Can a court review the internal affairs and processes of the legislature? Contemporary developments in South Africa

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Abstract

In the exercise of its constitutional authority to review legislation for unconstitutionality, can a court review the internal affairs or processes of the legislature? In other words, can the court intervene in the legislative process, the internal affairs of the legislature, or in a dispute between members and officials of the National Assembly notwithstanding the principles of separation of powers, the rule of law, and supremacy of the Constitution? Assuming that the court can intervene, then, on what ground(s) can such intervention take place? The recent split decision by the Constitutional Court in *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 6 SA 249 (CC) affirms two approaches: the traditional common-law, non-interventionist approach epitomised by the minority judgment, and the modern South African constitutional-interpretation approach represented by the judgment of the majority. The question common to both approaches, however, is whether the conduct of the functionaries of the Assembly violated a member's right to free speech and debate in the Assembly. This question is investigated alongside those instances where Parliamentary Bills have been challenged for constitutionality. The conclusion inevitably is that the common-law, non-interventionist approach to the privileges of the legislature does not apply unconditionally in the modern South African constitutional state where the Constitution provides otherwise; conduct of the Speaker or any other official of the legislature violates individual or minority members' rights; or where the rules of the Assembly are defective and, therefore, inconsistent with the Constitution.

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INTRODUCTION

The judicial branch is undoubtedly the institution among the three organs of state that is vested with the power to declare any law or conduct inconsistent with the Constitution, invalid.[1] It is also well-known that in exercise of their extensive constitutional powers to strike down legislation for unconstitutionality, the courts tend to keep their distance from matters considered to fall within the internal domain of the legislature. They adopt a non-interventionist approach: '[a] self-denying ordinance in relation to interfering with the proceedings of Parliament'[2] which underlines the 'mutuality of respect between two constitutional sovereignties'.[3] Why do the courts restrain themselves where the Constitution does not expressly impose any obstacle to their exercise of power? The search for the answer to this question demands that the common-law principle of judicial non-intervention in the internal affairs of the legislature or the legislative process first be addressed before reasons advanced to rationalise the unwillingness of the courts to intervene are considered. It is also common knowledge that this judicial restraint stems not only from the courts' deference to the other arms of government on considerations of the separation of powers;[4] it also derives from the doctrine of justiciability underlying judicial avoidance of those issues not properly suited for adjudication[5] and which rightly belong to the domain of the executive, the legislature, or the political sphere.[6]

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.[7] It is the duty of the court to enforce the rule of law; to ensure that

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1 Section 172(1) of the Constitution of the Republic of South Africa, 1996, hereafter referred to as 'the Constitution.'

2 *Per* Lord Woolf MR in *R v Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 All ER 93 at 94.

3 *Per* Sedley J, quoted in *Al Fayed* at 95.

4 In terms of this principle, the courts guard against any attempt by the executive branch to assign functions of non-judicial nature to serving judges – *South African Association of Personal Injury Lawyers v Heath and Others* 2001 1 SA 883 (CC) at 897B–902A; *City of Cape Town v Premier, Western Cape and Others* 2008 6 SA 345 (C) pars 167–217.

5 Okpaluba 'Justiciability and constitutional adjudication in the Commonwealth: the problem of definition (1) and (2)' (2003) 66/3 and 4 *THRHR* 424 and 610 respectively.

6 See Okpaluba 'Justiciability, constitutional adjudication and the political question in a nascent democracy: South Africa (parts 1 and 2)' (2003) 18/2 and (2004) 19/1 *PR/PL* 331 and 114 respectively.

7 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC); *Merafong Demarcation Forum and Others v President of the Republic of South Africa* 2008 5 SA

the organs of state operate within the constitutional framework for the distribution of powers; while at the same time, refraining from intruding into territories mapped out for those other branches. The courts maintain this delicate balance by observing the principle of separation of powers, on the one hand, and justiciability, on the other. And, when the legislature is the organ involved, there is the long-standing principle of judicial non-intervention in the internal affairs of the legislature or its legislative process, which originated from the English common-law principle of parliamentary privilege.

Where does the court's power of judicial review of legislation end and judicial restraint begin? Sometimes, the questions are: what constitutes the internal affairs of the legislature or, what amounts to the proceedings of parliament? The answers to these questions are important for the determination of whether parliamentary privilege would apply under the common law. In order, therefore, to put the discussion in proper perspective, a brief analysis of the common-law principles of parliamentary privilege and the rationalisation first receive attention. The article then proceeds with a discussion of the constitutional origins of parliamentary privilege and the attitude of the courts towards the internal affairs of the legislature and its processes, including the judicial reviewability or otherwise of parliamentary Bills in modern South African constitutional law. The ensuing investigation reveals that, in the light of the extensive constitutional regulation of the subject, judicial intervention in the internal affairs of the legislature is allowed in more instances under the South African Constitution than at common law. This is in accordance with the extensive powers of judicial review vested in the courts by the Constitution. Finally, the article discusses the situation where the Assembly's own rules are defective in that they bar a member from exercising her right under section 102 of the Constitution thereby violating the very essence of the principle of free speech and the debate doctrine which is what parliamentary privilege sets out to protect. There can, therefore, be no question of the Constitutional Court intervening

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171 (CC); *Van Abo v President of the Republic of South Africa* 2009 5 SA 345 (CC); *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 3 SA 293 (CC); *Democratic Alliance v President of the Republic of South Africa and Others* 2012 1 SA 417 (SCA); *Minister of Local Government, Housing and Traditional Affairs, KZN v Umlambo Trading 29 CC and Others* 2008 1 SA 396 (SCA); *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2012 3 SA 486 (SCA); *Democratic Alliance v President of the Republic of South Africa* 2012 1 SA 417 (SCA), confirmed *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC).

in order to protect the constitutional right of the member to participate in the proceedings of parliament. Such intervention is also likely where the constitutional imperative that the National Assembly must encourage and promote representative and participatory democracy in parliament, is violated or threatened with infringement. This is because the court must protect the principle of participatory democracy as well as enforce the performance of a constitutional obligation imposed upon the legislature. The majority judgment in *Mazibuko v Sisulu, Speaker of the National Assembly*[8] epitomises the foregoing propositions. Although the common-law, non-interventionist approach does not apply in the South African context in all its ramifications, it is nonetheless important that it should form the starting point of an article of this nature not only because it is a necessary link to the historical origins of the topic, but also as it remains a vital aspect of the common-law jurisprudence.

THE TRADIDITIONAL COMMON-LAW, NON-INTERVENTIONIST PRINCIPLE

The common-law constitutional concept applied uniformly throughout the Commonwealth is that parliament is master of its own proceedings and affairs in the sense that it enjoys certain powers, privileges, and immunities. This is known in Westminster constitutional jurisprudence as parliamentary privilege. It derives from the British political tradition which evolved after a protracted struggle for supremacy,[9] eventual negotiation, and compromise between the House of Commons and the Crown on the one hand, and the Crown, the courts, and the House of Lords, on the other.[10] The basic principles of parliamentary privilege originated in article 9 of the UK Bill

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8 *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 4 SA 243 (WCC); *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 6 SA 249 (CC).

9 *Per* Frankfurter J speaking on the origins of the 'Speech or Debate' Clause in the American Constitution in *Tenney v Brandhove* 341 US 367 at 372 (1951); Harlan J, *United States v Johnson* 383 US 169 at 178 (1966); Keith J in *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) par 19; Sir Edward Coke, *Institutes of the laws of England* (1644) (4 Inst) 15.

10 Bearing in mind that the courts in the United Kingdom lack the general competence to entertain challenges of constitutional invalidity of Acts of Parliament in the face of the doctrine of parliamentary sovereignty, the question of judicial non-interference with the internal business of the Houses of Parliament operate with more vigour in that jurisdiction. As Lord Denman CJ stated in the early parliamentary privilege case – *Stockdale v Hansard* (1839) 112 ER 1112 at 1156: 'All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt.' See also *per* Frankfurter J, *Tenney v Brandhove* 341 US 367 at 372 (1951).

of Rights 1689 in terms of which freedom of speech and debate or proceedings in parliament and its committees were protected from impeachment or challenge in a court of law. The speeches of Lord Coleridge CJ and Stephen J in *Braudlaugh v Gossett*[11] put the matter in perspective. Lord Coleridge held that what was said or done within the walls of parliament could not be questioned in a court of law as the jurisdiction of the Houses over their members – such as their right to impose discipline 'within their walls' – was absolute and conclusive.[12] Furthermore, if any injustice was done to a member, 'it is injustice for which the courts of law afford no remedy'.[13] For his part, Stephen J held that parliament was not subject to the control of the courts in its administration of that which relates to its own internal proceedings.[14] Secondly, parliament has 'exclusive power of interpreting' a statute insofar as its own proceedings are concerned, and that, 'even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly'.[15] Thirdly, '[F]or the purpose of determining on a right to be exercised within the House itself, only the House could interpret the statute: but as regards rights to be exercised out of and independently of the House, such as a right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House'.[16] In rejecting an application to quash a report of the Parliamentary Commissioner of the House of Commons in *R v Parliamentary Commissioner for Standards, ex parte Al Fayed,*[17] Lord Woolf MR held that the 'activities of Parliament are accepted in general … to be not subject to judicial review'. In other words, what the Commissioner was doing, 'directly related to what happens in Parliament'.[18]

Parliamentary privilege as a concept has developed in scope and extent from the Blackstonian aphorism that 'whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that

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11 (1884) 12 QBD 271.
12 *Id* at 275.
13 *Id* at 277.
14 *Id* at 278.
15 *Id* at 280.
16 *Id* at 282.
17 [1998] 1 All ER 93 at 96–7. See also *Ex parte Herbert* [1935] 1 KB 594; *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407.
18 The absolute privilege of parliament applied to its internal proceedings and not to what was said or done outside parliament. So, the summoning of parliament by the Speaker did not attract privilege as it was not an internal proceeding of parliament – *Teangana v Tong* [2005] NZAR 396 (Karibati CA) par 32.

House to which it relates, and not elsewhere'.[19] In effect, the courts will not countenance a challenge to what is said or done within the walls of parliament in the performance of its legislative functions and protection of its established privileges.[20] While the basic principle[21] has found expression in many common-law constitutions[22] ostensibly to strengthen the emerging principles of supremacy of the constitution, separation of powers, and the independence of both the legislature and the judiciary, the practices have been incorporated into statutes in their wider form.[23] For example, the High Court of Australia held in *R v Richards; Ex parte Fitzpatrick and Browne*[24] that as much as the judicial power of the Commonwealth reposes exclusively in the courts, as a general principle of construction, legislative powers should not be interpreted as allowing for the creation of judicial power or judicial authority vested in any body other than the courts contemplated in ch III of the Commonwealth Constitution. Although section 49 of the Constitution does not expressly so state, it is an exception to the fact that section 71 vests judicial powers exclusively in the courts in that it entrusts parliament with certain powers that 'theoretically' and 'scientifically' belong in the judicial sphere. To that extent, it stands in a special position in relation to ch III, and the doctrine of separation of powers is not a sufficient reason to give the clear words of section 49 a restrictive or secondary meaning they do not properly bear. Consequently, those powers which 'theoretically' and 'scientifically' belong within the judicial sphere, may by virtue of section 49 of the Commonwealth Constitution be exercised by parliament. Accordingly, a provision such as section 16(3) of the Parliamentary Privileges Act 1987

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19 *Blackstone's Commentary vol 1* (17ed 1830) 163.

20 *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407 at 413*g–h; R v Bunting* (1885) 7 OR 524 at 544; *Dillon v Balfour* (1887) 20 LR Ir 600 at 615–6; *Stockdale v Hansard* (1839) 9 Ad & E 1 at 114 and 209, 112 ER 1112; Erskine May, *Parliamentary Practice* (16ed 1957) 48. See also *per* Houlden J in *Roman Corporation Ltd et al v Hudson's Bay Oil and Gas Co Ltd et al* (1971) 2 OR 418 at 423.

21 *Erskine May's Treatise on the law, privileges, proceedings and usages of Parliament* (22ed 1997) 66, 93–97; *Halsbury's laws of England vol 44/1* (4ed 1995) par 1479.

22 For instance, provisions equivalent to those of art 9 of the Bill of Rights 1689 (UK) could be found in art V of the Articles of Confederation and art I § 6, nicknamed: 'Speech or Debate Clause', both of which prohibit the challenge or impeachment of any speech or debate in Congress in any court or anywhere outside Congress. See also ss 49 and 51(xxxix), Constitution of Australia and s 16 of the Parliamentary Privileges Act 1987 (Cth); s 242, Legislature Act 1908 and Imperial Laws Application Act 1988 – New Zealand; articles 105 (Parliament) and 194 (State Legislative Assembly), Constitution of India.

23 See *eg* Parliamentary Privilege Act 1987 (Zimbabwe); National Assembly (Powers and Privileges) Act Cap 12, Laws of Zambia.

24 (1955) 92 CLR 157 at 166–7.

(Cth) which restated the privileges and immunities of parliament in emphatic terms, was not invalid because of its implicit constitutional prohibition upon interference in the judicial powers or functioning of the courts as organs of state government.[25]

The Privy Council rejected an attempt by the New South Wales Court of Appeal[26] to limit parliamentary privilege solely to cases where those making statements in parliament were to be absolved of legal liability. And, in *Prebble v Television New Zealand Ltd,*[27] Lord Browne-Wilkinson put the matter beyond doubt when he stated that:

> … to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is contempt of the House punishable by the House:[28] if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.

RATIONALISING THE NON-INTERVENTIONIST DOCTRINE

Several reasons[29] have been advanced for judicial abstention from intervention in the internal affairs of the legislature. So, when the Constitutional Court was called upon to grant interim relief to a political party/applicant who had challenged the floor-crossing legislation in parliament in *President of the Republic of South Africa v United Democratic Movement*,[30] the court made it abundantly clear that:

> Having regard to the importance of the Legislature in a democracy and the deference to which it is entitled from the other branches of government, it would not be in the interests of justice for a Court to interfere with its will unless it is absolutely necessary to avoid likely irreparable harm and then only in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation. Where the

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25 *Laurance v Katter and Another* (1996) 141 ALR 447 (Qld CA); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

26 *R v Murphy* (1986) 5 NSWLR 18.

27 [1994] 3 All ER 407 at 415*e–f*.

28 *British Railways Board v Pickin* [1974] 1 All ER 609 at 629 *per* Lord Simon; *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378.

29 See *eg Report of the Select Committee on the Official Secrets Act, House of Commons 1939* xiv; *II Works of James Wilson* (Andrews ed 1896) 38.

30 2003 1 SA 472 (CC) par 31 (*UDM*).

> legislation amends the Constitution and has thus achieved the special support required by the Constitution, Courts should be all the more astute not to thwart the will of the Legislature save in extreme cases. [31]

Similarly, in *Minister of Home Affairs v Eisenberg and Associates; In re: Eisenberg and Associates and Minister of Home Affairs and Others*[32] the question was whether to grant leave to appeal against a decision of the High Court declaring the Immigration Regulations 2003[33] unlawful and inconsistent with the Constitution on the ground that in making the regulations, the Minister had not complied with the provisions of section 7 of the Immigration Act 2002.[34] Considering the relief sought, the Constitutional Court refused to accept that, as elastic as the provisions of section 172(1) of the Constitution might be, they do not empower the court to suspend the provisions of an Act of parliament or a proclamation that has not been the subject of a proper challenge before it. The court expressed doubt as to whether a court has the power to do this. However, even if it had such a power, it would have to be exercised sparingly and only in the most exceptional circumstances. The court, in a tone reminiscent of the *UDM* case, stated: 'In the present case, Parliament had discarded the old regime and introduced a new form of immigration control. To direct that the old regime must remain in force after the Act introducing the new regime had come into operation constituted an unjustifiable interference with the will of Parliament.'[35]

Paramount among the reasons for the modern judicial approach to non-intervention in the legislative process, is the principle of separation of powers incorporated into most common-law constitutions, which dictates that parliament must be accountable to itself and not to the executive or the courts.[36] This is because the business of parliament might well be stalled while the question of what relief should be granted was being argued in court. Indeed, the parliamentary process would be paralysed if parliament were to spend its valuable time defending its processes in court. This would undermine one of the essential features of the democratic state: the

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31 *Id* at par 31.
32 2003 (8) BCLR 838 (CC).
33 No 24952 of 2003.
34 Act 13 of 2002
35 Paragraph 69.
36 *United States v Brewster* 408 US 501 (1972).

separation of powers.[37] In any event, more reasons have been advanced by common-law courts to justify the application of the principle of non-intervention. These include: firstly, that the principle is not only an important protection for the independence and integrity of the legislature itself, but also serves as 'protection against possible prosecution by an unfriendly executive and conviction by a hostile judiciary'.[38] It is apparent from the history of the speech-or-debate clause that the privilege was not born primarily from a desire to avoid private suits,[39] but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary,[40] as well as to ensure the independence of individual legislators.[41] Secondly, legislators' immunity from deterrents to the uninhibited discharge of their legislative duty, was for the benefit of parliament as an institution and the nation as a whole, but not for the private indulgence of individual members[42] – 'One must not expect uncommon courage even in legislators'.[43]

Thirdly, the legislature as a key organ of democratic government ought to enjoy absolute independence from outside interference or control, the better to perform its functions without fear of prosecution, civil or criminal, and to enjoy continued respect.[44] Fourthly, appeals to the courts as to whether the behaviour of a member of the legislature does or does not merit a particular

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37 *Per* Ngcobo J, *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) par 36.

38 *United States v Johnson* 383 US 169 at 178–9 (1966) *per* Harlan J.

39 See *Tenney v Brandhove* 341 US 367 (1951); *Kilbourne v Thompson* 103 US 168 (1880).

40 *Per* Harlan J, *United States v Johnson* 383 US 169 at 180–1 (1966).

41 *United States v Brewster* 408 US 501 at 507 (1972).

42 *Buchanan v Jennings* [2005] 1 AC 115 (PC) par 19.

43 *Per* Frankfurter J in *Tenney v Brandhove* 341 US 367 at 377–378 (1951). In this case, the plaintiff had raised serious charges against the defendants, members of the legislature in the conduct of investigations in the business of parliament. Frankfurter J, for the majority, held that the courts would not go beyond the narrow confines of determining that a committee's investigations may fairly be deemed within its province. To find that a committee's investigations, whether the committee was a standing or special committee insofar as it was part of representative government, had exceeded the bounds of legislative power, it must be obvious that there was a usurpation of functions exclusively vested in the judiciary or the executive.

44 In *II Works of James Wilson* (Andrews ed 1896) 38 it was stated that: 'In order to enable and encourage a representative of the public to discharge his public trust with fairness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of anyone, however, powerful, to whom the exercise of liberty may occasion offence.' See also: *Report of the Select Committee on the Official Secrets Acts* (House of Commons 1939) xiv; *per* Burger CJ, *Coffin v Coffin* 4 Mass 1 at 27 (1808).

sanction would impair the proper functioning of the chamber by enmeshing it in legal proceedings. The judicial and legislative arms of government ought to be seen to be independent of one another if they are to command confidence. In the fifth place, judicial abstention from interference in parliamentary proceedings is the best guarantee of parliamentary abstention from interference in the judicial process. This abstention enables courts to avoid precipitating constitutional crises likely to be engendered by a confrontation between the courts and the legislators who, in the constitutional scheme of things, hold the sword.[45] Sixth, a legislature could provide its own remedies for injustice perpetrated against a member by itself or its officers. Lastly, the aggrieved member has the right of appeal to the electorate.[46]

CONSTITUTIONAL ORIGINS OF PARLIAMENTARY PRIVILEGE IN SOUTH AFRICA

In contemporary South Africa, any inquiry into the status of any legal proposition does not start with the common law, it starts with the

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[45] *Cf* the *Keshav Singh's* case – *Special Reference No 1 of 1964* AIR 1965 SC 745 which generated such acrimony between the executive, the legislature and the courts in India. A State Legislative Assembly had committed one Keshav Singh, a non-member, for contempt of the Legislature. Sequel to Singh's release on bail by the High Court, the Assembly passed a resolution requiring the production in custody before it of Singh, his advocate and the two judges who had granted him bail. On a successful application for a stay of execution of the Assembly's resolution, the Assembly modified its earlier resolution by requiring the two judges to appear before the House and offer an explanation. It was at this juncture that the President made a special reference to the Supreme Court to determine whether the totality of the actions and resolutions of the Assembly were competent and in accord with the Assembly's claim for privileges. The Supreme Court pointed out that the power to regulate its procedure by virtue of Art 194(1) was by that same article made subject to the specified provisions of the Constitution. Thus, the freedom of speech guaranteed members of parliament in that sub-Art was independent of the freedom of speech of which everyone was entitled by virtue of Art 19(1)*(a)*. It was held that in terms of the absolute freedom of speech in Art 194(1) and (2), a legislator, who by his speech or vote in the Legislative Assembly violates any of the fundamental rights guaranteed by Part III of the Constitution, would not be answerable for the said contravention in any court. If the speech made in parliament amounted to libel or, was otherwise actionable or indictable under any other provision of the law, the member would be covered by immunity from any action in court. On the other hand, the privilege of controlling its proceedings or regulating its procedure does not include the issuing of warrants and imprisonment of persons for alleged breaches of parliamentary privilege(s).

[46] *Syvret v Bailhache and Another* [1999] 1 LRC 645 (Jersey); *Maha v Kipo* [1996] 2 LRC 328; *Prebble v TV New Zealand Ltd* [1994] 3 All ER 407 (PC); *New Brunswick Broadcasting Co v Nova Scotia* (1993) 100 DLR (4th) 212; *Siale v Fotofili* [1987] LRC (Const) 240; *Sanft v Fotofili* [1987] LRC (Const) 247; *Burdett v Abbott* (1811) 14 East 1.

investigation of whether the subject matter is provided for in the Constitution, and thereafter by national legislation. It is only where the Constitution or national legislation is silent, that the inquiry shifts to the common law. For example, there is no provision in the Constitution which stipulates that parliamentary Bills should not be subject to judicial review. On the other hand, the express provision in the Constitution that Bills could be reviewed by the Constitutional Court in specified circumstances, is an implicit admission that such an exercise may not be permissible outside this prescribed and narrow confine. In effect, while at common law, the courts derive their authority for not interfering in the proceedings of parliament from the concepts of parliamentary privilege and the sovereignty of parliament, the South African courts derive their authority to review or not to interfere with internal parliamentary business from the Constitution. In South Africa, the Constitution is supreme, not the legislature. Therefore, the concept of the absolute immunity of the legislature can only apply to the extent that the Constitution has expressly or impliedly incorporated the common-law principles of parliamentary privilege. The proposition is that the existence or otherwise of parliamentary privilege in any given circumstance in South Africa is a matter of constitutional interpretation, and that the courts will read the provisions in question having regard to the doctrine of separation of powers, the rule of law, the supremacy of the Constitution, and the deference they pay to the legislature as the law-making organ of state. A combination of these precepts constitute the sources of judicial restraint in this regard.

In South Africa, there are three critical sources in the 1996 Constitution which, when read together, provide the core of parliamentary privilege and the basis for the analysis of the case law that follows in this article. The first is that the provisions of sections 57(1)*(a),*70(1)*(a)* and 116(1)*(a)* of the Constitution provide, in the spirit of the common law, that the National Assembly (NA), the National Council of Provinces (NCOP), and provincial legislatures, respectively, have the power to determine and control their internal arrangements, proceedings and procedures.[47] In the same vein, the

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[47] Although the rights of members of parliament to refer the issue of constitutionality of Bills to the Constitutional Court which was in issue in *Guateng Provincial Legislature v Kilian* 2001 (3) BCLR 253 (SCA) pars 28–29 in terms of s 98(9) of the interim Constitution 1993 was not retained in the final Constitution 1996, the ruling of the SCA *vis-à-vis* the powers of the Speaker remains relevant. The question was whether the Speaker had authority to have given an undertaking that the legal costs of the members would be paid by the Gauteng Legislature. It was held that the Speaker's common law

NA, the NCOP and the provincial legislatures are empowered to make their own rules and orders governing their business, with particular regard to 'representative and participatory democracy, accountability, transparency and public involvement'.[48] In addition to the rules and orders of the respective legislative organs providing for the establishment, composition, powers, functions, procedures and duration of their committees,[49] they are equally obliged to provide for 'the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy'.[50]

The second is the provisions of sections 58(1), 71(1) and 117(1) of the Constitution which are referred to as 'privilege' in respect of the NA, the NCOP and the provincial legislatures. Section 58(1)*(a)* provides that the members of the cabinet, deputy ministers and members of the NA have, subject to its rules and orders, freedom of speech in the NA and its committees.[51] They are not liable in civil or criminal proceedings, and may not be arrested, imprisoned, or be held liable for damages for: (i) anything that they say in, produce before, or submit to the NA or any of its committees; or (ii) anything revealed as a result of anything they have said in, produced before, or submitted to the NA or any of its committees.[52]

The third is that the members of the cabinet and of the Executive Council of Provinces (PEC) are accountable collectively and individually to the NA and the provincial legislatures respectively, for the performance of their functions in terms of sections 92(2) and 133(2) of the Constitution. It was

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powers included the power to regulate the business of the legislature, that is, the legislative process. Thus, the determination of the dispute concerning the constitutionality of a bill in its formative stage is a determination in the interests of the provincial legislature and its effectiveness and efficient functioning. It is part and parcel of the legislative process. It followed therefore that the costs incurred to bring about a resolution by the Constitutional Court of the disputes which had arisen within the legislature, were costs which should properly be borne as part of the costs of administration of such provincial legislature. The Speaker was thus empowered to give an undertaking on behalf of the legislature to pay the costs of the minority incurred in the referral of a pending bill to the Constitutional Court under the interim Constitution.

48 Sections 57(1)*(b);*70(1)*(b)*; 116(1)*(b)*.

49 Sections 57(2)*(a);* 70(2)*(a);* 116(2)*(a)*.

50 Sections 57(2)*(b);* 116(2)*(b)*.Section 70(2)*(b)* is differently worded. It provides that the rules and orders of the NCOP must provide for 'the participation of all the provinces in its proceedings in a manner consistent with democracy'.

51 See also 117(1)*(a)* which confers similar privileges to members of provincial legislature and the province's permanent delegates to the NCOP.

52 Sections 58(1)*(b);* 71(1)*(b);* 117(2)*(b)*.

held in *Oosthuizen v Lur, Plaaslike Regering en Behuising, en 'n Ander,*[53] that it was not open to a member of any of the legislative chambers to compel a cabinet minister or a member of the PEC to account in court for the performance of his or her duties where the applicant legislator has failed to secure such accountability in the legislative chambers. Consequently, the Free State Provincial Division refused to issue orders that would compel a member of the PEC to furnish a better answer to a question posed to him by the applicant in terms of the standing orders of the provincial legislature. It was held that sections 57 and 116 of the Constitution authorise the NA and the provincial legislatures to be masters of their internal arrangements and proceedings, and that this prevents the courts from enquiring into due compliance with the rules of the legislature. Further, what had occurred in the legislature in this case had taken place during the course of its internal proceedings, and issuing the order sought would clearly amount to interference in such proceedings. The question posed in the legislature, and the failure to answer it appropriately, would fall within the accountability clause of section 133(2) of the Constitution. The court was consequently not empowered to interfere.

It is doubtful whether the reasoning in the *Oosthuizen* judgment would survive appellate scrutiny in the light of the Constitutional Court judgments discussed below. For example, a member of the national executive stands before the NA to answer questions relating to his or her department, but instead avoids to answer pertinent questions concerning his or her actions or lack of action on an important policy issue involving his or her department. Backed by his or her majority party in the legislature, he or she indignantly refuses to address or answer the question which would lead to his or her accounting to the NA for the decisions or inaction when called upon to do so by minority members of the legislature. Suppose that the refusal means that the business of the NA is impeded and its oversight powers over the national executive[54] are impaired. Suppose, further, that the Speaker as the presiding officer in the NA whose duty it is to call upon the cabinet member to answer the question(s) posed, fails to maintain an impartial stance or is partisan. Assuming that the attitude of the Speaker is to 'protect' the 'comrade' cabinet member who belongs to the same majority party as the Speaker. Does this mean that resort to parliamentary privilege will exclude the courts in the face of an apparent breach of a constitutional mandate – a

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[53] 2004 1 SA 492 (O).

[54] Section 54(2)*(b)*.

breach of the same provision creating the obligations of members of the executive to account to the legislature for their performance? If the rule or standing order of the NA so provides, or by her ruling, the Speaker condones the refusal to answer pertinent questions, the conclusion is that legislative oversight failed to materialise.[55] It is submitted that in such a situation, the courts can be approached to intervene so as to protect the minority members' constitutional right to participate in the debates in the NA. It is submitted further that any infringement of a constitutional provision is by definition an invitation for the intervention of the courts if they are called upon to do so. If, therefore, the courts cannot rise to protect members asking vital questions in the NA, and indeed obtain answers, how else is the principle of accountability to be ensured and the members' rights to free speech and debate in the NA be protected? At what point will the court give effect to section 2 by declaring conduct inconsistent with the Constitution invalid, or ensuring that the obligations imposed by it are fulfilled? Would this not be an appropriate situation in which to approach the Constitutional Court in terms of section 167(4)(e) and to ask whether parliament has failed to fulfil a constitutional obligation?[56]

The tyranny of the majority may prevail in debates to the extent that internal arrangements and proceedings remain intact, but the decision as to whether the action of the presiding officer of the legislature is legal or irrational, is the preserve of the courts. It has been well established that every public functionary in South Africa is subject to the doctrine of legality and the rule of law.[57] It is thus submitted that both the President of the Republic and the

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55 Navsa JA succinctly put the matter in *Democratic Alliance v President, Republic of South Africa* 2012 1 SA 417 (SCA) par 66 where the court was reviewing the presidential appointment of the National Director of Public Prosecutions. Navsa JA had said: 'No one is above the law and everyone is subject to the Constitution and the law. The legislative and executive arms of government are bound by legal precepts. Accountability, responsiveness and openness are constitutional watchwords. It can rightly be said that the individuals that occupy positions in organs of State or who are part of constitutional institutions are transient but that constitutional mechanisms, institutions and values endure. To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.'

56 *Cf per* Ngcobo J *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) par 38.

57 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others* 2000 2 SA 674 (CC) par 20. See also *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC); *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC).

Speaker of the National Assembly are subject to the Constitution and the law. To that extent, the Speaker cannot be a judge in his or her own case. Parliamentary privilege, as it obtains in the British constitutional dispensation, presupposes that the Speaker of the legislature must not be seen to take sides. It is one of the conventions of the British constitution, that once a member of parliament has been elected to the position of Speaker, he or she must cease to participate actively as a member of any political party. That is why it is possible that a member of a minority party can be elected Speaker of the House of Commons because he or she assumes a position of neutrality in presiding over the business of parliament.[58] Does this mean that in the absence of any existing usage or convention, or of any regulatory provision to that effect, a political party office-bearer elected as Speaker, can continue to hold such a position in his or her political party while presiding over the NA? As section 52 of the Constitution is silent on the matter, would it follow that in spite of the high ideals and values placed on justice, fairness, and impartiality by the South African Constitution, it would nonetheless condone such a dual role in which an umpire doubles as a player?

There can be no doubt that the practical application of the non-interventionist principle to parliamentary Bills that manifested in both *Glenister v President of the Republic of South Africa and Others*[59] and *Doctors for Life International v Speaker of the National Assembly*,[60] stems from the common law. Again, although the majority did not say so expressly, the judgment in *Mazibuko v Sisulu, Speaker of the National Assembly*[61] is reminiscent of the non-interventionist principle favouring the doctrine of free speech and debate. On the other hand, the approach of both the trial judge and the minority judgment in that case, support the other aspect of the non-interventionist principle, that is, non-interference in the internal affairs of the legislature. *Mazibuko* has brought to the fore the on-going debate around the need for the protection of minority members' rights and the question of the legal status of a defective internal rule of the NA. Ultimately,

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58 See Wade & Phillips *Constitutional and administrative Law* (9ed 1977) 165 which put the matter more succinctly than the Bradley & Ewing edition, *Constitutional and administrative law* (14ed 2007) 189. See also *Hood Phillips' Constitutional and administrative law* (7ed 1987) 183.

59 2009 1 SA 287 (CC) pars 33 and 35.

60 2006 6 SA 416 (CC).

61 *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 4 SA 243 (WCC); *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 6 SA 249 (CC).

and in addition to the constitutional exception to the jurisdiction of the Constitutional Court to determine abstract questions in the form of parliamentary Bills, the majority judgment in *Mazibuko* lends its weight to the generally accepted principle that the courts will intervene where the legislative process interferes with the rights of an individual. More importantly, the majority judgment is authority for the proposition that, in line with the modern South African principles of judicial review, where the internal law-making process of the NA is shown to be defective, the courts are duty-bound to make an appropriate declaration.

PROCEEDINGS IN PARLIAMENT

The fact that the principle of judicial non-intervention in the business of the legislature also applies to the constitutional jurisprudence of Commonwealth African countries, can be gleaned from the pronouncements of the Supreme Court of Appeal of South Africa,[62] the Supreme Courts of Nigeria[63] and Zimbabwe,[64] and the High Courts of Namibia[65] and Zambia.[66] Establishing what constitutes parliamentary privilege is the first limb of the problem, as in contradistinction to the common-law principle, the power of judicial review of parliamentary legislation applies in the United States[67] and in Commonwealth countries[68] with written constitutions – save for the Socialist

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62 In addition to the many South African cases discussed in this article, see also *Speaker of the National Assembly v De Lille and Another* 1999 4 SA 863 (SCA).

63 See also *Adesanya v President of the Republic of Nigeria* (1981) 2 NCLR 358; *Attorney General of Bendel State and Others v Attorney General of the Federation and Others* (1982) 3 NCLR 1; *Oloyo v Alegbe, Speaker, Bendel State House of Assembly* (1985) 6 NCLR 61.

64 *Mutasa v Makombe NO* 1998 1 SA 397 (ZSC); *Smith v Mutasa and Another NNO* 1990 3 SA 756 (ZS).

65 *Federal Convention of Namibia v Speaker, National Assembly of Namibia and Others* 1994 1 SA 117 (Nm HC).

66 *Chiluba v Attorney General* (2002) (Unreported) 2002/HP/0630.

67 Since the Supreme Court extolled the pre-eminence of judicial review in American constitutional system in its decision in *Marbury v Madison* 1 Cranch 137, L Ed 60 (1803), the courts in the United States have not looked back in developing the constitutional jurisprudence of that country through judicial review and interpretation in spite of the early challenges and the continuing controversy surrounding the nature, scope and essence of judicial review. See Lockhart, Kamisar and Choper, *Constitutional rights and liberties: cases and materials* (5 ed 1981) 1–59.

68 For instance, Bhagwati CJ speaking for the Indian Supreme Court, has said in *Sampath Kumar v Union of India* AIR 1987 SC 386 at 388 that: 'It is now settled as a result of the decision of this court in *Minerva Mills Ltd v Union of India* (1981) 1 SCR 206, AIR 1980 SC 1789 that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away, the Constitution will cease to be what it is. … The power of judicial review is an integral part of our

Republic of Sri Lanka.[69] The question posed here lies between these two opposing principles of constitutional law,[70] and is: 'Does the exercise of the courts' power of judicial review of legislation extend to every act of the legislature, including actions not strictly or directly connected with law-making?' In other words, how far does the principle of judicial review of legislation extend in light of the constitutional-cum-judge-made doctrine of non-reviewability of matters within the exclusive domain of the legislative branch? In simple terms, to what extent does the principle of non-reviewability of the internal affairs of the legislature intrude into the constitutional role of the courts to pronounce on the constitutional validity of legislation in particular, and more generally on the actions of the legislative branch which impinge on the rights of its members or, for that matter, non-members?[71]

Canada presents a possible exception. Section 52(2) of the Constitution of Canada 1982 does not mention parliamentary privilege in its list of what constitutes the Constitution of Canada, nor is there any Canadian statute dealing with this question. Neither section 4 of the Parliament of Canada Act 1985, nor the Constitution Act, 1867, explicitly states what the privileges of Senate and House of Commons are or should be. Rather, both instruments link the privileges available to the Canadian parliament and its members to those enjoyed by the House of Commons of the UK parliament and its

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constitutional system and without it, there will be no Government of laws and the Rule of Law would become a teasing illusion and a promise of unreality.'

69 Okpaluba n 5 above 610 at 617.

70 *Cf per* Lord Nicholls in *The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v Symonette and Others* [2000] 5 LRC 196 at 207–9 when he spoke of two 'basic' and 'general principles of high constitutional importance', one applicable in the common law of the United Kingdom where parliament is supreme, while the other obtains in other common law countries with written Constitutions.

71 In Nigeria the law is fairly straighforward. Insofar as the action of the Assembly falls within its legislative authority, the court cannot interfere. Except that it will interfere where the rights of members or non-members were involved or where the legislature took it upon itself to exercise powers not entrusted upon it by the Constitution such as investigating alleged criminal conduct of a member or a non-member. See generally, *Ume-Ezeoke v Makarfi* (1982) 3 NCLR 663 at 669; *Okwu v Wayas and Others* (1981) 2 NCLR 522. Indeed, Fatayi-Williams CJN held in *Sofekun v Akinyemi and Others* (1980) 5–7 SC at 18 that it was only a court or tribunal that could try any person for a criminal offence in Nigeria in accordance with s 33(4) of the 1979 Constitution. Thus, it was held in *Akomolafe v The Speaker, Ondo House of Assembly and Others* (1984) 5 NCLR 357 at 368 that a State House of Assembly did not qualify as 'a court or tribunal' within s 33(4) of the 1979 Constitution hence it could not investigate alleged criminal offence committed by one of its members without violating the Constitution and the member's fundamental right.

members. It follows that parliamentary privilege in Canada continues to be located in those privileges which existed when the Canadian Confederation was formed in 1867. In Canada, therefore, parliamentary privilege remains largely in the realm of the British unwritten, common-law conventions. This, no doubt accounts for the divergence in the views expressed by the justices of the Canadian Supreme Court as to the status of parliamentary privilege in Canadian constitutional law and its relationship with the Canadian Charter of Rights and Freedoms. For example, in *New Brunswick Broadcasting Co v Nova Scotia,*[72] the majority of the Supreme Court of Canada held that parliamentary privilege is part of the Constitution of Canada to be implied by reference in the preamble to the 1867 British North America Act which prescribed'a constitution similar in principle to that of the United Kingdom' for Canada. In his dissenting opinion, Corry J held that the exercise of the constitutional power of privilege was not entrenched in the Constitution of Canada, and that the Canadian Charter of Rights and Freedoms must accordingly apply to the exercise of parliamentary privilege.[73]

The modern South African approach

In pre-democratic, apartheid South Africa where the sovereignty of parliament was celebrated by the lawmakers and upheld by the judiciary, the privileges, immunities, and powers of the British parliament formed part of her erstwhile constitutional jurisprudence through section 36 of the Powers and Privileges of Parliament Act 1963.[74] That this was the case was captured by Corbett CJ when he observed in *Poovalingam v Rajbansi*[75] that there was a 'close bond between our law and English law on the subject of parliamentary privilege.' But, while this illustrates the state of South African law prior to the coming into operation of the new dispensation, the judgment of the late Chief Justice Mahomed in *Speaker of the National Assembly v De Lille*[76] shows not only the break with that tradition, but also the changed circumstances brought about by the South African Constitution 1996 which has comprehensively regulated the extent of and limits to the exercise of governmental powers.

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72 (1993) 100 DLR (4th) 212.
73 (1993) 100 DLR (4th) 212 at 251.
74 Act 91 of 1963.
75 1992 1 SA 283 (A) at 290I.
76 1998 3 SA 430 (SCA).

According to Mahomed CJ, the South African constitutional model does not contemplate 'a tortuous process of discovery of some obscure rule in English parliamentary law and custom justifying the suspension of a Member of Parliament'.[77] Therefore, the new constitutional approach was enunciated by Mahomed CJ to the effect that, firstly, the NA is subject to the supremacy of the Constitution, so that, as an organ of state, it is bound by the Bill of Rights. This means that all its decisions and acts are subject to both the Constitution and the Bill of Rights. Secondly, parliament in South Africa can no longer claim supreme power subject to limitations imposed by the Constitution, as it is now subject in all respects to the provisions of the Constitution.[78] Thirdly, the exercise of parliamentary privilege, which is clearly a constitutional power, is not immune from judicial review under the Constitution. Accordingly, where parliamentary privilege is exercised in breach of a constitutional provision, redress may be sought by an aggrieved party from the courts whose primary function is to protect the rights of the individual.[79]

The legislative process

In South Africa, the national legislative process outlined in sections 73 to 82 of the Constitution begins with the introduction of a Bill in the NA where it is considered and passed. The Bill then moves to the NCOP. The third and final stage is when the Bill is considered and signed by the President. In *Doctors for Life International v Speaker of the House of Assembly*[80] the Constitutional Court had to decide, in the context of these stages in the passage of a Bill, whether it was competent to grant declaratory relief in respect of the parliamentary proceedings: (i) after parliament has passed the Bill, but before it has been signed by the President; (ii) after it has been signed by the President but before it has been brought into force; or (iii) before parliament has concluded its deliberations on the Bill? Before considering these three questions, the court held that the constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of the democratic government. This is embedded in provisions apportioning powers between the legislative, executive and judicial branches which

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77 1998 3 SA 430 (SCA) par 30.
78 *Id* par 25.
79 *Id* par 33.
80 2006 6 SA 416 (CC).

manifests as the concept of separation of powers with 'important consequences for the way in which and the institutions by which power can be exercised.'[81] Further, courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They, too, must observe the constitutional limits to their authority. This means that the judiciary should not interfere in the processes of other branches of government unless it is mandated to do so by the Constitution.[82] The Constitution is, after all, the supreme law and is binding on all branches of government, including the legislature. Therefore, in exercising its legislative authority, parliament 'must act in accordance with, and within the limits of, the Constitution',[83] and 'the obligations imposed by it must be fulfilled'.[84] Furthermore, the courts are required by the Constitution 'to ensure that all branches of government act within the law' and must fulfil their constitutional obligations.[85] In this regard, the Constitutional Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'.[86] In particular, section 167(4)(e) entrusts the Constitutional Court with the power to ensure that parliament fulfils its constitutional obligations and, in so doing, the section gives meaning to the supreme-law clause mandating that all obligations imposed by section 2 of the Constitution 'must be fulfilled'.[87] Having so held, Ngcobo J then set out to address the legal status of a Bill as outlined below.

Between the passing of the Bill and its signing

All members of the court agreed with Ngcobo J's interpretation of section 167(4)(b) of the Constitution on the exclusive jurisdiction of the court to decide on the constitutionality of parliamentary and provincial Bills, and section 167(4)(e) on the question of whether parliament or the President has failed to fulfil a constitutional obligation. It was held that the provisions of section 167(4)(b) and (e) could be harmonised by understanding that sub-section 167(4)(b) limits the scope of 167(4)(e) when the purpose and effect

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81 2006 6 SA 416 (CC) par 37 citing *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 110.

82 2006 6 SA 416 (CC) par 37.

83 44(4), 1996 Constitution.

84 Section 2, 1996 Constitution.

85 See *President of the Republic of South Africa v United Democratic Movement* 2003 1 SA 472 (CC) par 25.

86 *President of the Republic of South Africa v SARFU (2)* 1999 4 SA 147 (CC) par 72.

87 2006 6 SA 416 (CC) par 38.

of a constitutional challenge under section 167(4)(e) is to render a Bill invalid.[88] Therefore, after parliament has passed a Bill and before the President has assented to and signed it, the court cannot grant any relief in relation to the Bill, save where the President has requested it to do so in the limited circumstances of section 79(4)(b) of the Constitution.[89] In the present case, as the impugned Sterilisation Amendment Act 3 of 2005 had been promulgated and had come into operation after the proceedings had been launched, and the question whether the Constitutional Court had jurisdiction had to be determined at the time when the proceedings were instituted, the challenge to the Bill as enacted into law had to be dismissed.[90]

Between the signing of the Bill and its coming into effect

The purpose of section 80 of the Constitution which addresses a constitutional challenge to a Bill after it has been signed into law by the President but before it has been brought into force, was to allow for abstract review at the instance of members of the NA. This section merely regulates the conditions under which members of the NA may within a thirty-day period, challenge an Act of parliament that has been promulgated.[91] There is nothing in section 80 to preclude the Constitutional Court, or any other court for that matter, from considering the validity of an Act of parliament at the behest of a member of the public. Nor is there anything in the constitutional scheme to preclude the court from considering the constitutional validity of a statute that has not been brought into effect. At this point the legislative process has been completed and the question of interfering with it cannot arise. Once a Bill has gone through the necessary legislative processes and been enacted into law, the Constitutional Court would have the power to adjudicate over its constitutionality.[92] It was, therefore, competent for the court to have granted relief in respect of the proceedings in parliament after the Bill had been enacted into law but before it had been brought into force. To that extent, it was held that the court had jurisdiction to consider the constitutional challenge to the Dental Technicians Act 24 of 2004; The Choice on Termination of Pregnancy Amendment Act 38 of 2004; and the Traditional Health Practitioners Act 35 of 2004.[93]

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88 *Id* at par 52.
89 *Id* par 56.
90 *Id* pars 10, 57–58.
91 *Id* pars 60 and 63.
92 *Id* par 64.
93 *Id* par 65.

Before parliament has concluded its deliberations on a Bill

As none of the statutes involved in the challenges in *Doctors for Life International* was at a deliberative stage in parliament when the proceedings commenced, the court refrained from answering whether it was competent to interfere in the deliberative process of parliament to enforce the duty to facilitate public involvement in the legislative process in terms of sections 72(1)(a) and 118(1)(a) of the Constitution. Although the question is very important, the court found it undesirable to proffer an answer.[94] The answer to this question is clarified in the discussion which follows.

The *Glenister* case

When contemplating intervention in the legislative process as the appellant approached it to do in *Glenister v President of the Republic of South Africa and Others,*[95] the court must be mindful of the doctrine of separation of powers.[96] This is understandable: while a court can review a legislative enactment and declare it unconstitutional for infringing entrenched rights or for violating any other provision(s) of the Constitution, it does not review the internal affairs of the legislature or the legislative process itself.[97] The lesson garnered from *Doctors for Life International* and confirmed in the present case, is that judicial review of legislation can only take place after the Bill has gone through all the processes of enactment and could in law be termed an Act of parliament.[98]

Here lies the difference between the internal process of enacting a law – termed a 'Bill' at that stage – and when it has finally passed through all the stages in parliament and is assented to by the President. At this stage, it has

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94 *Id* at par 71.

95 2009 1 SA 287 (CC) pars 33 and 35.

96 See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC) pars 68–69; *Minister of Finance and Another v Paper Manufacturers Association of SA* 2008 6 SA 540 (SCA); *Van Abo v President of the Republic of South Africa* 2009 5 SA 345 (CC); *Centre for Child Law v Minister of Justice and Constitutional Affairs* 2009 6 SA 632 (CC); *International Trade Administration Commission v SCAW South Africa* 2012 4 SA (CC) 618; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA); *Pikoli v President of the Republic of South Africa* 2010 1 SA 400 (GNP).

97 See the discussion in Okpaluba, 'Justiciability, constitutional adjudication and the law-making process: a Commonwealth reflection I' (2003) 17 (2) *Speculum Juris* 146; same author, 'Justiciability, constitutional adjudication and the law-making process: a Commonwealth reflection II' (2004) 18/1 *Speculum Juris* 57.

98 2009 1 SA 287 (CC) pars 41, 44 and 47. Contra *Glenister v President of the Republic of South Africa and Others (2)* 2011 3 SA 347 (CC).

become a law which a court can review or enforce. The SCA affirmed the principle that the courts have traditionally resisted intruding on the internal procedures of the other branches of government in *Minister of Finance v Paper Manufacturers Association of SA*.[99] Here the question was whether the High Court had jurisdiction to restrain the Minister from introducing a Bill – parts of which the applicant found objectionable – in parliament. The Supreme Court of Appeal held that if there were a flaw in the law-making process which would render the resulting law invalid, the appropriate time to intervene would be after the completion of the legislative process. The appropriate remedy would be to have the resulting law declared invalid. The court, however, held that an exception was necessary to that judicially crafted or 'settled rule' of practice where immediate intervention was required to prevent the violation of the Constitution and the rule of law. In such a case, the courts would, in exceptional circumstances, intervene and grant interim relief. Such intervention is possible where the aggrieved party could not be afforded substantial relief once the process had been completed because the underlying unconstitutional conduct would have achieved its objective. The present case did not fall within this exception. In setting aside the interim interdict, the court held that the answer to the question of whether the High Court could interdict the introduction of a Bill in parliament was to be found in section 172 of the Constitution which deals with the powers of the courts in constitutional matters. The language of section 172(2) is quite specific and does not include a decision on the unconstitutionality of a Bill. Harms ADP held that 'the reason appears to me to be obvious. If a High Court could decide on the constitutionality of a Bill, and issue an interdict, which is final in effect,[100] preventing its submission to Parliament, it short-circuits the constitutional process and emasculates the requirement that the Constitutional Court has to confirm any invalidity before it takes effect.'

POWER TO DETERMINE ABSTRACT CONSTITUTIONAL QUESTIONS

The 1996 Constitution owes its legitimacy, its legal validity and existence, to the exercise of the power to deliver opinion on abstract constitutional issues vested in the Constitutional Court by the interim Constitution of

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[99] 2008 6 SA 540 (SCA) pars 18–19 and 22–23.

[100] Compare *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 2 SA 715 (CC) par 50.

1993.[101] The Constitutional Court was mandated to certify that the final Constitution complied with the constitutional principles in Schedule 4 of the Interim Constitution and agreed upon after rigorous negotiations. The Constitutional Court, therefore, participated significantly in finalising the 1996 democratic Constitution through the certification process. It was also provided that the new constitutional text passed by the Constituent Assembly would not come into force unless the Constitutional Court certified that all provisions of the text complied with the constitutional principles. So, in the first[102] and second[103] *Certification* judgments, the Constitutional Court first came face to face with deciding abstract questions of law where no case or controversy was in dispute. The duty to decide abstract questions did not end at that stage; it was incorporated into the 1996 Constitution.

Since the advent of the 1996 Constitution, the Constitutional Court has remained one of the few adjudicative institutions in the Commonwealth[104] vested with the power to give advisory opinion to the executive, the President or a provincial premier, on the constitutionality of a Bill brought to the President or the premier for assent.[105] To this extent the jurisdiction of the court transcends the narrow constitutional confine. The court does not, like most common-law courts, under the guise of constitutional adjudication, deliver advisory opinions or adjudicate over matters where there are no live issues or constitutional matters or controversies, between contending parties. However, the exercise of this jurisdiction over the constitutionality of a Bill in the special circumstances provided for under the Constitution, necessarily involves the court in making binding declarations on abstract matters, and exercising its judicial authority where no case or controversy, in the American sense, or in common-law parlance, no justiciable dispute, has been brought before it.[106] This is something alien to the common-law tradition but

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101 Section 71(3) of the Interim 1993 Constitution.

102 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC). It is true to state that the journey of justiciability of the socio-economic rights enshrined in the Final Constitution started with the pars 77–78 of this judgment.

103 *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997 2 SA 97 (CC).

104 See s 53, Supreme Court Act 1985 (Canada); art 134, Constitution of India; art 64(2) Constitution of Namibia 1990. See especially, Okpaluba, 'Justiciability and standing to challenge legislation in the Commonwealth: A tale of the traditionalist and judicial activist approaches' (2003) 36 (1) *CILSA* 25 notes 27–30.

105 Sections 79(4)*(b)*, 127(2) *(b)* of the 1996 Constitution.

106 See *eg Ex parte the President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC); *In Re Constitutionality of the Mpumalanga*

which, from time to time, may draw a court – like the Supreme Court of Canada – into deciding issues that may turn out to constitute a political question.[107] To this extent, it could be said that there is no 'case-or-controversy' requirement in South Africa's Constitution. However, case-or-controversy is contemplated in section 34 where access to court is predicated on 'any dispute that can be resolved by the application of law'. The indicator must always be what the Constitution does or does not provide. For example, other than in America, the enforcement of fundamental rights does not depend on whether the interest of the applicant has been affected by the law or conduct sought to be impugned[108] but on whether a right entrenched in the Bill of Rights has been infringed.[109]

In effect, given the category of persons entitled to approach the courts to enforce breaches of fundamental rights, the operation of standing in South African constitutional adjudication is not at all restrictive. There is, therefore, no wholesale application of the rule of standing in South African constitutional law as there is in the United States of America, the United Kingdom, or Australia. However, the case-or-controversy requirement may be insisted upon by the court in exercising its discretion in relation to constitutional challenges not involving breaches of fundamental rights.[110] Again, the enforcement of socio-economic rights – albeit limited by the language of the Constitution – allows the courts to enforce, at least to some extent, government policy by scrutinising whether or not the policy conforms to the constitutional obligations of the government. Therefore, although policy formulation may as a general rule not be subjected to judicial review, it is not immune from the prying eyes of the courts where it relates to the constitutional obligations of the government in the provision of access to health care, food, water, social security, housing, and shelter: the socio-economic rights.[111]

Petitions Bill, 2000 2001 (11) BCLR 1126 (CC).

107 *In Re Secession of Quebec* (1998) 161 DLR (4th) 385; *Re Canada Assistance Plan* [1991] 2 SCR 525 at 545; *In Reference Re Manitoba Language Rights* [1985] 1 SCR 721.

108 See 'Justiciability and standing to challenge legislation in the Commonwealth: a tale of the traditionalist and judicial activist approaches' (2003) 36 (1) *CILSA* 25.

109 See Okpaluba 'Standing to challenge governmental acts: current case law arising from South Africa's constitutional experiment' (2002) 16 *Speculum Juris* 208; same author, 'Constitutionalization of standing in South African public adjudication: Some sundry issues' (2002) 17/1 *Speculum Juris* 31.

110 *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 3 SA 191 (CC).

111 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and*

The Constitutional Court recently considered the distinction between this unique jurisdiction and its general attitude to the non-reviewability of a parliamentary Bill. In *Van Straaten v President of the Republic of South Africa*,[112] the court was called upon to declare a Bill unconstitutional. It reiterated what it had previously held in *President of the Republic of South Africa v United Democratic Movement*[113] and *Doctors' for Life International v Speaker, National Assembly:*[114] that its jurisdiction to consider the constitutionality of a Bill before parliament is limited to the specific circumstances contemplated in section 167(4)(b) of the Constitution. It may do so at the prompting of the President under section 79(4)(b), or at the instance of a provincial premier in terms of section 121(2)(b) of the 1996 Constitution. This aside, the Constitution contains clear and express provisions which preclude any court from considering the unconstitutionality of a Bill, save in the limited circumstances contemplated under sections 79 and 121.[115] In declining jurisdiction to entertain the application, the court held:

> It is true that the President has recently signed these bills into law. And this court would ordinarily have jurisdiction to consider the constitutional validity of these bills once they have been enacted into law. However, as we pointed out in *Doctors' for Life International,* the 'crucial time for determining whether a court has jurisdiction is when the proceedings commenced'.[116] Therefore the question whether this court has jurisdiction must be determined at the time when the present proceedings were instituted and not when the court considers the matter.[117]

The court's reluctance to intervene in the legislative process applies *mutatis mutandis* to the internal business of the legislature as illustrated by the *Mazibuko* litigation which involved the dispute over a 'vote of no confidence' in the President in parliament[118] and which is discussed below.

Others (1) 2002 (10) BCLR 1033 (CC).

112 2009 3 SA 457 (CC).

113 2003 1 SA 472 (CC) par 26.

114 2006 6 SA 416 (CC) par 43.

115 *Van Straaten* par 4.

116 *Doctors' for Life* par 57.

117 *Van Straaten* par 5.

118 *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 4 SA 243 (WCC); *Mazibuko v Sisulu, Speaker of the National Assembly* 2013 6 SACR 249 (CC).

FREE SPEECH AND DEBATE DOCTRINE

The common-law principle of parliamentary privilege in terms of which anything said or done in parliament and its precincts is beyond the reach of the courts, developed from the overarching free-speech-and-debate principle inherent in the *corpus* of parliamentary process. The *Mazibuko* litigation was, to a great extent, a question of free speech and debate. It involved the applicants' right to initiate a debate on a vote of no confidence against the President, and the freedom of the members to debate the motion. But, interestingly, the minority opinion of the Constitutional Court aligned with the trial judge's approach to the matter from the judicial non-interventionist angle, while the majority dealt with it from the point of view of the rules of the legislature being defective and thus ineffective. None of the judges considered the free-speech-and-debate approach. In any event, whenever the Speaker of the House seeks to prevent a member from participating in the proceedings of the House, the free speech and debate principle comes into play. By the same token, the question whether the free speech and debate principle has been compromised, arises when the majority party in parliament acts in a way that suggests it has used its numbers to intimidate the minority parties, thereby depriving them of the right to participate meaningfully in the proceedings of parliament, or where a private member's Bill is subjected to a requirement not contemplated by the Constitution, or where introducing a motion of no confidence in the President is governed by a defective rule of the Assembly.

Minority member's right to participate in the business of the Assembly

For all intents and purposes, *Mazibuko* represents the struggle of the minority parties in the National Assembly to exercise their right of free speech and debate without unlawful interference by any functionary of the NA the majority party in parliament. The issue of minority participation has previously arisen in a somewhat different context in *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly.*[119] But the outcome of that case was aligned with the majority opinion in *Mazibuko* in that it culminated in the rules of the NA being found defective and in contravention of the constitutional right of a member. Section 73(2) of the Constitution allows a member the opportunity to introduce a bill in the NA, and section 55(1)*(b)* allows the NA to initiate or prepare legislation. However, certain NA rules required a member to secure the permission of the Assembly before

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[119] 2012 6 SA 588 (CC) pars 63 and 68.

introducing a Bill under section 73(2). The constitutionality of this requirement was the source of challenge in *Oriani-Ambrosini*.

The Chief Justice held that the power of the NA to make its own rules in terms of section 57(1) of the Constitution must be exercised with due regard to representative and participatory democracy, accountability, transparency, and public involvement. The second significant requirement is that the rules must cater for the participation of minority parties represented in the NA, in the proceedings of the Assembly and its committees in a manner consistent with the Constitution. The third element is that the rules should only provide for the initiation or preparation of legislation and the introduction of a Bill in a way that facilitates the exercise of these powers by individual members of the NA. They must pave the way and smooth the path for this purpose.[120] The very nature and composition of the NA renders it pre-eminently suited to fulfil the role of a national forum where even individual members might initiate, prepare and present legislative proposals to be considered openly by all the representatives of the people present in the Assembly.[121] The power of an individual member of the NA to introduce a Bill, particularly those from the ranks of the opposition parties, has more than ceremonial significance. It gives them an opportunity to go beyond merely opposition and to propose constructively, in a national forum, a different way of doing things. It provides an avenue for minority parties to contribute to the national debate and to how things could be done differently.[122]

Quite apart from the Bill not resulting in a parliamentary act, the power to introduce it in the first instance supports the type of democracy envisaged in the Constitution. It facilitates meaningful deliberations on the significance and potential benefits of the proposed legislation. This important power should not be restricted without good reason.[123] Further, representative and participatory democracy requires that even members of minority parties in the NA be given a genuine platform on which to give practical expression to the aspirations of their constituencies by playing a more meaningful role in the law-making processes.[124] It follows, therefore, that any rule that empowers the NA to impose or reinforce the permission requirement will be

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120 Paragraph 62.
121 Paragraph 46.
122 Paragraph 57.
123 Paragraph 59.
124 Paragraph 63.

constitutionally invalid and inconsistent with section 57 read with sections 55(1)(b) and 73(2) of the Constitution.[125]

Therefore, when the opposition parties in the NA adjourned the Assembly's proceedings and, in *Mazibuko v Sisulu, Speaker of the National Assembly,*[126] requested Western Cape High Court to intervene in the gerrymandering in the NA in the wake of the motion to impeach the President, the judge had no doubt that there was clearly a constitutional right to introduce a motion of no confidence in the President because section 102(2) of the Constitution so provided. He held that the Constitution envisaged that such a motion could be brought not only by a majority party, but also by a minority party which sought to garner support for the motion from members across the floor of the House. The right of an elected member of the House to bring a motion, whether in the form of a Bill or a motion of no confidence in the President in terms of section 102 of the Constitution, captured the animating spirit of the South African democracy which could not be reduced to the view of a transient majority.[127] Davis J, at least, left no one in doubt of his displeasure that legislators brought such an issue to court, when he said that:

> It is necessary to say something in this regard about this particular application. 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. There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. 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 matters. What courts can do, however, is to say to parliament: 'you must operate within a constitutionally compatible framework; you must give context to s 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence; however, how you allow that right to be vindicated is for you to do, not for the courts to so determine.[128]

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[125] Paragraph 68.
[126] 2013 4 SA 243 (WCC) at 256E–H and 259I.
[127] *Id* at 247J–248A, 250C–D and 250H–I.
[128] *Id* at 256E–H.

It was held that the Speaker did not have a residual power under the rules to break the deadlock or schedule a debate on a motion of no confidence, acting on her own.[129] The court, therefore, had no power to grant a *mandamus* directing the Speaker to exercise a power she did not have.[130] Further, although there was a *lacuna* in the rules that prevented the vindication of the constitutional right to initiate a motion of that sort, it was not for the High Court to decide whether parliament had failed to fulfil a constitutional obligation under section 167(4)(e) of the Constitution. This falls within the exclusive jurisdiction of the Constitutional Court.[131]

The majority judgment in *Mazibuko*[132]

For present purposes, the two interrelated questions for determination by the Constitutional Court in *Mazibuko* were: (a) whether the Speaker has the power to schedule a motion of no confidence on her own authority; and (b) whether the rules of the NA were inconsistent with the Constitution to the extent that they did not provide for motions of no confidence in the President as envisaged in section 102(2) of the Constitution. The majority agreed with the High Court that rule 2(1) dealt with matters not covered in the rules and did not apply to the present circumstance. More crucial, however, was that rule 2(1) was permissive and not peremptory, so that even if it were to apply, the Speaker would not be compelled to give a ruling or make a rule. Therefore, there was nothing in the rules to justify the inference that the power to set and schedule a motion devolved upon the Speaker when the programme committee could not decide, for whatever reason, on a matter within its responsibility.[133] A further reason why the *mandamus* sought in this case could not be granted, was that section 57(1) of the Constitution vested in the NA the power to determine and control its internal arrangement, proceedings, and procedure and to make rules and orders concerning its business.[134] On a proper reading of the rules, therefore, the Speaker acting alone, had no residual power to schedule a motion of no confidence in the President for debate and vote in the Assembly.[135]

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129 *Id* at 258I.

130 *Id* at 256C–E. See also *Oriani-Ambrosini v Speaker of the National Assembly* 2012 6 SA 588 (CC) par 84.

131 *Id* at 261H–I.

132 *Mazibuko NO v Sisulu and Others* 2013 6 SA 249 (CC).

133 *Mazibuko* pars 27–29.

134 See also *Oriani-Ambrosini v Speaker of the National Assembly* 2012 6 SA 588 (CC) pars 60–65; *Doctors for Life International v Speaker, National Assembly* 2006 6 SA 416 (CC) pars 118–129.

135 *Mazibuko* pars 31–32.

The right of an individual member of the NA to move or participate in a motion of no confidence in the President flows from section 102(2) of the Constitution. It 'is central to the deliberative, multiparty democracy envisioned in the Constitution.[136] It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance.'[137] Moseneke DCJ held that the High Court had been correct to find that to move a motion of no confidence in the President was manifestly a constitutional right accorded to both the majority and minority parties.[138] While the exercise of this constitutional right may be regulated by the Assembly, it cannot make rules that may 'deny, frustrate, unreasonably delay or postpone the exercise of the right'. It follows, therefore, that when a member or a political party in the NA tables a motion of no confidence in terms of section 102(2) and in accordance with the rules, the motion must be given serious and prompt attention by the responsible committee or committees of the Assembly and by the NA itself. This means that the responsible committee or the NA must take steps to ensure that the motion is tabled and voted on without unreasonable delay.[139]

The majority further agreed with the High Court that a vital constitutional entitlement to move a motion of no confidence in the President could not be left to the whims of the majority or minority in the programme committee, or any other committee of the NA. It would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President might never reach the Assembly except with the generosity and concurrence of the majority in that committee. It was similarly unacceptable that a minority within the programme committee could render 'the motion stillborn when consensus is the decision-making norm'. The court further observed that it would have been an easy matter had the Constitution specified that the scheduling of a motion of no confidence in the President was subject to political negotiation, lobbying, bargaining and agreement between the parties in the Assembly.[140] The Deputy Chief Justice explained that 'lobbying, bargaining and negotiating amongst political parties in the Assembly must be a vital feature of advancing the business and mandate of

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136 *Oriani-Ambrosini* par 95*; Democratic Alliance v Masondo* 2003 2 SA 413 (CC) par 42.
137 *Mazibuko* par 44.
138 *Id* at par 45.
139 *Id* at par 47.
140 *Id* at par 57.

Parliament conferred by Chapter 4 of the Constitution. However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement.'[141]

Like Davis J in the High Court, the majority held that there was a *lacuna* in the rules regulating the decision-making process in the programme committee charged with arranging the Assembly's programme. To the extent that the rules regulating the business of the programme committee did not protect or advance or might frustrate the rights of the applicant and other members of the NA as regards the scheduling, debating and voting on a motion of no confidence in the President as contemplated in section 102(2), they were inconsistent with the Constitution and invalid.[142] In concluding the judgment of the majority, Moseneke DCJ held that Chapter 12 of the Rules of the National Assembly was inconsistent with section 102(2) of the Constitution to the extent that it failed to make provision for an unhindered exercise by a member of the Assembly, acting alone or in concert with other members, of the right to have the NA schedule, deliberate and vote on a motion of no confidence in the President.[143] This judgment is authority for saying that although the legislature is master of its own processes and affairs, and can order its business without interference from the courts, where it makes a rule that is inconsistent with the Constitution that inconsistency is an invitation for the intervention of the Constitutional Court invoking its special, original jurisdiction in terms of section 167(4)(e) of the Constitution.

The minority opinion in *Mazibuko*

The minority of the court, however, expressed a contrary view on the court's involvement in this type of dispute. Jafta J who delivered the dissenting judgment described the warning of Davis J as 'timely'. In his view, political issues must be resolved at a political level since the courts should not be drawn into political disputes, the resolution rested appropriately within the domain of another department in terms of the Constitution.[144] As far as Jafta J was concerned, the whole parliamentary process 'set in motion a series of

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[141] *Id* at par 58.
[142] *Id* at par 51.
[143] *Id* at par 72.
[144] *Id* at par 83.

errors'[145] and it was not in the interests of justice to grant an applicant seeking nothing but a mere declaratory judgment over a matter already being addressed by the NA, direct access to the court. 'Scarce judicial resources', he warned, 'should not be spent on matters such as the present. It is certainly not in the interests of justice for 11 judges of the highest court to entertain matters where the cause of the complaint is being addressed by a competent authority.'[146] The power of the court to declare a law or conduct invalid did not mean that it was compelled to 'determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the declaration'.[147]

Another reason why the minority would not interfere in the *Mazibuko* dispute was the fact that the principle of separation of powers forbade it from intervening in matters falling within the domain of parliament, except where the intervention was mandated by the Constitution.[148] It is a requirement of the constitutional system that in exercising their judicial review powers, the courts must observe the constitutional bounds as the Constitution is not only supreme, it binds all organs of state.[149] Although Jafta J agreed that the case raised constitutional issues and therefore met the court's jurisdictional requirement, he, however, dissented from the majority judgment because it was not in the interests of justice to grant the applications.[150] And, when it came to matters falling 'within the heartland of Parliament', the Constitution contemplates 'a restrained approach to intervention in those matters by the courts'. So, where a competent authority has already taken steps to correct conduct inconsistent with the Constitution, 'it may not be necessary for the guardians to take action'.[151] Jafta J cited in support the judgment by Moseneke DCJ who emphasised in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd*[152] that:

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145 *Id* at par 85.
146 *Id* at par 133.
147 *Ibid*. See also *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1996 3 SA 514 (CC) par 15.
148 *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) par 37.
149 *Mazibuko* par 134.
150 *Id* at par 87.
151 *Id* at par 135.
152 2012 4 SA 618 (CC).

> In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of state into the terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.[153] It is in the performance of this role that the courts are more likely to confront the question whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that the courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their own power.[154]

Where the right(s) of a member is implicated

The majority judgment of the Constitutional Court in *Mazibuko* made the vital point that the legislature is the ultimate master of its own process, subject only to the Constitution and the law.[155] So, where in the course of regulating its own process, it violates a constitutional provision or the right(s) of a member, the court's non-interventionist stance ceases and it will move to protect the right involved.[156] A notable illustration of the break-down of the non-interventionist chain is the Supreme Court of Appeal judgment in *Speaker of the National Assembly v De Lille.*[157] This case established the principle that where the conduct of the legislature impinges on the right(s) of a member, the courts will intervene in favour of that member to protect a breach of a right in the Bill of Rights. The Supreme Court of Appeal affirmed the trial judge[158] who had held that section 58(1) of the Constitution expressly guaranteed freedom of speech in the NA, subject to its rules and standing orders and that this was a crucial guarantee. The threat that a member of the Assembly would be suspended for something said in the Assembly inhibited freedom of speech in the chamber and must therefore adversely impact on that guarantee. The suspension of a

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153 *Scaw* par 92.
154 *Id* at par 93.
155 *Mazibuko* par 31.
156 It will be recalled that Jafta J dissenting in *Mazibuko* par 156, held that s 102(2) conferred power on the National Assmbly and not rights on political parties and certainly not both power and rights.
157 1999 4 SA 863 (SCA).
158 *De Lille v Speaker of the National Assembly* 1998 (7) BCLR SA 916 (C).

member from the NA where he or she was not obstructing, disrupting, or unreasonably impeding the management of orderly business within the Assembly, but rather as some kind of punishment for making a speech in the Assembly which was in no measure obstructive of the proceedings, was not provided for by any national legislation or the rules and orders of parliament. Accordingly, the suspension in those circumstances lacked constitutional authority and was invalid.

De Lille compares favourably with the post-independence Zimbabwe Supreme Court judgment in *Smith v Musasa NNO*[159] where it was held that the Speaker imposed a penalty which he lacked authority to impose, such an imposition not falling within the privileges of the House and being in contravention of the Parliamentary Salaries and Allowances Act Chap 2.03, in terms of which, even under suspension, a member was entitled to his salary and allowances. It was wrong for parliament to have deprived a member of his salary and allowances as a penalty and such conduct was not covered by the privileges of the House. It was obvious that 'when construing the provisions of chapter 10 the courts of justice cannot ignore any breaches of fundamental rights in order to rule in favour of parliamentary privilege. To do so would be inconsistent with the provisions of the Constitution.'[160] The Supreme Court further stated the reasoning behind its decision in these words:

> When considering Parliamentary privileges in most Commonwealth countries, including Zimbabwe, it is important to remember that these countries have embodied in their Constitutions Declarations of Human Rights. The Judiciary in countries like India, Zimbabwe and many others can lawfully strike down legislation passed by Parliament. This is why, when privileges, immunities and powers claimed by the House of Assembly conflict with provisions of the Declarations of Rights in their Constitutions, the courts will resolve the conflict in favour of the fundamental rights of the citizen.[161]

CONCLUSION

Admittedly, the courts' powers of judicial review, whether it is the power to declare legislation unconstitutional or to review executive conduct for the purposes of illegality, irrationality or unreasonableness, are very wide. Yet,

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[159] 1990 3 SA 756 (ZS).
[160] *Id* at 762J.
[161] *Id* at 763F–G.

the courts have not allowed that fact to obscure their recognition that the doctrines of separation of powers and the rule of law contemplate that each organ of state must be free to function insofar as it does so in accordance with the constitutional prescripts. With regard to the judicial review of legislation, the restraints tend to revolve around the legislative process and the internal affairs of the legislature. Again, except where the legislature steps outside of its constitutional bounds, the courts will not interfere in the process of law-making, review parliamentary Bills, or direct the internal affairs of the legislature. One thing, however, is clear on the reading of the South African Constitution. That is, that the founders of the Constitution placed great faith in the courts to direct, through their review powers, the path the South African democracy must tread. It emerges from this, that the courts will go behind the general principle of judicial non-intervention to the legislative process if the legislature steps outside of its constitutional authority. For instance, the courts will intervene if the legislature deviates from its law-making duties or proceeds contrary to the manner and form as stipulated in the Constitution or any other law; if it carries out its duties in a manner that will deprive a member of the protection afforded him or her by the Constitution or any other law; or where the rules of the Assembly interfere with the member's right to participate in the proceedings of parliament.