose at trial whether such reliance infringed Article 9. The Court of the Queen's Bench held that it did infringe Article 9. The plaintiff could not use the court to infer malice from statements made in Parliament, and it was not open to either party to go, directly or indirectly, into

[119] *Bradlaugh v Gossett* (1884) 12 QBD 271, 32 WR 552, 53 LJQB 209, 50 LT (1884) EWHC 1 (QB).
[120] *Bradlaugh v Gossett* (1884) 12 QBD 271, 32 WR 552, 53 LJQB 209, 50 LT (1884) EWHC 1 (QB).
[121] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*; 187.
[122] [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB.

any question of the motive or intention of the defendant for in anything said in Parliament.[123]

The Court further alluded to the law and custom of parliamentary privilege which originated from the principle that;

> …whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudicated in the House to which it relates and not elsewhere.[124]

It was further held that the basis of parliamentary privilege is that a member must have complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter.[125] Further the Court went on to state that, what is said or done in the house in the course of proceedings, cannot be examined outside of parliament to support a cause of action even though the cause of action arises out of Parliament.[126] The above case demonstrates that no matter how defamatory the utterances made are, if made during the proceedings of Parliament and in the House, they remain protected.

Mathenjwa, argues that the conclusion can be drawn that the doctrine protects the integrity of Parliament as an institution by affording it power to regulate its own affairs and to protect persons associated with the functioning of Parliament when exercising their right to freedom of speech within Parliament.[127]

He further argues that there are two types of parliamentary immunity: non-accountability; and inviolability.[128] On the one hand, non-accountability means freedom of the parliamentary vote and freedom of speech in Parliament or in a parliamentary context.[129] This entails that under non-accountability, parliamentarians may not be held legally accountable for their utterances and

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[123] *Church of Scientology of California v Johnson-Smith*, [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB.
[124] *Church of Scientology of California v Johnson-Smith*, [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB.
[125] *Church of Scientology of California v Johnson-Smith*, [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB.
[126] Ibid.
[127] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, 389.
[128] Ibid, 389.
[129] Ibid, 389.

voting behaviour in the Chamber to which they belong. Non-accountability protects members from prosecution, investigation, arrest, detention and trial for opinions expressed or votes cast by them in the exercise of their parliamentary function.[130]

Inviolability, on the other hand, denotes immunity from legal action, detention, or measures of protection or investigation falling outside the immediate scope of a member's activities in Parliament.[131] Hardt, explains that as opposed to non-accountability, inviolability is limited in time, often applies only while Parliament is in session and usually ends with the end of the parliamentary mandate. This means that it only has suspensive effect.[132] Mathenjwa points out that a variety of states, mainly those with a British colonial history, use the Westminster type of parliamentary privilege or immunity which is limited to non-accountability.[133]

The analysis of Article 9, *Bradlaugh*[134] case and *Church of Scientology of California*[135] case and the earlier position as discussed in Chapter One by May,[136] all support the fact that the parliamentary immunity practiced in Britain is that of non-accountability which protects members from prosecution, investigation, arrest, detention and trial for opinions expressed or votes cast by them in the exercise of their parliamentary function. Campbell[137] also affirms that the protection of Article 9 clearly covers debates in parliament, including motions, parliamentary questions and answers. They cover also the proceedings of parliamentary committees, the tabling of documents and petitions once presented to the House.[138]

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[130] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 390

[131] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 390.

[132] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 390

[133] Ibid, 390.

[134] *Bradlaugh V Gossett* (1884) 12 QBD 271, 32 WR 552, 53 LJQB 209, 50 LT (1884) EWHC 1 (QB).

[135] *Church of Scientology of California V Johnson-Smith*, [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB.

[136] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997), page 140.

[137] E Campbell 'Parliamentary Privilege' *The Federal Press* (2003) available at Http://federationpress.com.au/bookstore/book.asp?isbn=9781862874787, accessed on 29 May 2019.

[138] E Campbell 'Parliamentary Privilege' *The Federal Press* (2003) available at Http://federationpress.com.au/bookstore/book.asp?isbn=9781862874787, accessed on 29 May 2019.

The British model on privilege also make use of "contempt of parliament" which is alien to most states.[139] Contempt of Parliament grants criminal jurisdiction to an assembly to punish anyone, member or not, who breaches its privileges, and derives not from the legislative function of the House of Commons, but from the ancient English notion of the "High Court of Parliament" that predated any concept of the separation of powers.[140] This right exists irrespective of whether these acts occur before the House or one of its Committees, within the precincts of the House of Commons or outside it. Such acts are considered by the House to be a contempt and its power to punish such acts cannot be challenged by the courts.[141]

May, further explains that disturbances occurring within the Public Gallery of the House or before any of its Committees, are dealt with by the Sergeant-at-Arms and his staff of Doorkeepers. Offenders are removed and escorted from the premises.[142] If the disruption was serious enough to interrupt the sitting of the House or Committee, the offender (s) may be detained in a police custody room on the premises until the rise of the House, at whatever hour that may be.[143]

3.2.2 The Position of Parliamentary Privileges and Immunities in Canada.

It has been explained in the previous paragraphs that many former British colonies, including Canada, derive their parliamentary powers privileges *mutatis mutandis* (subject to the necessary adjustment) from relatively broad constitutional and statutory provisions as they are applied in the United Kingdom's House of Commons.[144] The preamble to the Canadian Constitution[145] states an intention to establish a constitution similar in principle to that of the United Kingdom.[146] Mr White, MP in the lower house, the House of Commons, in the Canadian Parliament in Ottawa, explains that "the Supreme Court of Canada has held that Canadian

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[139] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,
[140] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997), page 103).
[141] Ibid, page 103-104.
[142] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997);104).
[154] Ibid page;104.
[143] Ibid, page 104.
[144] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page; 12-13.
[145] Constitution Act, 1867 (UK), reprinted in 1985.
[146] Ibid, preamble of the constitution Act, 1867 (UK), reprinted in 1985.

Legislature's historically recognised inherent constitutional powers as are necessary for their proper functioning, may be similar, but not necessarily identical to the privileges of the United Kingdom House of Commons".[147]

The Supreme Court of Canada (SCA), in the case of *New Brunswick Broadcasting Co. v Nova Scotia (speaker of the House of Assembly)*[148] considered privilege in the context of freedom of expression guaranteed by the Charter.[149] The New Brunswick Broadcasting Corporation, carrying on business under the name of MITV, had made a request to film the proceedings of the Nova Scotia House of Assembly with its own camera or one provided by the Speaker.[150] However, the Speaker refused television cameras in the House citing parliamentary privilege. The SCA held that parliamentary privilege, and in this case, the long-established right to exclude strangers from the House, was not subject to the Charter because the right to exclude strangers from the House, has constitutional status, and therefore cannot be derogated by another part of the Canadian Constitution. McLachlin J stated that;

> …if a matter falls within…the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body…".[151]

In this case the necessity of this was grounded on the importance that debate in the chamber should not be disturbed or inhibited in any way.[152] The above case demonstrates that parliamentary privilege is part of the unwritten convention in the Constitution of Canada. Therefore, the Canadian Charter of Rights and Freedoms do not apply to members of Nova Scotia House of Assembly when they exercise

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[147] V White, *Standing Committee on Rules, Procedures and Rights of Parliament- A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, (2015) June, available at https//sencanada/content/sen/Committee/412/rprd/rep/rep 07 June 15_e.pdf, accessed 15 May 2019. At Part I page; 13.

[148] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.

[149] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.

[150] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.

[151] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.

[152] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.

their inherent privileges of refusing strangers from entering the House.[153] McLachlin J also echoes the same sentiments and states that;

> …the majority agrees that the Charter of Rights and Freedoms do not apply to the House of Assembly's privilege. The Preamble of the Constitution Act, 1867 states that the Constitution's intention is to establish a Constitution similar in principle to that of the United Kingdom. Thus, parliamentary privilege cannot be negated by another part of the Constitution….*[154].*

In *Satnam Vaid v (Canada) House of Commons*[155] the decision of the Supreme Court of Canada created a *locus classicus (*a leading case) on the law of parliamentary privilege. The court developed a test for determining when a claim of parliamentary privilege can protect a legislative body or its members from legal scrutiny.[156] In *casu*, Satnam Vaid was a chauffeur for the various Speakers of the House of Commons from 1984 to 1994.[157] On January 11, 1995, Vaid was dismissed because he allegedly refused to accept the new duties under a revised job description.[158]

He filed a grievance on his termination, and on July 25, 1995, the Board of Adjudication ruled in his favour and ordered that he be allowed to resume his employment as chauffer. During the adjudication, Vaid claimed racial discrimination, which the Board said was not established.[159] On August 17, 1995, he returned to work, at which time he was told that the chauffeur's position had been changed to a bilingual one, and was sent for French language training.[160]

On April 8, 1997, he requested that he be allowed to return to work. On May 12, 1997, the Speaker's office replied that due to reorganization, his position was being made surplus effective May 29, 1997.[161] On July 10, 1997, he complained to the Canadian Human Rights Commission, claiming that the Speaker and the House of

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[153] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.
[154] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly*), [1993] 1 S.C.R 319.
[155] *Vaid V (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[156] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,
[157] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[158] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[159] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[160] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[161] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

Commons discriminated against him due to race, colour and ethnic origin. He also claimed workplace harassment.[162] The matter was referred to the Canadian Human Rights Tribunal. The Speaker and the House of Commons challenged the Tribunal's jurisdiction to hear the complaint *due to parliamentary privilege.*[163] The Speaker and the House of Commons sought judicial review at the Federal Court, Trial Division, which was refused. The decision was upheld by the Federal Court of Appeal.[164] In the unanimous decision of the Appeal court, delivered by Binnie J. The Court found that the first step of determining whether parliamentary privilege exists at the Federal level in a particular area is to;

> …ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation the Parliament of Canada or the House of Commons at Westminster".[165]

The Court went on to observe that if the existence and scope of the claimed privilege has not been authoritatively established, then it must be tested against the doctrine of necessity.[166] That is, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body. This also include the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.[167] The Court went on to find that parliamentary privilege was not so broad as to protect employment matters.[168]

Parliamentary privilege practiced in Canada follows the parliamentary immunity practiced in Britain and therefore can be classified as non-accountability which protects members from prosecution, investigation, arrest, detention and trial for opinions expressed or votes cast by them in the exercise of their parliamentary

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[162] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[163] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.
[164] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,
[165] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,
[166] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,
[167] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,
[168] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

function.[169] However, it appears that despite the incorporation of the British-like law of privilege and immunity in Canadian law, the scope of the Canadian privilege has been interpreted differently from the British privilege.[170] In the case of *Canada (House of Commons) v Vaid* it was observed that when determining the existence of privilege, the court should determine whether the privilege continues to be necessary for the functioning of Parliament.[171] In explaining the meaning, purpose, extent and scope of parliamentary privilege in Canadian law, the Court held in the Canadian context, that parliamentary privilege is the immunity and powers enjoyed by MPs, which are necessary to enable the members to discharge their duties.[172] Privilege is a power that is necessary to ensure the proper functioning and maintenance of the dignity and integrity of the House.[173] The privilege should be necessary to protect MPs in the discharge of their duties, and to hold the government to account for its conduct of the country's business.[174] The necessity of the privilege is determined by the question of what 'the dignity and efficiency of the house require'.[175] This judgement clearly limits the exercise of free speech in that it should not be arbitrary and must be directed at and linked to a transaction of the House.[176]

3.2.3 The Position of Parliamentary Privileges and Immunities in France.

Modern privilege had its origins in medieval England, as discussed in the previous chapters, and was also taken up in France after the 1789 Revolution.[177] The approach to privilege practiced in France is that of inviolability.[178] The French model originated when the French National Assembly (NA) on 23rd June 1789 declared that "the person of each deputy shall be inviolable". This reflected the superiority of the NA over the other organs of the state under the Revolution. A

[169] See above Chapter 3 paragraph 3.2.1.

[170] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 394).

[171] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

[172] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

[173] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

[174] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

[175] *Vaid v (Canada) House of Commons*, 2005 SCC30, [2005] 1 S.C.R. 667.

[176] Mathenjwa (note 37 above; 395-396).

[177] C M Langlois *Parliamentary Privilege: A Relational Approach* (unpublished LLM thesis, University of Toronto,

[178] Ibid, page 25.

doctrine of strict separation of powers, as well as the perceived need for special protection for the representatives of the people against the executive in a time of great turmoil. The concept of "inviolability" was very wide, although some modifications were introduced as early as in 1791, making an exception for cases of *in flagrante delicto*,(in the act of wrong doing) and giving the Assembly the competence to lift immunity.[179]

In France, members of Parliament enjoy the privilege of freedom of speech in parliament. The immunity they enjoy differs from the British and Canadian models.[180] Mathenjwa explains that the immunity provided for in France covers both non-accountability and inviolability protection. The basis of the proposition is found in the Constitution of France i.e. that of the Fifth Republic[181] This Constitution provides for under Article 26

> …No member of parliament may be prosecuted, investigated, arrested, detained or tried based on opinion expressed or votes cast by him in the exercise of his functions. No member of parliament may be arrested or subjected to any other measure of a criminal or correctional nature depriving him of or restricting his liberty without the authorisation of the bureau of the chamber to which he belongs. The detention of a member of parliament, any measures depriving him of or restricting his liberty, or his prosecution shall apply if the chamber to which he belongs so requires.[182]

He further explains that the French non-accountability protection is absolute in that it prohibits any form of legal proceeding, civil or criminal, against a member for acts performed, a vote cast, or an opinion uttered by him or her in the exercise of his or

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[179] 'European Commission for Democracy Through Law (Venice Commission): Report on The Scope and Lifting of Parliamentary Immunities' *Adopted by the Venice Commission at its 98th Plenary Session* (Venice, 21-22 March 2014). Strasbourg, 14th May 2014. Study No. 714/2013. Http://venice.coe.int/webforms/documents/default.aspx?pdfile=CDL-AD(2014) 011-e. at page 19. Accessed on the 19th March 2020.

[180] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page; 397.

[181] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49, page; 396.

[182] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 396.

her parliamentary functions.[183] The argument extends to the necessity of immunity to allow the elected representatives of the people to effectively fulfil their democratic mandate, without fear of harassment or undue charges from the executive, the courts or political opponents.[184] French MPs are also afforded inviolability protection, which means that they may not be arrested or detained during their term of office without the authority of the secretariat of his or her chamber of the French Parliament.[185]

The French Parliament has a role to play in the application of the immunity, since such Parliament's approval is required for the arrest or detention of a MP.[186] Parliament also has the power to lift the immunity.[187] This protection is not absolute in that it is limited to the duration of a member's mandate. Once his or her membership of the chamber expires, he or she can be arrested for the crime committed while he or she was a member of the chamber.[188]

In contrast to non-liability (also referred to as non-accountability), rules on parliamentary inviolability are most always of a temporal nature.[189] The idea is that justice should be merely delayed, not denied and that legal proceedings may be instituted once the period of immunity is ended.[190] The extent of this period varies.

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[183] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 397.

[184] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 397.

[185] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 397.

[186] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 398.

[187] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 , page 398.

[188] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 398.

[189] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 398.

[190] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 398.

It may be the parliamentary session in which the alleged offence is discovered, or may depend on the period of office of the parliamentarian concerned, and will last as long as he or she is re-elected.[191]

3.2.4 The Position of Parliamentary Privileges and Immunities in South Africa.

The evolution of the concept of parliamentary privileges should be understood against the history of the country before the attainment of democracy. This narration has been previously outlined in Chapter Two.[192] In the current constitutional dispensation, parliamentary privilege and immunity are sourced directly from the extant 1996 Constitution. Sections 58, 71 and 117 of such Constitution clearly enshrines the concept of parliamentary privileges as discussed in chapter One.

Like the scope of the parliamentary privilege in the United Kingdom, parliamentary privilege in South Africa has two components: freedom of speech, and the exclusive cognisance of parliament.[193] This is clear from the provisions in the Constitution which guarantees freedom of speech subject to the rules and orders of the NA.[194] As discussed in Chapter Two, the importance of freedom of speech in Parliament was emphasised in the case of *Speaker of the National Assembly v De Lille MP*[195] The purpose of the right to freedom of speech and debate in the NA was also further explained in the case of *Dikoko v Mokhatla,*[196] where the court held that; *"…*immunising the conduct of members from criminal and civil liability during deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government…*"*[197]

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[191] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 399.

[192] See above Chapter 2 paragraph 2.1.

[193] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 , page 399.

[194] Section 58 (1) (a) of the Constitution 1996.

[195] [1999] 4 ALL SA 241 (A).

[196] *Dikoko V Mokhatla* 2006 6 SA 235 (CC).

[197] *Dikoko v Mokhatla* 2006 6 SA 235 (CC).

Unlike in France, the protection in South Africa is limited to non-accountability (also referred to as non-liability) and inviolability is not part of parliamentary privilege.[198] The Constitution provides for non-accountability protection for Cabinet members, Deputy Ministers, members of the National Assembly, and the National Council of Provinces. In South Africa (NCOP), the constitution provides absolute privilege to members of parliament. It does so by exempting them from criminal and civil liability for exercising freedom of speech in parliament.[199]

The protection of members of parliament from arrest is explained in the High Court decision of *Democratic Alliance (DA)* v *Speaker of the National Assembly.*[200] The bone of contention in the case was caused by the decision of the Speaker to call in members of the South African Police Service to remove members of the Economic Freedom Front (EFF) who allegedly were disrupting Parliament. The Speaker based her decision on the provisions of section 11 of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 which empowers the Speaker to order police to arrest and remove from Parliament, a member who is participating in a disturbance in Parliament.[201] Applicant, Democratic Alliance (DA) sought a declaratory order declaring the above section of the Act, as inconsistent with the provisions of section 58 (1) (b) of the Constitution. The Western Cape High Court found that section 11 was invalid to the extent that it violates a member's constitutional privilege to freedom of speech and freedom from arrest guaranteed under section 58 (1) of the Constitution.[202]

[198] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, page 404.
[199] See above Chapter 1.
[200] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC).
[201] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC).
[202] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC).

3.2.5 Conclusion

This Chapter has established that there are two models of parliamentary privilege and immunity; non-accountability and inviolability protection. From the comparative analysis, this Chapter has shown that France practices both types of privilege. Britain, Canada and South Africa practices non-accountability protection only.[203] In South Africa, the courts have interpreted parliamentary privileges and immunities which accords with the supremacy of the Constitution which requires all conduct to be subject to it. It has been further established that despite the absolute exemption of members from arrest, arising from anything said, produced in, or submitted to Parliament, MPs are not exempt from criminal acts committed during the exercise of their freedom of speech during the proceedings of Parliament. The qualification of this right is the requirement that the activity performed by MPs should be linked to the business of Parliament.

[203] M Mathenjwa 'The Constitutional Phenomenon of Parliamentary Privilege and Immunity in South Africa: A Comparison with Jurisdictions in Britain, Canada and France' (2016) 49 *Comparative and International Law Journal of Southern Africa*, pages 406-407.

CHAPTER FOUR: A CRITICAL ANALSIS OF THE TENSIONS BETWEEN THE POWERS OF PARLIAMENT AND THE PRIVILEGES OF PARLIAMENTARIANS.

4.1 Introduction.

The scope of section 58 (2) of the Constitution provides that other privileges and immunities of the NA, Cabinet members and MPs may be prescribed by national legislation.[204] This indicates that section 58(2), referred to above, on privilege on its own is not exhaustive because the Constitution allows for the national legislature to prescribe other privileges and immunities for the NA.[205] Accordingly, the conduct of presiding officers of Parliament in exercising powers on behalf it and that of individual members should resonate within the provisions of the Constitution read with the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No.4 of 2004, and be lawful. Lastly, the purpose of this chapter is to set out and discuss the analysis which embodies the critical thoughts on the preceding chapters.

4.2 Power of the National Assembly to regulate its affairs.

The Constitution provides for the internal arrangements, proceedings and procedures of the NA under section 57.[206]

It has been clearly outlined in the previous chapters that despite the free-speech guarantee, the NA and the NCOP need mechanisms to maintain control of their proceedings to ensure effective internal order and discipline, especially during debates.[207] It must be remembered that liberty is not licence in a constitutional democracy.

4.3 Rules of the National Assembly

Botha explains that while sections 57 and 70 of the Constitution provide that the NA and the NCOP may determine and control their internal arrangements,

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[204] Section 58 (2) of the Constitution of the Republic of South Africa, 1996.

[205] Section 59 (2) of the Constitution of the Republic of South Africa, 1996.

[206] Section 57 of the Constitution provides that:- (1) The National Assembly may-

(a) Determine and control its internal arrangements, proceedings and procedures; and

(b) Make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

[207] See above Chapter 1.

proceedings and procedures and make rules and orders concerning their business, these rules must, however, be promulgated and implemented with due regard to the essence of the democracy.[208] The rules applicable for purposes of this dissertation are the Rules of the NA 9th Edition.[209] The sources of authority of the National Assembly are derived from eight (8) different independent sources, namely; the Constitution, the Powers and Privileges Act, rules of the NA, Joint Rules of Parliament, Orders or any binding decision of the National Assembly, directives and guidelines of the Rules Committee, Rulings of the Presiding Officers, and any conventions or practices that have been established in the NA.[210]

The Rules also provide for the regulation of conduct of members and mechanism to deal with conduct amounting to misbehaviour in conflict with the rules in the NA. Rule 10 provides for contempt and further makes cross reference to the Powers and Privileges Act, 2004. Rule 70 provides for the removal of a member who, in the opinion of the Presiding Officer has deliberately contravened the Rules or disregards the authority of the Chair and/or that a MPs' conduct is grossly disorderly. Rule 73 provides for the removal of a MP from the Chamber and precincts, on the instruction of the Presiding Officer, concerned, by the Sergeant-at-arms or the parliamentary protection services.

The mechanisms established under the Rules for the regulation of violations of the NA rules are mainly found under Rules 216 to 219. Rules 216 provides for the establishment of the Disciplinary Committee and Rule 219 provides for the powers and functions of such a committee. Rules 211 to 214 provide for the establishment of the Privileges Committee and the functions and powers for that Committee.

The NA in its regulation and implementation of Parliament's authority, is guided by the essence of democracy as earlier advanced by Botha.[211] Rule 63 echoes the same sentiments of section 58 of the Constitution with regard to the guarantee

[208] J Botha 'The State of Parliamentary Free Speech- *Democratic Alliance V Speaker of the National Assembly*' (2016) 38 *Obiter,* page 20.

[209] Rules of the National Assembly, 9th Edition: Parliament of the Republic of South Africa, 26th May 2016.

[210] Ibid, Part 2, Rule 2 Page 32.

[211] J Botha 'The State of Parliamentary Free Speech- Democratic Alliance V Speaker of the National Assembly' (2016) 38 *Obiter,* page 20.

of freedom of speech.[212] Though the Rules guarantee freedom of speech in the NA they also regulate the orderly exercise of such freedom in the NA. The conduct of debate in the NA and order in public meetings are generally provided for under chapter 5 of the Rules.[213] The NA also censures gross disorderly conduct against its members in the NA or in its forums.[214] The Rules also establishes a Standing Committee on Rules of the NA under Rules 190 to 193. The key function of such a committee is to develop and formulate policy proposals concerning the exclusive business of the Assembly in respect of the proceedings, procedures, rules, orders and practices concerning the business of the Assembly.[215]

4.4 The Criticisms and analysis of the tensions between the Powers Parliament and Privileges of Parliamentarians.

Chapter one explained that the National Legislation giving effect to the privileges and immunities of Parliament is the Powers, Privileges and Immunities Act.[216] The objective of the Act is generally to define and declare certain powers, privileges and immunities of Parliament, Provincial Legislatures, members of the NA, delegates to the NCOP and members of Provincial Legislatures. It has been explained in Chapter one that parliamentary privilege is a legal prerogative enjoyed by the MPs and their committees. In South Africa, the privileges enjoyed by MPs are provided for under sections 58, 71 and 117 of the Constitution.[217] Privileges enjoyed by MPs include freedom of speech and that a member will not be held liable to any proceedings in any court in respect of anything said or any vote given by him in parliament or any committee thereof. It has been outlined in

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[212] Rules of the National Assembly (note 216 above; rule 63). Provides that 'Freedom of speech (1) In accordance with Section 58(1) (a) of the Constitution, Cabinet members, Deputy Ministers and members of the National Assembly have freedom of speech in the Assembly and in its committees, subject to its rules and orders. (2) In accordance with Section 58(1) (b) of the Constitution, Cabinet members, Deputy Ministers and members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the Assembly or any of its committees, or anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees. (3) The provisions of Sub-rules (1) and (2) also apply to proceedings in a mini-plenary session and other forums of the Assembly".

[213] Ibid, Chapter 5, pages 59 to 65.

[214] Rule 63 of the Rules of the National Assembly, 9th Edition: Parliament of the Republic of South Africa, 26th May 2016.

[215] Ibid, Rule 193 (1) (a), under Part 5, page 129.

[216] The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

[228] 1996 Constitution.

[217] 1996 Constitution.

Chapters one and two that parliamentary privilege refers to two aspects of the law relating to Parliament, the privileges or immunities of the Houses of Parliament and the powers of the House to protect the integrity of their processes. Parliamentary privilege exists for the purpose of enabling Parliament effectively to carry out its functions, which are basically to inquire, to debate and to legislate.[218]

The principal privilege, or immunity, is the freedom of parliamentary debates and proceedings from question and impeachment in the courts, the best-known effect of which is that MPs cannot be sued or prosecuted for anything they say in debate in the Houses.

The principal powers are the power to conduct inquiries, including compelling the attendance of witnesses, the giving of evidence and the production of documents. This also extends to adjudging and punishing MPs on matters arising from contempt of the Houses (offences against the Houses).[219] The immunities of the Houses and their members and the powers of the Houses, particularly the power to punish contempt, although referred together by the term 'parliamentary privilege' are quite distinct.[220]

Chapter two outlined the fact that parliamentary immunities and powers are part of the ordinary law and are interpreted and upheld by the courts. This was discussed in the case of *De Lille*[221] where the issue of jurisdiction of courts to inquire whether privilege exists and to determine its scope and extent within parliamentary business was definitively settled. The law of parliamentary immunities and powers is therefore not different from other branches of the law.[222]

This chapter will also analyse the immunities of NA and the rationale of those immunities. As earlier discussed in Chapter three, the immunity of parliamentary proceedings from impeachment and questioning in the courts is the only immunity of substance possessed by the House and their members and committees. All the comparative analysis in Chapter 3 reveal that the British, Canadian and French

[218] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997) 70.
[219] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997) 70
[220] Ibid, page 70.
[221] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A).
[222] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997); 75.

jurisdictions have something in common. They all share two aspects of the immunity. First there is the immunity from civil or criminal action and examination in legal proceedings of MPs and of witnesses and others taking part in proceedings in Parliament. This entails the right to free speech in Parliament, subject to the rules. The second is the immunity of parliamentary proceedings as such from impeachment or from being questioned in the courts. This entails the safeguarding of the separation of powers. It prevents the other two branches of government, the executive and judiciary, calling into question or inquiring into the proceedings of the legislature.[223]

The other important effect of the immunity is that the courts may not inquire into or question proceedings in Parliament. Parliament is therefore free to regulate its internal proceeding as long as it is done within the constitutional bounds and the essence of democracy. In chapter two Botha[224] argues that the South African courts have consistently confirmed that the goal of the Constitution is the foundation of an open and democratic society.[225]

This chapter has outlined that the Rules of the NA provide for the regulation of conduct of MPs and mechanisms to deal with deviation from these in the NA. The relevant rule in this regard is Rule 10 which provides for contempt of Parliament. The Powers and Privileges Act of 2004 also provides for such contempt in terms of section 7 and section 11.[226] This power to deal with contempt of the House is the exact equivalent of the power of the courts to punish contempt of court.

The rationale of the power to punish contempt is that the courts and the Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions and impact on their decorum or dignity.[227]

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[223] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997), 75.

[224] J Botha 'The State of Parliamentary Free Speech- *Democratic Alliance v Speaker of the National Assembly*' (2016) 38 *Obiter,* page 23

[225] Ibid, page 23.

[226] The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

[227] J Botha 'The State of Parliamentary Free Speech- Democratic Alliance V Speaker of the National Assembly' (2016) 38 *Obiter,* page 25.

The major criticism of the power of the House to punish contempt is that in exercising this power the House is acting as judges in their own cause, contrary to the principle of natural justice.[228] In the *EFF and Others case*,[229] similar assertions were made by members of the EFF complaining about the conduct of the Speaker of the NA and it's committee on Powers and Privileges.[230]

There have been a number of recent judgements concerning the internal functioning of Parliament. These judgements illustrate that the South African Constitution and the laws made in terms of it represent 'work in progress' and that our constitutional jurisprudence is developing and becoming more mature.[231] The courts, as the ultimate guardians of the Constitution, have an obligation to ensure, through the principle of legality, that the other branches of government exercise their powers within the bounds of their constitutional authority.[232] When the courts exercise judicial scrutiny over the affairs of the legislature they ought to be mindful of the English common-law principle of parliamentary privilege, based on the sovereignty of Parliament in that there is the long-standing principle of judicial non-intervention in the internal affairs of the legislature or its legislative process.[233] In South Africa this principle has been impacted on by virtue of the fact that the Constitution is supreme in the new democratic era, whereas in the pre-democratic era Parliament was sovereign, as is the position with the mother of Parliament at Westminster. This allows the courts in South Africa to intervene in the event that our Parliament should act in a manner that is inconsistent with the Constitution. To this extent the principle of non-intervention is ameliorated.

In the *Sisulu*[234] case**,** the court reflected these two approaches: the traditional common-law, non-interventionist approach epitomised by the minority judgement,

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[228] Ibid, page 25.

[229] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others (2014) ZAWCHC.*

[230] B Mshile 'Powers and Privileges Committee of the National Assembly' *Disciplinary hearing concerning EFF disruptions at National Assembly Sitting, 21 August 2014* available from https://pmg.org.za/committeemeeting/17600/, accessed 29 June 2019.

[231] J Botha 'The State of Parliamentary Free Speech- Democratic Alliance v Speaker of the National Assembly (2016) 38 *Obiter,* page 19.

[232] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*; 190.

[233] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*; 190.

[234] *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 (4) SA (WCC) paragraph 31.

in effect based on parliamentary sovereignty, which is now defunct according to our Constitution and the modern South African approach constitutional-interpretation approach represented by the judgement of the majority, permitting intervention when justified by the authority of a supreme Constitution.[235] In South Africa there has been a change of paradigm from parliamentary sovereignty to the supremacy of the Constitution.

In *casu*, the Western Cape High Court was requested to intervene in the gerrymandering in the National Assembly in the wake of the motion to impeach the President. Davis J, stated that

> …Courts do not run the country, nor were they intended to govern the country. Courts exist to police the constitutional boundaries…where the constitutional boundaries are breached or transgressed, courts have a clear and express role; and must then act without fear or favour…In the context of this dispute, judges cannot be expected to dictate to parliament when and how it should arrange its precise order of business matter'.*[236]*

The Court further held that the Speaker did not have a residual power under the rules to break the deadlock or schedule a debate in a motion of no confidence, acting on her own. Furthermore, by virtue of, *inter alia,* the doctrine of separation of powers, the Court, therefore, did not have the power to grant a *mandamus* directing the Speaker to exercise a power she did not have.[237]

In *Sisulu*, the majority judgement agreed with the High Court that there was nothing in the rules of the NA to justify the inference that the power to set and schedule a motion devolved upon the Speaker when the programme committee could not decide on a matter within its responsibility.[238] The Constitutional Court declined the *mandamus* sought against the Speaker on the ground that section 57 (1) of the Constitution vested the NA the power to determine and control its

[235] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*; 195
[236] *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 (4) SA (WCC) paragraph 31.
[237] *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 (4) SA (WCC) paragraph 32.
[238] *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 (4) SA (WCC) paragraph 42.

internal arrangement, proceedings, and procedure and to make rules and orders concerning its business.[239]

This judgement is authority for the established rule that the legislature is master of its own processes and affairs, and can order its business without interference from courts, where it makes a rule that is inconsistent with the Constitution that inconsistency is an invitation for the intervention of the Constitutional Court.[240]

On another note, the Constitutional Court judgement in the *Democratic Alliance* case, raised some important questions concerning the nature and scope of the parliamentary privilege in section 58 (1) (b) of the Constitution. The background of the case was precipitated by continuous interruptions by members of EFF in 2015, during President Zuma's annual SONA address at a joint-session of the two Houses of Parliament. The Speaker invoked provisions of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No.4 of 2004, to forcibly remove them from the Chamber by security personnel.

The Court was faced with addressing the challenge of section 11 of the Act. The majority judgement delivered by Madlanga J identified a number of issues requiring resolution, whether section 11 applied firstly to all persons, including MPs, secondly, how the term "disturbance" should be interpreted, and lastly whether an Act of Parliament was the appropriate mechanism to regulate internal order and discipline of debates in Parliament.[241].

The majority of the Court confirmed the importance of free speech in Parliament and also recognised that the right to parliamentary free speech is not absolute. Section 58 (1) (a) of the Constitution does not give members a free reign to disrupt the proceedings of Parliament so as to render it 'hamstrung'.[242] The majority also conducted both a purposive and contextual interpretative analysis of the meaning of section 11 of the Powers, Privileges and Immunities of Parliament Act.[243] In its

[239] *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 (4) SA (WCC) paragraph 31.
[240] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*; 195.
[241] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC), paragraph 10.
[242] Ibid paragraph 28.
[243] The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

final analysis, the majority found that the cumulative effect of the grammatical meaning of "person", the context of the Act in its entirety; section 11's purpose is to prevent members from causing a disturbance and impeding parliamentary proceedings, and the absurdity of interpreting section 11 to exclude a MP, meant that section 11 should be interpreted to include such a MP.[244] The majority then considered the type of disturbance that would trigger a section 11 removal from the chamber. The majority also held that it was unconstitutional for parliamentary free speech to be regulated by means of an Act of Parliament, as opposed to the rules of Parliament.[245]

On another note, the High Court, in the *Malema case*, was faced with a situation wherein it had to resolve whether certain remarks that were uttered by the applicant (Malema) during parliamentary sittings that the ANC government 'massacred people in Marikana' were protected free speech in terms of the provisions of section 58 of the constitution. The Applicant (MP Malema) was ordered by the Respondent (Chairperson of the NCOP), to withdraw the statement, but he adamantly refused. He was then ordered to leave the House as the remark was considered to be 'un-parliamentary'. He then lodged an application requiring the Court to have the Respondent's rulings declared unlawful and invalid.[246]

The Court invalidated the rulings made by the Chairperson, and furthermore affirmed the legitimacy of the Constitution as foundational to the establishment of the NA which is elected by the people as part of a system of a democratic government to ensure accountability, responsiveness and openness and insofar as they afford a guarantee of freedom of speech in Parliament, subject to its rules and orders and legislation enacted by Parliament in that regard. The Court found the rulings of the Chairperson to be irrational, establishing that she misconstrued the interpretation of the alleged 'unparliamentary' remark as a reference to the 'Members of Parliament who were members of the Cabinet and reflected on their integrity by literally accusing them personally of murder'.[247]

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[244] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC) paragraph 28.
[245] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC) paragraph 48.
[246] *Malema v Chairman of the National Council of Provinces* 2015 (4) SA 145 (WCC), paragraph 27.
[247] *Malema v Chairman of the National Council of Provinces* 2015 (4) SA 145, paragraph 60.

The judicial scrutiny concerning the tensions of the powers of Parliament and the privileges of Parliamentarians has contributed to the development of the Powers, Privileges and Immunities Act.[248] The *Democratic Alliance*[249] case gave rise to the amendment of the above Act.

4.5 The Powers, Privileges and Immunities of Parliament and Provincial Legislature Amendment Act, 2019.

Parliament in response to the directive issued by the Constitutional Court in the *Democratic Alliance* case then responded by enacting an amendment to the principal Act of 2019.[250]

Section 1 of Act No. 4 of 2004 was amended by changing the meaning of the word "***disturbance"*** to mean:

> …any act which interferes with or disrupts or which is likely to interfere with or disrupts the proceedings of Parliament or a House or Committee but does not include an act committed by a member in the exercise of his or her privilege contemplated in section 58 (1) and 71 (1) of the Constitution".

Section 3 of the Amendment Act[251] makes amendment to section 11 of the Principal Act, of 2004 by substituting the whole section with a new section 11 to read: "***Persons creating disturbances.***

> A person, **other than a member,** who creates or takes part in any disturbance in the precincts while Parliament or a House or Committee is meeting may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services.

Section 28 of the Principal Act[252] has been amended to provide that a provincial legislature may choose to either appoint a Standing Committee or establish an *ad hoc* Committee to deal with disciplinary action against members of a provincial

[248] Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.
[249] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC).
[250] The Powers, Privileges and Immunities of Parliament and Provincial Legislature Amendment Act, 2019.
[251] Powers, Privileges and Immunities of Parliament and Provincial Legislature Amendment Act, 2019.
[252] Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

legislature for contempt of that provincial legislature, and to provide that the Speaker of the Provincial Legislature exercises control and authority over the precincts on behalf of that provincial legislature".

4.6 Conclusion

This chapter has demonstrated that although sections 57 and 70 of the Constitution provide that the NA and the NCO control their internal arrangements, proceedings and procedures and make rules and orders concerning their business, these rules must, however, be promulgated and implemented with due regard to the essence of the democracy and constitutional supremacy. Accordingly, the conduct of presiding officers of Parliament in exercising powers on behalf of Parliament, and that of individual members should resonate within the provisions of the constitution read with the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No.4 of 2004, and be lawful. This chapter has also further demonstrated that as the ultimate guardian of the Constitution, the courts have an obligation to ensure through the principle of legality, that the other branches of government exercise their powers within the bounds of their constitutional authority.[253] When the courts exercise judicial scrutiny over the affairs of the legislature they ought to be mindful of the English common-law principle of parliamentary privilege, in that there is the long-standing principle of judicial non-intervention in the internal affairs of the legislature or its legislative process, which South Africa has inherited from the Westminster tradition. Furthermore, judicial scrutiny has immensely contributed to the evolution of the law of Parliamentary Privilege through the enactment of the recent Powers, Privileges and Immunities of Parliament and Provincial Legislature Amendment Act, 2019.

[253] C Okpaluba 'Can A Court Review the Internal Affairs and Processes of The Legislature? Contemporary Developments in South Africa', (2015) 48 *Comparative and International Law Journal of Southern Africa*; 197.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION.

5.1 Introduction

This chapter examines the implementation of the doctrine of parliamentary privilege in the South African NA. It will further assess whether the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004, is effectively implemented in addressing the regulation of the autonomy of the NA, or whether the Act is used as a tool by the ruling party to silence the opposition parties. This Chapter also discusses and sums up the findings of this study. It specifically focuses on the Speaker's power of the enforcement of the law of privilege and whether the foundational values of accountability have been compromised by the alleged manipulation of the law of privilege in the NA at the hands of the ruling party. This chapter also argues that the Rules of the NA ought to be revisited to incorporate a procedure where potential disputes which are likely to cause a disruption should be first deliberated upon in a closed House caucus session. This will eliminate unnecessary contestations in the chamber during plenary.

5.2 Challenges of implementing the Parliamentary Privileges.

Ntlama argues that the *De Lille*[254] judgement constitutionalised the process of the application of the law of privilege and entrenched its enforcement.[255] However, the affirmation of the standard required on the application of the law of privilege was underscored by the manner in which the NA handled the enforcement of the discipline of the institution in line with the requisites of the Privileges Act.[256] This was against the members of the EFF, who allegedly disrupted the President's address in Parliament on the 21st August 2014.[257] The alleged disruption was caused by a question put to President Zuma, when he was asked when he going to 'pay back the money' as per the recommendations of the Public Protector's Report on the Nkandla spending?[258] The President's response caused members of the EFF to bang on the benches to voice their objections. Members of the EFF

[254] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A).

[255] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 214.

[256] Ibid, page 219.

[257] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure* 223.

[258] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 224.

were ordered out of the NA by the Speaker. The Powers and Privileges Committee was directed to investigate the allegations that were brought by the Speaker against the EFF, for transgressing the rules of the NA.[259] During the investigation by the Committee, members of the EFF walked out of the parliamentary inquiry. The walkout followed calls by EFF leader, Julius Malema, for the powers and privileges committee to stop the entire disciplinary process saying it was contaminated with the ANC, as the majority party, acting as complainant, judge and possibly witnesses if the case proceeds.[260] Malema wanted the committee to summon the Speaker, Ms Mbete, and caution her against the manner in which she conducted herself by refusing to acknowledge members of the EFF who wanted to pose questions to the President.[261] Malema also pointed out that the majority of the committee were ANC members, a party which has been calling for a harsher sentence against members of the EFF in response to the fracas in Parliament.[262]

According to Malema, the complainant Ms Mbete is not only a Speaker of the House of the NA, but the governing party's National Chairperson who on Mondays sits with the President and on Thursday attends the ruling party caucus and on other days preside over House meetings where she is expected to be impartial. He further blamed the Speaker for the chaos in the plenary session, saying she was the one who should be charged. He declared:

> …The Speaker of Parliament refused us an opportunity to receive an answer from the president and continued to recognise other members of Parliament to ask questions despite the fact that our question was not answered.[263]

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[259] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 224.

[260] B Mshile 'Powers and Privileges Committee of the National Assembly' *Disciplinary hearing concerning EFF disruptions at National Assembly Sitting, 21 August 2014* available from https://pmg.org.za/committeemeeting/17600/, accessed 29 June 2019.

[261] Ibid.

[262] B Mshile 'Powers and Privileges Committee of the National Assembly' *Disciplinary hearing concerning EFF disruptions at National Assembly Sitting, 21 August 2014* available from https://pmg.org.za/committeemeeting/17600/, accessed 29 June 2019.

[263] B Mshile 'Powers and Privileges Committee of the National Assembly' *Disciplinary hearing concerning EFF disruptions at National Assembly Sitting, 21 August 2014* available from https://pmg.org.za/committeemeeting/17600/, accessed 29 June 2019.

He alleged further that the Speaker blatantly ignored them and instructed then to sit down.[264] The Committee investigated the complaint and recommended that members of the EFF should be suspended for 30 days without pay based on the extent of the contraventions. In turn, the EFF lodged an application in the Western Cape High Court for an interdict against the implementation of the recommendations of the Committee.[265] This Court observed that it was evident that the Committee was motivated by arbitrariness, which attests to the argument made by the EFF that the establishment of the Committee was nothing more than a 'sugar-coating' exercise of the political authority of the ruling party, the ANC.[266] The Court further noted that the punishment was designed as a ploy to limit the powers of 'the parliamentarians who are dispatched to Parliament to articulate the needs, views, political and economic attitudes of their constituency, the people who voted for them.[267] The Court further contended that the suspension did not consider the long-term effects of the short-term decision, as it sought to weaken the EFF's ability to represent its constituency.[268]

Ntlama further explains that the whole fracas is traced to the conduct of the Speaker when she could not retain her composure and deal with the alleged disruption without the appearance of bias.[269] She further contends that the Speaker was more anxious to protect the vested interests of the ruling party as she happened to be its National Chairperson. The Speaker reduced her constitutional role to a partisan political power in the NA and negatively impacted on the development of the principles of accountability and transparency in relation to the development of the law of privilege.[270] She further argues that the importance of constitutional partisanship in the regulation of the internal controls in the NA raises questions about the credibility of the office of the Speaker. The Speaker is required

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[264] Ibid.

[265] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (2014) ZAWCHC.

[266] Ibid.

[267] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (2014) ZAWCHC page 19.

[268] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (2014) ZAWCHC, page 34.

[269] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 226. [284] Ibid, page 227.

[270] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, pages 227-228.

to manage any issue that emanates from the NA as objectively as possible, irrespective of affiliation to any of the political parties.[271]

Citing the *Lekota* judgement,[272] she clearly articulates the duties of the Speaker. She summaries them as follows; firstly, that the Speaker is required to perform the functions of that office fairly and impartially in the interests of the NA and Parliament; secondly, the Speaker has to maintain order, and apply and interpret its rules, conventions, practices and precedents; and lastly, the Speaker has to jealously guard and protect the MPs rights of political expression entrenched in the Constitution.[273]

In *Malema* [274] discussed in Chapter 4 above, the court invalidated the rulings made by the Speaker and thoroughly examined the application of the law of privilege. The Court found the rulings of the Speaker to be irrational.[275]

Ntlama further observes that the enforcement of the law of privilege has been a 'thorn' in the functioning of the NA, and with respect to the office of the Speaker.[276] She further commented on the *EFF and Others* case,[277] that the manner in which the Speaker handled the alleged disruptive behaviour was 'disingenuous' because it did not fall within the tenor of the legal culture of accountability and transparency. She explains that the law of privilege is closely linked and founded on the values of accountability, and the Speaker created an impression of bias which clouded the importance of transparency in the NA processes.[278] According to Ntlama, the draconian handling of the EFF's alleged disruptive behaviour in maintaining the

[271] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 228.
[272] *Lekota v Speaker, National Assembly* (2015 (4) SA 133 (WCC).
[273] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 214, page 227.
[274] *Malema v Chairman of the National Council of Provinces* 2015 (4) SA 145 (WCC).
[275] See above Chapter 4 paragraph 4.5.
[276] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 228
[277] *Economic Freedom Fighters and Others V Speaker of the National Assembly and Others* (2014) ZAWCHC. [293] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 228.
[278] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 228.

discipline of the NA, has developed a perception of an institution that is ruled by installing fear in its dissenting voices.[279]

5.3 Findings

This dissertation has explored the doctrine of Parliamentary Privilege and its origins. It is apparent that the tensions between the powers of Parliament and the privileges of parliamentarians stems from the constitutional and legal basis for the protection of the institutional status and MPs and its committees from any action, legal and otherwise, that could arise from an opinion expressed in the house. Ntlama explains that this entails the personal and institutional independence that is enjoyed by Parliament and its MPs in the performance of their duties without fear of intimidation or any barriers that may impede the fulfilment of their functions.[280]

The immunities of the House and their members and the power of the House, although referred to, together as 'parliamentary privilege' are quite distinct. In chapter four this dissertation highlighted that the power of the NA to determine and control its internal arrangements, proceedings and procedures are sourced directly from the Constitution under the provisions of section 57. The NA may make rules and orders concerning its business.

The principal powers are the power to conduct inquiries, including compelling the attendance of witnesses, the giving of evidence and the production of documents. This also extends to adjudging and punishing members on matters arising from contempt of the Houses, offences against the House.

The principal privilege, or immunity, is the freedom of parliamentary debates and proceedings from question and impeachment in the courts. This means that MPs cannot be sued or prosecuted for anything they say in debate in the House.

In the comparative approach discussed in Chapter three, the *Bradlaugh* case,[281] depicting the British position of parliamentary privilege, stressed the fact that the court has no power to interfere in matters relating to the internal management of the House of Commons. This is the position in the UK because its Parliament is

[279] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, page 229.
[280] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 214, page 218.
[281] *Bradlaugh v Gossett* (1884) 12 QBD 271, 32 WR 552, 53 LJQB 209, 50 LT (1884) EWHC 1 (QB).

sovereign, whereas in South Africa the position is different in that our Parliament is not and our Constitution is supreme. In the *Church of Scientology* case[282] the court stressed that the basis of parliamentary privilege is that a member must have complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter. The Court further stated that what is said or done in the House in the course of proceedings, cannot be examined outside of parliament to support a cause of action even though the cause of action arises out of Parliament.

The Canadian parliamentary privilege also supports the parliamentary immunity practiced in Britain which protects members from prosecution, investigation, arrest, detention and trial for opinions expressed or votes cast by them in the exercise of their parliamentary function.

In France, members of Parliament enjoy the privilege of freedom of speech in Parliament. The immunity they enjoy differs from the British and Canadian models. This is brought about by virtue of their constitution under Article 26, which provides that 'no member of parliament may be arrested or subjected to any other measure of criminal or correctional nature depriving him of or restricting his liberty without the authorisation of the bureau of the chamber to which he belongs'.[283]

In the South African jurisdiction, parliamentary privilege and immunities are sourced directly from the Constitution, which as indicated above is sovereign, and these are provided for under sections 58, 71 and 117.[284] The importance of freedom of speech in Parliament was extensively discussed in the case of *De Lille.*[285] *Dikolo*[286] case stated that 'immunising the conduct of members from criminal and civil liability during deliberations is a bulwark of democracy, it promotes freedom of speech and expression'.[287] The *Democratic Alliance*[288] case was basically scrutinizing the powers of the House to order arrest and removal of a

[282] *Church of Scientology of California v Johnson-Smith*, [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB. [299] *Church of Scientology of California v Johnson-Smith*, [1972] 1 ALL ER 378, [1971] 3 WLR 434, [1972] 1 QB.

[283] See Chapter 3 paragraph 3.2.3 above.

[284] Constitution of the Republic of South Africa, 1996.

[285] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A). [303]

[286] *Dikolo V Mokhatla* (2006) 6 SA 235 (CC).

[287] *Dikolo V Mokhatla* (2006) 6 SA 235 (CC).

[288] *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC).

member who is participating in a disturbance in parliament. The courts found that freedom of speech and freedom from arrest was guaranteed under section 58 of the Constitution. Another case with a similar principle is *EFF and others.*[289]

The tensions between powers of Parliament and the privileges of MPs are now properly balanced in the South African context by judicial intervention into the internal affairs of Parliament, by virtue of the supremacy of the Constitution, permitting judicial review of the conduct of the Speaker. The enquiry of whether there has been a breach in the privileges of MPs must crucially depend on the Constitution. *It is the supreme law, not Parliament.* It is the ultimate source of all lawful authority in the country. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the constitution is invalid.[290] It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts.[291] No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances, by virtue of judicial review provided for in sub-sections 172(1) and (2) of the Constitution.[292]

South Africa has made significant progress in the development of the law of parliamentary privileges. Courts have directed parliament to amend offending sections in the law of parliamentary privileges, encapsulated in the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004. This law has recently been amended to comply with the recommendations made by the Constitutional Court, in the case of *Democratic Alliance*.[293] The recent amendment is discussed in Chapter 4 above, which resulted in the 2019 amendment Act.[294] Although in theory South Africa has made tangible strides in the law of parliamentary privileges, the cardinal issue is whether the law is effectively applied. The recommendations below sets out the short comings therein.

[289] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (2014) ZAWCHC.
[290] Constitution of the Republic of South Africa, 1996.
[291] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A), page 6.
[292] *Speaker of the National Assembly v De Lille MP and Another* [1999] 4 SA 241 (A), page 6.
[293] Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 487 CC.
[294] Powers, Privileges and Immunities of Parliament and Provincial Legislature Amendment Act, 2019.

5.4 Recommendations.

This dissertation recommends that the office of Speaker of the Assembly should be a non-partisan one. This is in line with an accepted tradition of parliamentary democracy. The office of Speaker of the United Kingdom's House of Commons has an in-built tradition of political neutrality.[295] In order to maintain political neutrality, the British have generally followed a convention, that after the election of the office of the Speaker, he/she cuts off his connection with his or her party.[296] This is meant to avoid any likelihood of bias in the execution of the duties of the office of Speaker of the House.

This dissertation recommends that the Speakers of the House of Assembly ought to maintain political neutrality from party politics. It has been discussed above in this chapter five that the position of Speaker in the NA is highly compromised. In the Privileges Committee which was tasked to investigate alleged disruptions in the House during the President's address in Parliament on the 21st August 2014, the Speaker directed the Committee to make the investigations. Mr Julius Malema, MP made assertions before the Committee that the complainant is not only the Speaker of the House, but a party National Chairperson who on Mondays sits with the President and on Thursdays attends the ruling party's caucus and on other days preside over House meetings where she is expected to be impartial. This creates a serious conflict of interest and likelihood of the apprehension[297] of bias in her execution of duties of the office of Speaker, because clearly she cannot maintain an impartial and objective posture when regulating the internal processes and procedures of the NA, when holding the Executive accountable and transparent to progress to attain South Africa's democracy. This therefore calls for a specific regulation in the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act to protect and specify in particular the requirement of political neutrality of the office of Speaker.

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[295] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997) 178.

[296] E May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997) 181. [313] B Mshile 'Powers and Privileges Committee of the National Assembly' *Disciplinary hearing concerning EFF disruptions at National Assembly Sitting, 21 August 2014* available from https://pmg.org.za/committeemeeting/17600/, accessed 29 June 2019.

[297] See the famous dictum of Lord Hewart in *R v Sussex Jistices, ex parte McCarthy* [1924] 1 KB 256 at 259 who declared that '[i]t is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly be seen to be done.'

Ntlama explains that the Speaker was more anxious to protect the vested interest of the governing ANC, as the ruling party as she happened to be its National Chairperson. The Speaker reduced her constitutional role to a partisan political power in the NA.[298]

The Speaker is required to manage any issue that emanates from the NA as objectively as possible, irrespective of affiliation to any of the political party. The Speaker does not represent any political party when discharging the functions of his or her office. It is further expected from the Speaker to jealously guard and simultaneously protect all MPs rights of political expression entrenched in the Constitution and maintain the dignity and decorum of Parliament. It is therefore a recommendation of this dissertation that the position of the office of Speaker should be a non-partisan,[299] by a mechanism, similar to that used by the Speaker at Westminster, as indicated above. This may in turn bolster the application and implementation of the law of parliamentary privilege and holding the Executive accountable.

Based on the findings and discussions above it is further recommended that the composition of the Privileges Committee should be adequately capacitated to deal with issues of breach of the rules and contempt of parliament, allegations. Rule 212 provides that 'the Committee consists of the number of Assembly members that the Speaker may determine with the concurrence of the Rules Committee, subject to the provisions of Rule 154'.[300] This Committee exercises the penal jurisdiction of Parliament in regard to contempt of Parliament. Devenish suggests that the Assembly should involve a judicial committee, whose members would all have legal training and experience.[301] The judicial committee will also fulfil other legal and constitutional functions of the NA.[302]

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[298] N Ntlama 'The Law of Privilege and the Economic Freedom Fighters in South Africa's National Assembly: The Aftermath of The 7th of May 2014 National Elections', (2016) (2) *De Jure*, 214, page 288.

[299] Ibid, page 288.

[300] Rules of the National Assembly, 9th Edition.

[301] G E Devenish 'The Imperical Presidency and the Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*, 167.

[302] G E Devenish 'The Imperical Presidency and the Powers and Privileges of Parliament' (1988) 3 (2), *SA Publiekreg= SA Public Law*, 179.

The Venice Commission also noted that Parliament is a political institution, and the members are politicians, not impartial judges. Therefore outside experts may be brought in to assist (though not with voting rights). The experts may for example be chosen from academia, retired judges or other people of undoubted integrity and independence. The Commission went on to observe that in some countries it would be sufficient to regulate this in the parliamentary rules of procedure.[303]

The last recommendation of this dissertation concerns the Rules of the NA that they ought to introduce a procedure where contentious issues may be first ironed out before they erupt in a plenary session. This procedure may be referred to as Bipartisan House Caucus.[304] This is a House caucus called for all members irrespective of party affiliation and the caucus meetings are closed to the public, but media and constituents are updated soon after the bipartisan House caucus meeting concludes.[305] The dissertation recommends for this procedure which will help cushion the dramatic increase in political contestations in the NA, and some issues may be resolved at such House caucuses.

5.5 Conclusion

The law on parliamentary privileges in South Africa has evolved from the constitutional order of 1909, which brought about the Powers and Privileges Act No. 9 of 1911, there has been many constitutional developments up to the final Constitution of 1996. On the same issue, the law on privilege has evolved in South Africa over more than a century, since unification in 1910, to give effect the current constitutional order with regards to parliamentary privileges and immunities. The law as it currently stands by virtue of the Powers, Privileges and Immunities of Parliament and Provincial Legislature Act, 2004, as amended, clearly articulates the law on parliamentary privileges within the tenor of the contemporary constitutional yardstick, premised on the 1996 Constitution, encapsulating, constitutional supremacy and judicial review. The enforcement of the law of parliamentary privileges has exposed the intense

[303] 'European Commission for Democracy Through Law (Venice Commission): Report on The Scope and Lifting of Parliamentary Immunities' *Adopted by the Venice Commission at its 98th Plenary Session* (Venice, 21-22 March 2014). Strasbourg, 14th May 2014. Study No. 714/2013. Http://venice.coe.int/webforms/documents/default.aspx?pdfile=CDL-AD(2014) 011-e. at page 19. Accessed on the 19th March 2020.

[304] available from https://www/ Nondoc.com/2020/03/16/bipartisan-house-caucus/

[305] Ibid.

tensions precipitating serious conflicts between the powers of Parliament and privileges of MPs. It has been established that the above state of affairs has arisen due to the highly conflicted and ambivalent nature of office of the Speaker of the NA. The office of Speaker should be that non-partisan and impartial and have the complete confidence of all MPs. This would then bring about certainty regarding the implementation and enforcement of the law on parliamentary privilege and thus assist the institution of Parliament to fulfil one of its core constitutional mandate; that of executive oversight. This would also limit the number and dangerous nature of political contestations in the NA and also by extension limit judicial review. This has occurred because some opposition parties take this route because they feel politically frustrated at the hands of the ANC, as the ruling party which allegedly manipulates the law of privilege to manage dissenting voices and curb legitimate freedom of expression in Parliament.

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