The constitutional phenomenon of parliamentary privilege and immunity in South Africa: a comparison with jurisdictions in Britain, Canada and France

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Abstract

Whereas the doctrine of parliamentary privilege originated in the United Kingdom where it was originally applied to ensure unhindered service to the King by his advisors, this article shows that the privileges and immunity of parliament are interpreted differently in different countries. It further shows that different countries practise different types of privileges and parliamentary immunity. Britain, Canada and South Africa practise non-accountability immunity which protects members of parliament from civil and criminal liability, whilst France, in addition to non-accountability, also practises a form of inviolability which protects members of parliament from criminal liability arising from any criminal act committed outside of parliament while they are sitting members. This comparative study shows that the content of privilege and immunity comprises exclusive cognisance of a parliament that protects its integrity and so enables it to regulate its own affairs, and the freedom of speech and debates to such an extent that members are protected in the discharge of their parliamentary duties. The scope of the privilege is limited to anything said in, produced before, or submitted to parliament or its committees and which involves the business of parliament. Protection is not limited to members of parliament: national legislation can extend the privilege to other personnel who are linked to the business of parliament. Parliamentary business is not confined to transactions taking place within the precincts of parliament, since parliament can sit anywhere outside its normal seat. The interpretation of parliamentary privilege in foreign jurisdictions sheds light on the interpretation and

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illuminated the meaning of the privileges and immunities of parliament in South Africa under the 1996 Constitution.

INTRODUCTION

Since the dawn of the new constitutional democracy, there has been a growing trend to seek judicial review of decisions of the Speaker of the National Assembly and Chairperson of the National Council of Provinces (NCOP), based on claims by members of parliament that the freedom of speech in parliament has been infringed.[1] This state of affairs has evoked interest in legal circles regarding parliamentary privileges and immunities. Cases that have come before courts in the main involve the infringement of the privileges and immunities of parliament. Surprisingly, the extent and scope of the privilege and immunity under the Constitution of the Republic of South Africa, 1996,[2] has not been fully considered.

Accordingly, the aim of this study is to determine the scope of the parliamentary privileges and immunities in the Constitution. To this end I compare the nature and scope of privileges and immunities in foreign jurisdictions. In this regard, the British jurisdiction is relevant because historically South Africa was once a British colony and English law forms one of the historical foundations of South African law.[3] Since the law of parliamentary privileges and immunities applies differently in different countries, the law of privilege in a continental system country such as France, and in the Anglo-American system which applies in Canada and Britain, are relevant in exploring the doctrine of parliamentary privilege. Moreover, Canada is one of the old democracies which, like South Africa, has a three-tiered system of government. Accordingly, comparative research on this subject will assist in interpreting and analysing the scope of parliamentary privilege and immunities in South Africa.

THE MEANING OF PARLIAMENTARY PRIVILEGE AND IMMUNITY

1 See *Speaker of National Assembly v De Lille MP* 1999 4 ALL SA 241 (A), *Mazibuko v Sisulu* 2013 6 SA 249 (CC) & *Lekota v Speaker, National Assembly* 2015 4 SA 133 (WCC).

2 Hereafter the Constitution.

3 See Du Plessis & Kok An *elementary introduction to the study of South African law* (1989) 22.

The terms 'privilege' and 'immunity' are used interchangeably. Rogers and Walters argue that privilege is an unfortunate term, as it implies a special advantage rather than a special protection. They suggest that 'public interest immunity would be a more apt description'.[4] In the same vein, Hardt defines parliamentary immunity as 'a legal instrument which inhibits legal action, measures of investigation, and law enforcement in civil or criminal matters against members of the legislature'.[5] In contrast, Child defines parliamentary privilege as:

> [T]he sum of the peculiar rights enjoyed by each house collectively as a constituent part of the High Court of parliament and by members individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.[6]

Immunity exempts both the house and individual members from liability in that even if the house collectively adopts legislation that infringes an individual's right, it cannot be sued for damages by the individual who has suffered harm as a result of the adoption of that legislation. The privilege further protects both the house, as represented by its presiding officers, and the individual members, when exercising the right to free speech in parliament. Authors on the law of parliamentary privilege identify two elements: the exercise by parliament of control over its own affairs, known as 'exclusive cognisance';[7] and 'freedom of speech and debate'.[8] Exclusive cognisance means that the freedom of each house to regulate its own affairs,[9] and the freedom of speech and debate, protects speech and debates in the houses of parliament from impeachment or questioning outside the houses of parliament.[10] Based on the meaning and essential components of the privileges and immunities of parliament, the conclusion can be drawn that the doctrine protects the integrity of parliament as an institution by affording it the power to regulate its own affairs and to protect persons associated with the functioning of parliament when exercising their right to freedom of speech within parliament.

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4 Rogers & Walters *How parliament works* (2004) 164.

5 Hardt *Parliamentary immunity: a comprehensive study of the systems of parliamentary immunity of the United Kingdom, France and the Netherlands in a European context* (2013) 3.

6 Child *Politico's parliament guide to election practice & law* (2001) 255.

7 Smyth 'Privilege, exclusive cognisance and the law' in Horne, Drewry & Olivier (eds) *Parliament and the law* (2013) 35.

8 *Id* at 37.

9 See Roders & Walters *How parliament works* (2004) 166.

10 *Id* at 165.

There are two types of parliamentary immunity: non-accountability; and inviolability.[11] On the one hand, non-accountability means freedom of the parliamentary vote and freedom of speech in parliament or in a parliamentary context.[12] Non-accountability protects members from prosecution, investigation, arrest, detention and trial for opinions expressed or votes cast by them in the exercise of their parliamentary function. Inviolability, on the other hand, denotes immunity from legal action, detention, or measures of protection or investigation falling outside of the immediate scope of a member's activities in parliament.[13] Accordingly, Hardt points out that a variety of states – mainly those with a British colonial history – use the Westminster type of parliamentary privilege or immunity which is limited to non-accountability. Many states in Continental Europe, on the other hand, follow what is termed a 'continental parliamentary tradition' which involves both non-accountability and inviolability.

THE POSITION IN BRITAIN

The doctrine of parliamentary privilege in Great Britain originated in the House of Commons early in its history. Privileges of the house were exercised by petition to the monarch presented at the commencement of every new parliament requesting him or her to grant the house freedom of speech in debate, freedom from arrest, freedom of access to the monarch, and that the most favourable construction be placed on all their proceedings.[14] The principle of the immunity of members of parliament was aimed at protecting members from arrest or molestation so as to ensure the service of members of the King's Council, judicial and other public officers, and members of the royal household.[15] The fullest form of parliamentary privilege and immunity is laid down in the Bill of Rights Act which provides that 'the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament'.[16]

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11 Hardt n 5 above at 4.

12 *Ibid*. Hardt states that under non- accountability parliamentarians may not be held legally accountable for their utterances and voting behaviour in the assembly to which they belong.

13 *Ibid*. Hardt points out that as opposed to non-accountability, inviolability is limited in time, it often applies only while Parliament is in session and usually ends with the end of the parliamentary mandate. This means that it only has suspensive effect. Practically, members of Parliament can still be arrested and prosecuted after the end of their terms for crimes committed during the time of their mandate.

14 *Id* at 62.

15 *Id* at 65.

16 See art 9 of the Bill of Rights Act 1689.

The wording of article 9 does not clearly explain the scope of its operation. Hardt, therefore, states that questions as regards the precise meaning and scope of article 9 of the Bill of Rights have never really been conclusively resolved.[17] This view is reinforced by Child who states that:[18]

> The exact meaning of article 9 is disputed. One possible interpretation is that the article simply affords protection to members against actions for libel based on comments made during parliamentary proceedings. Other rather wider interpretation is that the article prevents any questioning of parliamentary proceedings in court.

Given the uncertainty concerning the meaning and scope of the privilege, the British courts and the Joint Committee on Parliamentary Privilege have provided an interpretation of the privilege which sheds a light on the meaning and scope of the parliamentary privilege and immunity.

In the case of *In the matter of the Parliamentary Privilege Act, 1770*,[19] the issue arose from a letter written by the applicant, Strauss, a member of parliament (MP), to the Paymaster-General about certain conduct of the London Electricity Board. The chairman of the board perceived the applicant's letter as defamatory of the board and caused its lawyers to write a letter to the applicant demanding an unqualified withdrawal of the comments, failing which they would institute an action for damages against him. When the issue was discussed in the House of Commons, the Speaker ruled that the threat of damages against the MP was a breach of parliamentary privilege, in that when the applicant made the statement he was engaged in proceedings in parliament which fell within the meaning of the Bill of Rights of 1689. However, the house sought a ruling from the Judicial Committee on whether the House of Commons would be acting contrary to parliamentary privilege, if it were to treat a writ against an MP in respect of a speech or proceedings by him in parliament, as a breach of its privileges.[20] It was held that the threat of action against the MP for a statement made during parliamentary proceedings constituted a breach of privilege.[21] It should be noted that the protection concerned a member who was pursuing parliamentary business in his capacity as an MP by writing a letter to the head of a government department. According to this judgment,

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17 Hardt n 5 above at 102.
18 Child n 6 above at 256.
19 *In the Matter of Parliamentary Privileges Act, 1770* [1958] 2 ALL E.R 329.
20 *Id* at 330.
21 *Id* at 333–334.

although the letter did not involve the proceedings of parliament inside parliament, it was still protected as it related to the business of parliament.

In *Church of Scientology of California v Johnson–Smith*,[22] the issue arose from a statement made by the defendant, an MP, during an interview on a television programme about the Church of Scientology, which the plaintiff perceived to imply that his organisation was harmful.[23] The statement was based on the report of the House of Commons contained in *Hansard,* which the defendant claimed was absolutely privileged. The plaintiff used the relevant pages of *Hansard* in an attempt to prove that the defendant had been malicious in making the statement. The question was whether the court would not infringe parliamentary privilege if the content of *Hansard* were used to prove the defendant's motive.

The court alluded to the law and custom of parliamentary privilege which originated from the principle that 'whatever matter arises concerning either house of parliament ought to be examined, discussed, and adjudicated in the house to which it relates, and not elsewhere'.[24] It was held that the basis of parliamentary privilege is 'a member must have a complete right of free speech in the house without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter'.[25] The court further held that what is said or done in the house in the course of proceedings there, cannot be examined outside of parliament to support a cause of action even though the cause of action arises out of parliament.[26] The court found that it was not open to either party to question the defendant's motive for anything said in parliament. This judgment shows that no matter how defamatory the utterances made are, if made during the proceedings of parliament and in the house, they are protected.

In *Rost v Edwards*,[27] the court considered whether or not the register of members' interests and the procedure relating to it, qualified as parliamentary proceedings. The court answered the question in the negative.[28] In *R v Chaytor*,[29] the court considered whether the submission of

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22 *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378 (QB).
23 *Id* at 379.
24 *Id* at 380.
25 *Id* at 381.
26 *Id* at 382.
27 *Rost v Edwards* (1990) 2 QB 460.
28 *Id* at 477.
29 *R v Chaytor* [2010] UKSC 52.

fraudulent claim forms for allowances and expenses by an MP falls under the proceedings of parliament, and so qualifies for the protection of privilege. Lord Phillip concluded that it does not qualify for the protection of privilege, because it has no connection with the essential business of parliament.[30]

According to Hardt, the Joint Committee on Parliamentary Privilege defines proceedings in parliament as meaning 'all words spoken and acts done in the course of, or for the purposes of or necessarily incidental to, transacting the business of either house of parliament or of a committee'.[31] With regard to immunity from arrest, authors on the British law of parliamentary privilege agree that freedom from criminal arrest has never been part of the British privilege, but arrest refers to civil arrest which has since been abolished in Britain.[32]

Hardt further points out that the scope of article 9 has been limited by subsequent legislation such as the Parliamentary Elections Act, 1695, and the Defamation Act, 1996, which impliedly amend article 9 to allow for certain proceedings to be scrutinised by the courts.[33] The Joint Committee on Parliamentary Privilege's definition of the proceedings in parliament is even broader in that it protects not only something said, but also acts performed. However, the acts performed are limited by the requirement that they must be linked to the business of parliament.

THE POSITION IN CANADA

According to Maingot, from the time the legislative assembly was established in Canada in 1758, the law accorded it and those taking part in its deliberations, all the powers considered necessary for a legislature and its members to perform their legislative work.[34] Consequently, members of parliament enjoyed freedom of speech in debate and were protected from arrest in connection with civil cases. Currently, the federal parliament in

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30 *Id* at par [48].

31 Hardt n 5 above at 105.

32 Lipcombe & Horne 'Parliamentary privilege and criminal law' in Horne, Drewry & Olivier n 7 above at 67 points out that unlike the position in some jurisdictions in the UK, individual members of parliament do not have a special immunity from criminal prosecution. This view is reinforced by Hardt n 4 above at 119, who points out that the immunity from arrest never applied in criminal cases but was limited to arrest in civil cases.

33 Hardt n 5 above at 103.

34 Maingot *Parliamentary privilege in Canada* (1982).

Canada enjoys the privileges provided for by article 9 of the Bill of Rights Act, 1689.[35]

However, it appears that despite the incorporation of the British law of privilege and immunity in Canadian law, the scope of the Canadian privilege has been interpreted differently from the British privilege. This view is supported by the judgment in *Canada (House of Commons) v Vaid,*[36] where the court held that in determining the existence of privilege, though the British history of the privilege is important, it is also important that a Canadian court should defer to its own parliament's view of the scope of autonomy necessary to fulfil its functions.[37] It was further held that privilege is evolving and, referring to the United Kingdom's unwritten law of privilege, the court held that the UK law of privilege was flexible enough to meet the changing circumstances.[38] Accordingly, when determining the existence of privilege, the court should determine whether the privilege continues to be necessary for the functioning of parliament.[39] In *Re Quellet (No 1)*,[40] the accused, a minister of the federal Cabinet, made disparaging remarks about a judge concerning a judgment he had made. Subsequently, the judge ordered the accused to appear before the court to answer charges of contempt of court. The accused raised the defence of parliamentary privilege on the basis that he had made the statement as an MP. The court acknowledged that although anything spoken in the chamber of parliament cannot be made the subject of any proceedings outside of parliament, the question is how far things said outside the chamber of parliament may be said to be proceedings in parliament?[41] It was held that communications between members outside the house are not covered by the privilege. Therefore if, while outside of the house, a member publishes a statement made in the house, he must be liable for action if such statements are

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35 Maingot n 34 above at 11 points out that s 188 of the British North America Act, 1867, and s 4 of the Senate and House of Commons Act relating to privileges in the British House of Commons in 1867 provides that 'the privileges, immunities, powers to be held, enjoyed and exercised by the Senate and House of Commons and by the members thereof shall be such as from time to time defined by Act of the Parliament of Canada, but such privilege, or immunity shall not exceed those at the passing of such Act held, enjoyed, and exercised by the common House of Parliament of the United Kingdom of Great Britain and by the members'.

36 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667, [2005] SCC 30.

37 *Id* at par [40].

38 *Id* at par [39].

39 *Id* at par [29.6].

40 *Re Quellet (No 1)* [1976] 67 DLR (3ed) 73.

41 *Id* at 85.

defamatory.[42] In explaining the purpose of the privilege, the court held that its purpose "is to protect freedom of speech and debate in parliament but not, surely, to allow individual members to say what they will outside the walls of the house, to persons who are not members or even spectators of the proceedings inside".[43] Furthermore, the court held that the privilege would not extend to statements made to members of the press, when answering questions at a press conference which takes place outside of parliament[44] – *ie* the utterance of defamatory words by an MP to a journalist outside the house is not protected by absolute privilege.[45]

In the *Vaid* judgment, the issue arose from the conduct of the speaker of the House of Commons who had dismissed his chauffeur, Vaid, for reasons that amounted to workplace discrimination and harassment.[46] The issue on appeal was whether it was open to the court to investigate Vaid's complaint, as the speaker contended that the hiring of employees of the house was an internal affair of the house which is protected by parliamentary privilege from being questioned or reviewed by any tribunal or court other than the house itself.[47] The court found that parliament did not enjoy parliamentary privilege in regard to labour relations with its employees. Therefore, it was open to Vaid to submit a grievance regarding his unfair dismissal to court.[48] In explaining the meaning, purpose, extent, and scope of parliamentary privilege in Canadian law, the court held that in the Canadian context, parliamentary privilege is the immunity and powers enjoyed by members of parliament, which are necessary to enable the members to discharge their duties.[49] The privilege is a power that is necessary to ensure the proper functioning and maintenance of the dignity and integrity of the house.[50] The privilege should be necessary to protect members of parliament in the discharge of their duties, and to hold the government to account for its conducting of the country's business.[51] The necessity of the privilege is determined by the question of what 'the dignity and efficiency of the house require'.[52] This judgment reinforces the two components of parliamentary privilege:

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42 *Id* at 86.
43 *Id* at 87.
44 *Ibid.*
45 *Re Quellet (No 1)* [1976] 67 DLR (3ed) 73 90.
46 *Vaid* case n 36 above at par [1].
47 *Id* at par [2].
48 *Id* at par [87].
49 *Id* at par [29].
50 *Id* at par [13].
51 *Id* at par [41].
52 *Id* at par [29.7].

exclusive cognisance which maintains the integrity of the house by ensuring its proper functioning; and free speech which is the necessary tool to hold government accountable to the people.

When deliberating on the scope of the privilege, the court held that the privilege claimed should be closely and directly related to the fulfilment of its duties by parliament or its members.[53] However, the court warned that parliamentary privilege does not protect all activities by individuals simply because they take place in parliament.[54] It was held that

> [N]ot everything that is said or done within the chamber during the transaction of business forms part of proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the house as having been ordered to come before it in the course.[55]

It was further held that parliamentary privilege will not attract immunity from the ordinary legal consequences of conduct by parliament or its members, which exceeds the necessary scope of the category of privilege.[56] This judgment clearly limits the exercise of free speech in that it should not be arbitrary and must be directed at and linked to a transaction of the house.

THE POSITION IN FRANCE

In France, members of parliament enjoy the privilege of freedom of speech in parliament, but the immunity they enjoy differs from the British, Canadian and South African models. Parliamentary immunity is laid down in the Constitution of France which provides that:[57]

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

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53 *Id* at par [46].
54 *Id* at par [2].
55 *Id* at par [43].
56 *Id* at par [11].
57 Article 26 of the Constitution of France. An English translation of the Constitution of France is contained in Hardt n 5 above.

The immunity provided for in France covers both non-accountability and inviolability protection. Hardt argues that the French non-accountability protection is absolute in that it prohibits any form of legal proceeding, civil or criminal, against a member for acts performed, a vote cast, or an opinion uttered by him or her in the exercise of his or her parliamentary functions.[58] Boyron states that the immunity is necessary to allow members of parliament to express themselves in parliament without fear of retaliation from government or citizens.[59] French members of parliament are also afforded inviolability protection, which means that they may not be arrested or detained during their term of office without the authority of the chamber. This view is reinforced by Boyron who points out that no member of the French parliament can be arrested without the authorisation of the secretariat of his or her chamber.[60] Thus, Weizhong Yi argues that the French parliament has a role to play in the application of the immunity, since parliament's approval is required for the arrest or detention of a member.[61] Parliament also has the power to lift the immunity. However, since the immunity is a matter of public policy, an MP cannot renounce it him- or herself.[62] Furthermore, this protection is not absolute in that is limited to the duration of a member's mandate. Once his or her membership of the chamber expires, he or she can be arrested for the crime committed while he or she was a member of the chamber. The acts covered by inviolability are acts which qualify as crimes committed in the extra-professional sphere of activities which can be attributed to the parliamentary mandate.[63] Boyron supports this view by pointing out that the protection involves facts or events that are not related to parliamentary business.

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58 Hardt n 5 above at 187.

59 Boyron *The constitution of France: a contextual analysis* (2013) 111.

60 *Id* at 112

61 Weizhong Yi *Research on parliamentary privilege* (doctoral thesis submitted at the Faculty of Law, Humboldt-University, Berlin, 15 October 1972) 13.

62 Myttenaere 'Immunities of members of parliament' (report adopted at the Moscow session on September 1998). See www.ipu.org/ASGP-emyttenaere.pdf (last accessed on 29 September 2016). Myttenaere at 13, argues further that the assembly which lifts the immunity cannot impose certain conditions on legal proceedings due to the principle of the separation of powers in France, which impedes the legislative power from going on to fix conditions which the judicial power would have to respect in the exercise of its competences. See Mjapelo 'The doctrine of separation of powers: a South African perspective' (2013) at 3, who points out that the doctrine of separation of powers is concerned with the separation of three functions of government, namely, the legislative, executive and judiciary.

63 Hardt n 5 above at 191.

It is clear from the wording of the Constitution that the protection originally covered only members of parliament. However, Hardt points out that by virtue of the adoption of Act 14 of November 2008, non-accountability protection was extended to cover persons who make utterances orally or in writing before a committee of enquiry of the Senate or National Assembly. Utterances by a person who has been asked to testify, will not give rise to a legal action for defamation.[64] Accordingly, members of parliament enjoy both the non-accountability and inviolability immunities, whereas persons other than members of parliament enjoy only the non-accountability immunity. Members of the National Assembly and Senate, and other persons called as witnesses before these houses, can never be held accountable for their votes and utterances in parliament. The protection is not spatial in that it is not linked to location but to the parliamentary mandate.

In modern times inviolability protection is heavily contested in France. According to a report on the privileges and immunities of parliament – moderated by Ponceau (the Secretary-General of the Senate in France) – there are increasing restrictions on inviolability under the impact of the media and high profile law suits.[65] It is contested that the inviolability protection clashes directly with equality before the law, as it is an unjustified procedure which enables parliamentarians to escape justice and to block the investigation of criminal matters.[66] There have accordingly been substantial changes in the law aimed at reconciling the independent nature of parliament and the principle of equality.[67]

THE POSITION IN SOUTH AFRICA

In South Africa, parliamentary privilege and immunity are sourced directly from the Constitution, which provides that:[68]

> Cabinet members, Deputy Ministers and members of the National Assembly have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the Assembly or any of its committees; or anything revealed as

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64 *Id* at 187.

65 Ponceau 'Privileges and immunities of parliament' (2005) 55 *Const Parl Inf* 190 at 58. www.asgp.co/sites/default/files/documents/MSEME (last accessed 29 September 2016).

66 *Ibid*.

67 *Id* at 57.

68 Section 58 (1) of the Constitution.

> a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

The Constitution further provides for the privileges and immunities of delegates to the National Council of Provinces (NCOP),[69] and provincial legislatures,[70] in terms similar to those of the National Assembly. The Constitution also provides for privileges and immunities of municipal councils at the local sphere of government.[71] For purposes of this discussion, the focus is on the privilege of parliament which applies in similar terms to the National Assembly, NCOP, and provincial legislatures.

Like the scope of the parliamentary privilege in UK, parliamentary privilege in South Africa has two components: freedom of speech; and the exclusive cognisance of parliament. This is clear from the provision in the Constitution which guarantees freedom of speech subject to the rules and orders of the Assembly.[72]

Freedom of speech

The importance of freedom of speech in parliament was emphasised in *Speaker of the National Assembly v De Lille MP*,[73] where the court held that this right is a fundamental right crucial to democracy.[74] The purpose of the right to freedom of speech and debate in an assembly was further explained in *Dikoko v Mokhatla*,[75] where the court held that:[76]

> Immunising the conduct of members from criminal and civil liability during deliberations is a bulwark of democracy. It promotes freedom of speech and expression. It encourages democracy and full and effective deliberation. It removes the fear of repercussion for what is said. This advances effective democratic government.

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69 Section 71 of the Constitution. It should be noted that the provision of the Constitution extends the privilege and immunity to people who are referred to in ss 66 and 67 of the Constitution. Section 66 refers to Cabinet members and Deputy ministers and s 67 refers to the representatives of local government, who are attending meetings of the NCOP.

70 Section 117 of the Constitution.

71 Section 161 of the Constitution.

72 Section 58 (1) (a) of the Constitution.

73 *De Lille* case n 1 above.

74 *Id* at par [29].

75 *Dikoko v Mokhatla* 2006 6 SA 235 (CC).

76 *Id* at par [39].

Accordingly, freedom of speech is an essential tool for democracy which extends the accountability of government to the representatives of the people in parliament.

The extent and scope of the privilege

The Constitution provides absolute privilege to members of Parliament. It does so by exempting them from criminal and civil liability for exercising freedom of speech in parliament. The freedom of speech and debate in parliament is congruent with the political rights of the citizens to stand for public office and, if elected, to hold office.[77] The importance of these political rights was emphasised in the *Economic Freedom Fighters v Speaker of the National Assembly*,[78] where it was held that "the purpose of section 19 is to prevent the wholesale denial of political rights to citizens of the country from ever happening again".[79] Unlike in France, the protection in South Africa is limited to non-accountability and inviolability is not part of parliamentary privilege.

The protection of members of parliament from arrest was prompted in the High Court decision of *Democratic Alliance v Speaker of the National Assembly*.[80] The case arose from the decision by the Speaker of parliament to call in members of the South African Police Service to remove members of the Economic Freedom Fighters (EFF) who were allegedly disrupting parliament. The Speaker's decision was based on section 11 of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act (PPIPPLA),[81] which allows the Speaker to order police to arrest and remove from parliament, a member who is participating in a disturbance in parliament. The Democratic Alliance (DA) sought a court order declaring section 11 of the PPIPPLA unconstitutional and invalid, as it is inconsistent with section 58 (1) (b) of the Constitution which protects members of the

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77 Section 19 (2) of the Constitution provides that every adult citizen has the right to stand for public office and if elected to hold office.

78 *Economic Freedom Fighters v Speaker of the National Assembly* (201471/2014) [2014] ZAWCHC (23 December 2014).

79 *Ibid.*

80 *Democratic Alliance v Speaker of the National Assembly* (2792/2015) [2015] ZAWCHC 60.

81 Section 11 of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 provides that a person who creates or takes part in any disturbance in the precincts while Parliament or a house or committee is meeting, may be arrested and removed from the precincts, on the order of the speaker or the chairperson or a person designated by the speaker or chairperson, by a staff member or member of the security services.

Assembly from arrest for anything said in the Assembly. The court found that section 11 was invalid to the extent that it violates a member's constitutional privilege to freedom of speech and freedom from arrest guaranteed under section 58 (1) of the Constitution.[82]

The exemption of members from civil liability arose in a different context in *Swartbooi v Brink*,[83] which concerned the right to freedom of speech in municipal councils. In this case, councillors who were members of a municipality, took part in deliberations on, and voted in favour of, two decisions which were subsequently set aside by the High Court with an order that those councillors who voted in favour of the decision should be held personally liable for the costs of the proceedings.[84] When the matter came before the Constitutional Court, the court held that the privilege protects members of the municipal councils who participate in municipal council debates from civil liability, and that they are not civilly liable for how they vote in the council.[85] The principle of this judgment reinforces the view that the privilege affords members of parliament absolute immunity from civil liability.

Anything said in, produced before, or submitted to the Assembly or its committee

The word 'anything' should be interpreted strictly to mean anything that relates to the business of parliament, either in parliament or in its committee. 'Anything' excludes something said, produced, or submitted in parliament which is not linked to the business of Parliament. In practice, the issue of the connection between what is said, produced or submitted and the business of parliament arose in *Poovalingam v Rajbansi*.[86] The case involved a letter distributed by the respondent, an MP, while parliament was in session, containing remarks which the applicant, also an MP, perceived to be defamatory of him. The issue before the court was whether the respondent's letter was protected under parliamentary privilege. The court held that

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82 *Democratic Alliance* case n 80 above at par [43]. It should be recognised that the High Court order was referred to the Constitutional Court for confirmation in terms of s 15 (1) (a) of the Superior Courts Act 10 of 2013.

83 *Swartbooi v Brink* 2003 5 BCLR 502.

84 It should be noted that s 28 of the Local Government: Municipal Structures Act 117 of 1998 prescribes for the privileges and immunities of municipal councils in similar terms to s 58 of the Constitution which afford privileges to members of National Assembly. Furthermore, this provision of the Act implements s 161 of the Constitution which provides for privileges of municipal councils.

85 *Swartbooi* case n 83 above at par [16].

86 *Poovalingam v Rajbansi* 1992 1 ALL SA 230 (A).

parliamentary privilege is limited to what is said and done by a member in the exercise of his or her function as a member, and in the transaction of parliamentary business.[87] It was found that the respondent's letter dealt with a personal issue between him and the applicant and had nothing to do with parliamentary business. This judgment is reinforced by the judgment of the Constitutional Court in *Dikoko*'s case, where the court considered whether utterances made by Dikoko, while explaining his abuse of cell-phone allowance and his indebtedness to the municipal council, before the standing committee of the provincial government, were protected by the privilege for municipal councils. The court held that Dikoko's statements in the standing committee about his overdue cell-phone account could not be viewed as constituting the real and legitimate business of the council.[88] Similarly, the commission of a criminal act, such as assault of members during a heated debate, should not be covered by the privilege because it is not related to the business of parliament.

Personnel protected by the constitutional provision

As pointed out above, the Constitution provides for non-accountability protection for Cabinet members, Deputy Ministers, and members of the National Assembly. The scope of the constitutional provision on privilege is not exhaustive as the Constitution allows for the national legislature to prescribe other privileges and immunities for the National Assembly.[89] Consequently, national legislation cannot reduce rights or exclude persons from the category of personnel protected by the privilege under the Constitution. It can, however, add to the privileges granted by the Constitution. This view is reinforced by the High Court decision in the *Democratic Alliance v Speaker of the National Assembly* where the court declared section 11 of the PPIPPLA unconstitutional and invalid because it violated the members' constitutional privilege to freedom of speech and freedom from arrest guaranteed by section 58 (1) of the Constitution.[90] It follows, therefore, that national legislation may provide for additional categories of personnel to fall within the protection of freedom of speech.[91]

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87 *Id* at 241.

88 *Dikoko* case n 75 above at par [40].

89 Section 58 (2) of the Constitution provides that other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.

90 *Democratic Alliance* case n 80 above at par [43].

91 It should be noted that this study focuses on the constitutional phenomenon of the parliamentary privilege and therefore does not discuss the provision of the national legislation on the privileges.

Spatial location

The Constitution allows the National Assembly to sit at a place other than its permanent seat. This means that the business of parliament can be conducted elsewhere than at its permanent seat in Cape Town.[92] Parliament has done so on occasion[93] and when this happens, the protection accorded by parliamentary privilege transcends the precincts of parliament's permanent seat to cover wherever in the country it sits.

It appears that the scope of the protection of anything produced or submitted in the Assembly includes something that has arisen outside of parliament only when it is produced in parliament. For example, an internal memorandum between officials and a Cabinet minister about the drafting of legislation is not protected until it reaches parliament. However, once the memorandum has been produced in or submitted to parliament, it is protected. This should be the case because until the memorandum reaches parliament there is no question of a parliamentary procedure. Therefore, the British interpretation of the meaning of proceedings in parliament which protects even correspondence between an MP and head of a government department, does not apply in South African law.

Another aspect of the privilege that requires attention is the protection of something revealed as a result of something said in, produced before, or submitted to, the National Assembly. This aspect of the privilege protects freedom of speech by enabling members to divulge information which, without immunity, they could not divulge freely outside parliament. In a practical sense, the information revealed by De Lille MP in parliament on corruption in South Africa's arms procurement, resulted in the arrest and conviction of a senior government official for fraud and corruption.[94]

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92 Section 51 (3) of the Constitution provides that sittings of that National Assembly are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.

93 In accordance with the 2015 programme of taking Parliament to the people, Parliament is sitting in different parts of the country to facilitate public participation in matters of Parliament. See: parliament.gov.za on taking parliament to the people (last accessed 28 July 2015).

94 *S v Shaik* 2008 2 SA 208 (CC) where a government official who facilitated the procurement of arms was sentenced and convicted for corruption and fraud. It should be noted that De Lille MP who revealed the arms deal corruption in Parliament was not called or questioned in court although the case arose from her revelation in Parliament about corruption in the procurement of arms.

EXCLUSIVE COGNISANCE OF PARLIAMENT

As pointed out above, the freedom of speech in the National Assembly is limited by the power of the Assembly to regulate its internal affairs. In this regard, the Constitution provides that:

> The National Assembly may –
> (a) determine and control its internal arrangements, proceedings and procedures; and
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. The right to freedom of speech and its limitation are entrenched in the Constitution. Thus, both the exercise thereof by members of parliament and the regulation of that right by parliament should take place within the confines of the Constitution.[95]

The extent of the regulation of the freedom of speech in parliament was considered in the *De Lille* case. The issue arose from a resolution adopted by the National Assembly suspending an MP (the respondent) for fifteen days for calling members of the National Assembly spies and making serious allegations against them without substantiation. The respondent launched a court application for an order impugning the resolution of the Assembly which led to her suspension. The court held that the question of the legality of the resolution of the Assembly rested on the Constitution of the Republic of South Africa, not on parliament.[96] In this regard, parliament cannot make any law or perform any act which is not sanctioned by the Constitution.[97] The court held that section 58(1) of the Constitution guarantees freedom of speech in the Assembly, and section 58(2) authorises national legislation which clearly articulates the privileges and immunities of the National Assembly which have the effect of impacting on the specific guarantee of free speech for members of the Assembly.[98] In setting aside the decision of the National Assembly to suspend the applicant, the court found that the provision in the Powers and Privileges of Parliament Act[99] did not provide

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95 Section 57 (1) of the Constitution.

96 *De Lille* case n 1 above at par [14].

97 Section 2 of the Constitution provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by the Constitution must be fulfilled.

98 *De Lille* case n 1 above at par [20].

99 Powers and Privileges of Parliament Act 91 of 1963, which was in operation and regulated the powers and privileges of members of Parliament at the time of the hearing of this case.

for suspension as punishment of a member who was guilty of contempt of parliament.[100]

In explaining the constitutional powers of the Assembly to regulate its affairs, the court held that

> [T]he authority is wide enough to enable the Assembly to maintain order and discipline in its proceedings by means which it considers appropriate for this purpose. This would, for example, include the power to exclude from the Assembly for temporary periods any member who is disrupting or obstructing its proceedings or impeding unreasonably its ability to conduct its business in an orderly manner acceptable in a democratic society.[101]

The power of the National Assembly to regulate its affairs also arose in *Lekota v Speaker of National Assembly*.[102] In this case, the speaker (the respondent) ordered an MP (the applicant) to leave parliament after he refused to withdraw a statement that he had made without substantiation, namely, that the President of the Republic had violated his oath of office. The respondent ruled that the applicant's statement was out of order and contrary to the standing orders of parliament, which provide that members may not impute improper or unworthy motives or conduct on the part of other members, unless such members do so by way of a separate, clearly formalised, and properly motivated substantive motion. The applicant approached the High Court for an order declaring that the respondent's ruling was unlawful and inconsistent with the Constitution. The court held that members exercise their right to freedom of speech in the Assembly subject to its rules and orders, and that the Assembly may determine and control its internal affairs and make rules and orders concerning its business in terms of section 57(1) of the Constitution.[103] In dismissing the applicant's case, the court found that the remarks made by the applicant fell within the ambit of the standing orders of parliament and the respondent had been correct in ruling them out of order.[104]

It is clear that the exclusive cognisance of parliament enables it to control and discipline its members. As pointed out above, South Africa upholds the supremacy of the Constitution, and parliament should exercise its regulating powers within the spirit of the Constitution. This requirement was further re-

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100 *De Lille* case n 1 above at par [25].
101 *Id* at par [16].
102 *Lekota v Speaker of National Assembly* 2015 4 SA 133 (WCC).
103 *Id* at par [13].
104 *Id* at par [39].

affirmed in *Malema v Chairperson of the National Council of Provinces*,[105] where the presiding Speaker of parliament ruled that the utterances made by an MP, Mr Malema, that the ANC had massacred people at Marikana, were unparliamentary and did not accord with the decorum of the house. In this case, the court held that in determining whether the presiding officer of parliament had the authority to make the ruling, the starting point should be the Constitution.[106] On the facts, the court found that the applicant was expressing his opinion that the ANC was responsible for the death of people at Marikana, and that the speaker had materially misconstrued the scope of the rules of order.[107]

Accordingly, the conduct of both the presiding officers of parliament in exercising powers on behalf of parliament, and that of individual members should resonate with the provisions of the Constitution and be lawful.

CONCLUSION

In determining the scope of the privileges of parliament in South Africa, it has emerged that internationally, there is a disparity between interpretation and actual practice of the forms of parliamentary privilege. I have established that there are two components to the privilege and immunity of parliament – non-accountability and inviolability protection. Save for France which practises both types of privilege, Britain, Canada and South Africa practise non-accountability protection only.[108] While it is settled that the privilege comprises free speech and exclusive cognisance of parliament, its extent and scope, even in Britain where the principle originated, is still the subject of interpretation. In all the countries covered by the study, it was found that the conduct to be protected by the privilege must occur during proceedings in parliament and relate to the business of parliament. In Britain, the proceedings of parliament have been interpreted to include correspondence between an MP and a head of department outside of parliament.[109] However, in Canada, the protection is limited to conduct

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105 *Malema v Chairperson of the National Council of Provinces* 2015 4 SA 145 (WCC).

106 *Id* at par [44].

107 *Id* at par [60].

108 In South Africa, members of Parliament including a Deputy President of the Republic of South Africa were arrested and prosecuted during their term of office. Therefore, the inviolability protection of the members does not apply. In this regard, see the cases of *SV Yengeni* (A1079/03) [2005] ZAGPHC 117 (11 November 2005) & *S v Zuma* (CC 358/05) [2006] ZAKZHC (20 September 2006).

109 *In the matter of Parliamentary Privileges Act, 1770* [1958] 2 ALL E.R 329.

inside parliament and does not extend to communications outside of parliament between an MP and a person who is not an MP.[110]

The comparative study of the history of the principle of privilege and immunity of parliament shows that, despite the fact that Canada and South Africa historically inherited the principle from Britain, these countries have interpreted the principle differently. In South Africa, the interpretation of parliamentary privilege and immunity is informed by the Constitution which is the primary source, as supplemented by national legislation, the rules and orders of parliament which constitute secondary sources. This approach accords with the supremacy of the Constitution which requires all conduct to be subject to the Constitution and will, therefore, prevail only if such conduct is consistent with the Constitution.[111] The South African limitation of the right to freedom of speech to parliament, is in line with the aim of the privilege – *ie* to encourage free debate in parliament. The extension of this privilege beyond the confines of parliament does nothing to strengthen representative democracy in terms of which parliament is required to account to the electorate through open and fair debate. When something which occurred in parliament is communicated by an MP outside of parliament, the communication may no longer serve the purpose of the privilege to promote democracy by encouraging free speech and debate in parliament. The position in Canada where parliamentary privilege does not protect employment relations between employees and their employers in parliament, should equally apply to South Africa. Accordingly, when a presiding officer of parliament violates the right of an employee of parliament during their interaction during parliamentary proceedings, the conduct is not exempted from the provisions of labour law simply because it took place during the proceedings of parliament. This should be the case in South Africa, in that the Constitution guarantees everyone the right to fair labour practice.[112] Despite the absolute exemption of members from arrest, arising from anything said, produced in, or submitted to parliament, this provision does not exempt members from criminal acts committed during the exercise of their freedom of speech during the proceedings of parliament. This right is qualified by the requirement that the activity performed by members should be linked to the business of parliament. The exclusion of criminal acts committed during the parliamentary proceedings could discourage members from abusing the privilege. The scope of the privilege

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110 *Canada (House of Commons) v Vaid* [2005] I SCR 667, [2005] SCC 30.
111 Section 2 of the Constitution.
112 Section 23 of the Constitution.

is wide enough to enable members to exercise their freedom of speech and debate in parliament, and for parliament to maintain its integrity adequately.