

THE SOUTH AFRICAN PARLIAMENT IN 2015

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1. INTRODUCTION

Over the past year, the South African Parliament has experienced several major disruptions as well as bold challenges to its rules and procedures. Police have been called into the Parliamentary precinct on three occasions, the President's annual State of the Nation Address took place in the absence of the two largest opposition parties, during which the cell-phone signals in the chamber were jammed, MPs have repeatedly disobeyed the rulings of the Speaker (who herself has been the subject of a no confidence motion), scheduled parliamentary sessions such as 'question time' and 'debate on committee reports' have completely broken down on occasion. Political parties have also gone to court to challenge a range of actions, including use of 'unparliamentary' language, suspension without pay from the house and the legality of calling police into parliament.

While adversarial conduct and robust debate have been part and parcel of Parliament since 1994, the events over the last year have considerably changed its tone and workings and placed major pressures on the institution. These events have also arguably severely undermined the functionality, dignity and stability of Parliament from the public's perspective, whilst conversely levels of public interest in Parliament have seldom been higher.

While much of the chaos in Parliament since the national elections in May 2014 arises in a context where President Zuma is perceived as avoiding responding to the Public Protector's findings on the upgrades of his private homestead in Nkandla, it is nevertheless clear that - beyond the realm of politics - several important principles and issues are at stake relating to the role, status and functioning of Parliament under the Constitution. This paper seeks to address these issues.

These include Parliament's role in a constitutional democracy, the separation of powers principle as it applies to Parliament both in theory and in practice, the role of the Speaker in Parliamentary business, whether and how best to ensure that impartiality trumps political allegiances, and the nature of Parliamentary processes amongst other matters.

Now is an apt time to conduct a comprehensive assessment of the challenges facing Parliament, not only because of the recent problems mentioned above, but also because

the Rules of the National Assembly are currently being redrafted to bring them in line with the Constitution. The review of rules has been long in the making, having been amended in a piecemeal fashion since 1994. In 2012, the National Assembly Rules Committee identified '*a need for a comprehensive review to make the rules easier to follow and rectify anomalies*'¹ and this process is currently underway. The Rules should ideally ensure that the democratic space for, and participation by, all parties in debates and processes is both protected and expanded.

¹Procedural Developments in the National Assembly, Issue 18 at http://www.parliament.gov.za/content/99304_National_Assem_18_final.pdf

2. PARLIAMENT AND THE SEPARATION OF POWERS

2.1 Main features of the separation of powers doctrine and its development in modern democracies

The idea of separation of powers – and its critical role in preventing tyranny and protecting liberty - was articulated by Montesquieu in the mid-eighteenth century and subsequently influenced the French Declaration of the Rights of Man and the Constitution of the United States in 1789. Today, most countries around the world incorporate the principle of separation of powers between the legislature, executive and judiciary in order to guard against the over-concentration of power which may lead to abuse of that power.

Critical related aspects of the separation of powers doctrine include a system of checks and balances as well as provisions for accountability and transparency in government. In modern democracies, the separation of powers doctrine has moved beyond the initial goal of preventing tyranny and protecting liberty, and has come to serve a country's particular vision of an ideal state; for example, in South Africa, it plays a role in enhancing human rights, as well as a particular vision of democracy based on values of accountability, responsiveness and openness².

It is accepted that a complete separation of powers between the three branches is impossible due to the complex functioning of modern democracies (the three branches are constituent parts of the same government), and also because, in terms of the system of checks and balances, the respective branches of government will often be called upon to examine the conduct of the other branches. For example, the legislature oversees the conduct of the executive but must do so without interfering with the proper functioning and work of the executive, and Parliaments around the world have the power to determine their own processes in order to preserve their autonomy, yet a court may be called upon to act as a check on that power. At times, tension arises when one branch of government is seen

² O'Regan K, 'Checks and Balances: Reflections on the Development of the doctrine of Separation of Powers under the South Africa Constitution [2005] PER 5; See also section 1 of Constitution of the Republic of South Africa, 1996

as encroaching upon another, yet it is also recognised that such tension is in itself not a problem for as long as it results in a constitutionally compliant and healthier state³.

There is great variation around the world on how the principle of separation of powers is employed within a particular country and in what form. In order to understand how the system of separation of powers works in South Africa and what is required of Parliament at the level of both principle and practice, it is necessary to explore this doctrine in a more thorough fashion – to consider relevant constitutional provisions, the way the courts have sought to interpret and apply these, as well as controversies that have arisen in South Africa between the three branches in general, and around Parliament in particular.

2.2 Constitutional provisions regarding separation of powers in South Africa

The separation of powers system originates from Constitutional Principle 5 of the Interim Constitution of 1993 which provided that *'there shall be separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.'* The final Constitution adopted in 1996 had to give effect to this principle.

The Constitution also had to reflect the novel and fundamental character of the post-1994 South African state, described in Chapter 1 as 'one, sovereign, democratic state' founded on several foundational values including the supremacy of the Constitution and rule of law, non-racialism, non-sexism and human dignity.

In a deliberate break from that past, the principle of constitutional supremacy now defines the country's democracy and several constitutional provisions entrench and protect such supremacy. Section 2, entitled 'supremacy of the Constitution' states that *"(t)his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled"*. Section 83 states that the President *'must uphold, respect and defend the Constitution as the supreme law of the Republic'* and section 92(3) specifically requires that cabinet members must act in

³See also CJ Moseneke. 'Olive Schreiner Memorial Lecture: separation of powers, democratic ethos and judicial function' 2008 SAJHR

accordance with the Constitution. The courts, while enjoying an independent status, are also subject to the Constitution in terms of section 165 (2), while section 39 (2) specifically instructs them to promote the “*spirit, purport and objects of the Bill of Rights' in developing the common law*”. Therefore, every single entity including Parliament, the executive, the police, army, and entire public service are bound by the Constitution and all private persons are bound by the Bill of Rights to the extent that it is deemed applicable by the courts taking into account the factors set out in section 8 (2) of the Constitution.⁴

Furthermore, the Constitution as a foundational document that is meant to endure over time, itself receives a very high degree of protection. According to Section 74(2) bills amending the Constitution require a two-thirds majority in the National Assembly as well as a supporting vote of six of the nine provinces represented in the NCOP whereas a bill amending section 1 of the Constitution, which sets out the founding values, requires a 75 percent majority. This stands in contrast to the amendment of ordinary legislation which requires only a simple majority.

Since 1994, the impact of constitutional supremacy has been far-reaching, altering the entire legal order such that the Constitutional Court has referred to South Africa as a 'constitutional state' founded on the recognition of human rights⁵.

Guided by the principle of constitutional supremacy, the Constitution then seeks to incorporate the separation of powers doctrine by devoting three separate chapters, and vesting specific authority and functions to Parliament (Chapter 4), the President and national Executive (Chapter 5) and the courts and administration of justice (Chapter 8). Simply put, it gives the power to legislate to the National Assembly and the National Council of Provinces (NCOP) (in section 43), the power to develop and implement policy and legislation to the executive (section 85), and the power to adjudicate matters to the courts (section 165).

⁴ Section 8(2) states that (a) provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

⁵ See *S v Makwanyane* 1995(3) SA 391 (CC) at par 130; In *The National Gambling Board v Premier of KwaZulu Natal* 2002 (SA) 715 (CC) at par 33

2.2.1 Parliament consists of two chambers – the National Assembly (consisting of 400 members elected for a five year term under a closed list proportional representation system) and the National Council of Provinces (NCOP), representing the provincial interests of the nine provinces and composed of 90 delegates (54 permanent members and 36 rotating members). Parliament is an autonomous body subject only to the Constitution. It has the power to amend the Constitution and pass legislation in terms of section 44 of the Constitution⁶. Legislation passed by it is subject to scrutiny by the courts and must accord with the Bill of Rights as well as all other provisions of the Constitution. The National Assembly (and the NCOP) has the power to determine and control its own processes and arrangements but these must be conducted with due regard to representative and participatory democracy, accountability, transparency and public involvement according to section 57(1)(b).

2.2.2 Section 165 vests judicial authority in the courts and section 166 establishes the court system, outlining the role of each court. Section 165 stipulates that the **judiciary** is independent of the two other branches of government. In this way, the judiciary may scrutinise the laws and conduct of both these branches in order to determine whether they comply with the Constitution. A separate body, the Judicial Services Commission, is responsible for appointing judges so that they are independent of government. Section 165 (2) of the Constitution makes it clear that the courts, while being independent, are subject to the Constitution which it must apply '*without fear, favour or prejudice*'. Section 165(3) explicitly states that '*no person or organ of state may interfere with the functioning of the courts*'.

Under South Africa's constitutional framework, the Constitutional Court has a special role to monitor the separation of powers and ensure that the legislature and executive comply

⁶Section 44 gives the National Assembly the power to amend the Constitution; to pass legislation (including a matter listed in Schedule 4 but excluding...a matter listed in Schedule 5); and to assign legislative powers to another branch of government, except the power to amend the Constitution. Section 55 of the Constitution states that (1) In exercising its legislative power, the National Assembly may – (a) consider, pass, amend or reject any legislation before the Assembly; (b) initiate or prepare legislation, except money Bills. Section 55 (2) provides that '(t)he National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of (i) the exercise of national executive authority including the implementation of legislation and (ii) any organ of state. The National Assembly passes legislation and holds the executive to account.'

with the constitutional text. Disputes between organs of state, including their constitutional status, powers and functions, must be decided by the Constitutional Court⁷.

2.2.3 Section 85 vests **executive** authority of the Republic in the President, which is exercised in conjunction with other members of Cabinet. The Cabinet consists of the President, as its head, a Deputy President and Ministers⁸. The role of the executive, which is set out in section 85(2) of the Constitution, includes developing and implementing national policy and legislation, and co-ordinating the functions of state departments. While Cabinet can draft new laws or amendments to current laws (section 85(2)), it is only Parliament that has the power to pass laws.

At its first sitting after a general election the National Assembly elects one of its members as the President of the country (section 86(1)). Once elected as President, he or she must resign from the National Assembly (section 87). The President serves as head of state and head of government⁹ and appoints cabinet members to head government departments at a national level, and also has the power to dismiss them. No more than two cabinet members can be drawn from outside the National Assembly. While the President resigns from the National Assembly upon election, the vast majority of members of cabinet are members of the legislature.

The President must uphold, defend and respect the Constitution as the supreme law of the Republic and promote the unity of the nation (section 83). The President may speak in the National Assembly in terms of section 84 of the Constitution, but she or he may not vote. Cabinet members may attend and speak in the NCOP but may not vote (section 66(1)).

The President may not serve more than two terms¹⁰. According to section 89 of the Constitution, the President can be removed by a resolution of the National Assembly supported by at least two thirds of its members on specified grounds, which include a serious violation of the Constitution or law, serious misconduct, or inability to perform functions of the office.

⁷Section 167(4)(a) of the Constitution, 1996

⁸Section 91 of the Constitution, 1996

⁹Section 83(1) of the Constitution, 1996

¹⁰Section 88 of the Constitution, 1996

Since the power to initiate legislation vests in the executive, headed by the President, and since the President's party dominates Parliament, the President is in a very powerful position in respect of both the executive and legislative branches of government.

2.2.4 While the Constitution assigns specific powers and functions to the three branches of government (as described above), it also provides several **checks and balances** or accountability measures to curtail the exercise of that power. Section 1 entrenches the supremacy of the Constitution and rule of law as overarching values such that any inconsistent law or conduct is invalid and unlawful.¹¹ Section 55(2) gives the legislature the power to conduct oversight over the executive and to hold it to account for the performance of its obligations¹². While individual cabinet ministers are responsible for ensuring that government policy in their portfolio is implemented, Parliament has the duty and powers to ensure that ministers are implementing laws and policies and abiding by the Constitution. Section 92 of the Constitution specifically states *that '(m)embers of Cabinet are accountable independently and collectively to Parliament for the exercise of their powers and performance of their functions'* and section 92(3) directs cabinet members to provide reports to Parliament on matters under their control.

The Constitution in section 102 makes further provision for Parliamentary control over the executive. If a majority of members of the National Assembly support a no confidence vote in the President, she or he must resign. If the no confidence vote is directed against the Cabinet, the President must reconstitute the Cabinet.

Accountability mechanisms are also embedded in section 165 of the Constitution, which declares that the judiciary is bound by the Constitution and section 172 which grants the judiciary the power to scrutinize the conduct of the other two branches of government and to declare invalid any law or conduct inconsistent with the Constitution.

¹¹ This section also provides that any obligation imposed by the Constitution must be fulfilled. Similarly, section 2 stipulates that the Constitution is the supreme law of the Republic.

¹² Section 55(2) of the Constitution directs the National Assembly to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it.

While the 1996 Constitution does not explicitly refer to the separation of powers doctrine, the constitutional design clearly embraces and entrenches it. Furthermore, it is evident from the constitutional architecture that the three branches (acting as checks and balances) are not hermetically sealed from each other and exhibit a degree of overlap¹³.

The Constitutional Court in 1996 was asked to certify the final text of the Constitution, and to consider whether it complied with the principle of separation of powers established in the Interim Constitution. In doing so it set out the beginnings of South Africa's approach to the separation of powers doctrine:

*'There is ... no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of restraint by one branch of government upon another, there is no separation that is absolute. While in the USA and Netherlands members of the executive may not continue to be members of the legislature, this is not the requirement in the German system of separation of powers. Moreover because of the different system of checks and balances that exist in these countries, the relationship between the different branches of government and the power and influence that one branch of government has over the other differs from one country to another'¹⁴..... The principle of separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand the principle of separation of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch of government on the terrain of another....'*¹⁵

The Constitutional Court has therefore adopted the approach that *'no constitutional scheme can reflect a complete separation of powers'* and instead the scheme is *'always*

¹³See O'Regan supra at footnote 2

¹⁴ See also, for example, discussion by O'Regan ibid at footnote 2 on the manner in which the separation of powers doctrine has been incorporated in diverse ways around the world. She points out that "the system developed in each country depends on a range of factors including the conception of democracy adopted by the country, social, political and economic forces, as well as the history of governmental institutions."

¹⁵ In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at par 108-109

*one of partial separation*¹⁶. It further envisaged that over time the courts would *develop 'a distinctively South African model of separation of powers'* that reflects *'the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest'*.¹⁷

2.3 Jurisprudence on separation of powers in South Africa

Since 1996, there has been a reasonably extensive exploration of the separation of powers doctrine by our courts. Two cases, *Glenister v President of the Republic of South Africa*¹⁸ and *South African Association of Personal Injuries Lawyers v Heath*¹⁹ recognized that it is part and parcel of South Africa's constitutional design.

In applying the separation of powers principle to cases coming before it, the courts have inter alia ruled as follows. The head of a criminal investigation unit may not be a judge since only the executive has the power to prosecute crimes (in *South African Association of Personal Injuries Lawyers v Heath*)²⁰. The legislature may determine a minimum sentence for a crime, but may not determine the sentence in a particular case since this power vests in the courts alone (in *S v Dodo*)²¹. The legislature can delegate subordinate lawmaking powers but it cannot delegate plenary law making powers as the latter is reserved solely for the legislature (in *Executive Council Western Cape Legislature v President of the Republic of South Africa*)²². The executive does not have the power to commit an uncooperative witness to prison since only the courts possess the power to send someone to prison (in *De Lange v Smuts and Others*)²³.

¹⁶ At par109-102 in re Certification judgement *ibid*

¹⁷ *De Lange v Smuts* (1998) 3 SA 785 (CC) at par 60

¹⁸ (2009 (1) SA 287 at p 298

¹⁹ 2001 (1) BCLR 77 (CC) at par 22 where the Court pointed out that in South Africa, USA, Australia, "there is a clear, though not absolute separation between the legislature and executive on the one hand and court on the other."

²⁰ *Ibid*

²¹ 2001(5)BCLR 423 (CC)

²² 1995(10) BCLR 1289 (CC); See also Mojape P, 'The Doctrine of Separation of Powers' (a South African perspective) at <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf>

²³ 1998(7) BCLR 779 (CC)

Importantly, the courts have had to articulate their position with regard to the appropriate extent to which they may intrude into decisions of the other two branches of government within the separation of powers doctrine. In *Glenister*²⁴, for example, the Constitutional Court noted that, *'while duty-bound to safeguard the Constitution, they (the courts) are also required not to encroach upon the powers of the executive and legislature'*. In *S v Van Rooyen*²⁵ the Court stated that *"(i)n a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial powers have been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of separation of powers requires that the judiciary, in its comments about the other arms of state, show respect and courtesy, in the same way that other branches of government are required to show respect and courtesy to it'*. In this case, the Court proceeded to quote American constitutional scholar, Professor Tribe that *'(w)hat counts is not any abstract theory of separation of powers, but the actual separation of powers 'operationally defined by the Constitution. Therefore, where constitutional text is informative with respect to separation of powers issues, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but in fact might not have found their way into the constitutional structure'*²⁶. Thus, according to the Court, the constitutional text itself is paramount in determining the appropriate intrusion by the courts.

In a series of social and economic rights cases, the courts have also had to directly confront the appropriate parameters of their role, which was articulated as follows in *Minister of Health and Others v Treatment Action Campaign*²⁷: *'(c)ourts are ill-suited to adjudicate upon issues where court orders have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary*

²⁴Supra at footnote 17

²⁵ 2002 (5) SA 246 (CC) par 48

²⁶ S v Van Rooyen v2S002 (5) SA 246 at para 34

²⁷ 2002 (5) SA 703 at par 38

implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance'.

In general, South African courts arguably appear to have adopted a fairly flexible approach to separation of powers, underpinned by its transformative mandate. Through court judgments (further cases relating specifically to Parliament will be discussed below), it appears that the general South African approach to 'separation of powers' can be summarised as follows:

- (1) Each branch of government has the power and authority to perform a specific function which must be respected and protected, establishing the principle of “non-intrusion”;
- (2) However, the principle of “non-intrusion” must give way to the protection of fundamental rights which lie at the heart of our democratic order and the courts will intervene to ensure this;²⁸
- (3) While the Court will intrude on the terrain of the legislature and executive in order to protect fundamental rights, it must remain sensitive to the legitimate constitutional interests of the other branches of government and the intrusion must be as limited as possible.²⁹

2.4 Jurisprudence on Parliament, separation of powers and related matters

Parliament's critical power and privilege to determine its own business and procedures is guaranteed in section 57(1) of the Constitution.³⁰ In many countries, it is recognized that the legislature needs optimal control of its own arrangements in order for democracy to thrive, specifically in the face of growing executive power worldwide. Yet at the same time, the judiciary has the power, under the Constitution, to scrutinize Parliament's conduct. While at first glance this appears to profoundly interfere with the separation of powers

²⁸ See O'Regan *supra* at footnote 2, see for example also *Manufacturers Association of SA and Others in Re Ex Parte Application of the President of RSA and Others, S v Dodo* 2001 (3) SA 382 (CC), *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (CC)

²⁹ See O'Regan *ibid*

³⁰ Section 57(1) a. states that '(t)he NA may determine and control its internal arrangements, proceedings and procedures and b.makes rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement'.

principle, if the court lacked such power, it would fail in its duty to ensure that Parliament complies with the Constitution.

Recognizing the sensitive nature of this overlap, the courts have carefully considered in detail the nature of their duty when it comes to interfering with the decisions or processes of Parliament and how to reconcile its judicial oversight function with the separation of powers doctrine. Furthermore, in the course of these judgments, the courts have examined various duties placed on Parliament by the Constitution – these pronouncements continue to shed lights on many of the matters facing Parliament today.

2.4.1 In ***De Lille and Another v Speaker of the National Assembly***³¹, Patricia de Lille MP named 8 senior members of the ANC as being spies for the apartheid government during a debate in the National Assembly. The Speaker ruled that it was unparliamentary and de Lille unconditionally withdrew her statement. Subsequently an ANC-led motion resulted in the appointment of a Sub-committee that would report to the House on what action should be taken for de Lille's serious allegations made without substantiation. De Lille was formally charged for abusing her freedom of speech privilege and for contravening the Powers and Privileges of Parliament Act which provided that members should not impute improper conduct to other members except by way of a substantive motion. The House adopted the Committee's recommendation to suspend de Lille from the Assembly for 15 days. De Lille challenged the matter in the High Court on the ground that the Committee had tried to exclude her from deliberations, had prejudiced the issue, and had not seriously attempted to examine her conduct. The Speaker, however, argued that National Assembly (NA) proceedings regarding discipline are a matter of Parliamentary privilege under the Rules of the National Assembly (then rule 49(3) of the Standing Rules) and were therefore excluded from judicial review. The High Court held that all acts and decisions of Parliament are subject to the Constitution and therefore subject to review by the courts. The court emphasized that while section 57(1) permits Parliament to determine and control its internal arrangements, it may not do so in a manner inconsistent with the Constitution. To the extent that the Act in question placed the issue of Parliamentary privilege beyond the scrutiny of the Constitution and solely in the hands of the Speaker, it

³¹ 1998 (3) SA 430 (CC)

was not constitutional³². The Supreme Court of Appeal confirmed that section 58(1) expressly guaranteed MPs freedom of speech in the National Assembly (subject to its rules and orders) and found that de Lille '*...was not suspended because her behaviour was obstructing or disrupting or unreasonably impeding the management of orderly business in the Assembly, but as some kind of punishment for making a speech....*'³³

2.4.2 In ***Doctors for Life International v Speaker of the National Assembly and Others***³⁴ the applicants argued that Parliament had failed to fulfil its constitutional duty in section 58 of the Constitution when it failed to properly involve the public in the law-making process. The case is significant because the Court was called upon to consider Parliament's primary function, law-making, and had to directly consider the separation of powers doctrine. It stated as follows: "*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 government. The structure of the provisions entrusting and separating powers between the executive, legislative and judicial branches of government reflects the concept of separation of powers.*" The principle '*has important consequences for the way in which and the institutions by which power can be exercised.*' 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 of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.³⁵

The Constitutional Court proceeded to look into the scope and nature of Parliament's obligation to involve the public in law-making. The Court held that while Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, this discretion must be exercised in reasonable manner. This duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard when

³² *Ibid* at 456B-D

³³ *Ibid* at par 17

³⁴ 2006 (6) SA 416 (CC)

³⁵ (2006 (6) SA 416 (CC) par 37

laws are made that will have a direct impact on them. When determining whether Parliament has acted reasonably, the Court will consider a number of factors including the nature of the legislation, and what Parliament itself has assessed as being the appropriate method of facilitating public involvement in a particular case.

The Court described and emphasized the value of public participation in law-making. The participation by the public on a continuous basis gives vitality to the functioning of representative democracy and encourages citizens to be actively involved in public affairs and familiar with the laws as they are made. Public participation enhances the civic dignity of people by enabling their voices to be heard and taken account of. The spirit of democratic and pluralistic accommodation is likely to produce laws that are more widely accepted and therefore effective, strengthening the legitimacy of legislation in the public's perspective. A vibrant democracy had a qualitative and not only a quantitative dimension and dialogue and deliberation went hand in hand. In juxtaposition to South Africa's past, this forms part of the tolerance and civility that characterises the respect for diversity the Constitution demands.

2.4.3 In ***Oriani- Ambrosini***³⁶, an IFP MP sought to introduce a private members bill under sections 55(1) and 73(2) of the Constitution without getting the requisite permission required under the NA Rules. According to then Rule 234, a member had to submit a memorandum to the Speaker explaining the particulars, objects and financial implications of the Bill. The Speaker would then refer the memorandum to the Committee on Private Members' Legislative Proposals and Special Petitions. This Committee would then recommend to the Assembly whether permission should be refused or granted. Only after the Assembly had voted to allow the proposal to proceed, would the member be able to prepare and table a draft Bill. Oriani-Ambrosini challenged the rules on the ground that they restricted his constitutional right to introduce bills in the Assembly. The Court found that the NA rules in question were unconstitutional as they undermined the powers given by the Constitution to Members to initiate legislation.

The Court stated that *“the validity of the rules depend on whether they recognize and facilitate the exercise of the individual member's power...”* that are granted by the

³⁶ 2012 (6) SA 588 (CC)

Constitution.³⁷ The Court drew attention to the importance of deliberation in the legislative process and the inclusion of minority parties' views.³⁸ In this regard, the Court drew heavily on its previous pronouncements in *Democratic Alliance and Another v Masondo NO and Another*³⁹ "(T)he Constitution does not envisage a mathematical form of government, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is to be given to the rights of all to be heard and have their views considered..... Our Constitution establishes as "open and deliberative" form of democracy which is "calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should not be directed towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, South Africa belongs to all who live in it."

The Court in *Oriani* further emphasized "*the right of all to be heard and have their views considered*" in the context of the legislative process, saying that "*it is a collective responsibility of both the majority and minority parties and their members to deliberate critically and seriously on legislative proposals.... this approach would give meaning to and enrich our representative and participatory democracy, and will probably yield results that are in the best interests of all our people*"⁴⁰.

The Court also explained '*(t)his purposive interpretation of section 55(1)(b) does not undermine the power of the National Assembly to determine how best to run its affairs, nor does it work against the significance of being the majority party in the Assembly. It also does not disregard the views of other minority parties that may not be interested in, or supportive of, an individual member's legislative proposal. This is so because, even after a*

³⁷ *Ibid* at para 66. 'The validity of the Rules depends on whether they recognise and facilitate the exercise of the individual member's powers in sections 55(1)(b) and 73(2). Alternatively, whether they create a high risk of those powers being paralysed by placing the section 55(1)(b) power exclusively in the hands of the National Assembly, functioning as a collective body, thus inhibiting the exercise of the section 73(2) power by extension.'

³⁸ *Ibid* at para 47

³⁹ 2002 (3) SA 413 (CC)

⁴⁰ *Supra* footnote 38 at par 47

*member would have caused the Assembly to reflect properly on the potential benefits of her proposal to the nation, the majority voice would still prevail.*⁴¹

Importantly, with regard to the National Assembly's power in section 57 of the Constitution to make rules regarding its internal arrangements, the Court stated that *'the words "arrangements, proceedings and procedures" indicate that the Assembly's power to make rules is limited to the regulation of process and form, as opposed to content and substance'* and further and more to the point that *'the power of the National Assembly to "make rules . . . concerning its business" must be exercised "with due regard to representative and participatory democracy, accountability, transparency and public involvement.*⁴² Equally significant, said the Court, is the need for the rules to cater for *"the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy"*⁴³.

2.4.5 In ***Mazibuko v Sisulu and Another***⁴⁴, Lindiwe Mazibuko, MP gave notice in the Assembly of a motion of no confidence in President Jacob Zuma in terms of section 102(2) of the Constitution. The Speaker referred the motion to the Programming Committee and the Chief Whips Forum. The Programming Committee, which is tasked with scheduling the business of the Assembly, could not reach consensus (neither could the Chief Whips forum) and the motion was not scheduled for debate in the Assembly. Mazibuko subsequently sought an interdict in the High Court compelling the Speaker to schedule the motion for debate and vote in the Assembly. When the High Court dismissed her application, she appealed to the Constitutional Court, arguing that the Rules pertaining to the tabling of motions were inconsistent with the Constitution - the rules should vindicate a member's constitutional right to have a motion of no confidence debated and voted on as a matter of urgency.

Firstly, the Court considered its duty to scrutinize the rules of Parliament and how it can be reconciled with the separation of powers doctrine. While the Court will not prescribe the

⁴¹ *Ibid* at par 52

⁴² *Ibid* at par 61

⁴³ *Ibid* at par 62

⁴⁴ 2013 (6) SA 249 (CC)

form and content of Parliamentary rules, it will give effect to the duties placed on Parliament by the Constitution.

Secondly, the Court emphasized the vital purpose of motions of no confidence, which ensure that the President and executive are accountable to it. The Court ultimately found that an MP is entitled to have a motion of no confidence scheduled by the Assembly and voted on within a reasonable time. In this regard, it decided that the scheduling of motions of no confidence cannot not depend on whims or the majority or minority on the Programming Committee or any other committee⁴⁵. The Court found that neither the Rules nor the actual practice of the Programme Committee provide for effective decision-making regarding the scheduling of motions, thereby infringing the rights of members to bring, debate and vote on such motions. *'When the Constitution entitles a member or party to take a particular step or embark on a process in the Assembly, the Rules may prescribe a procedure for the envisaged process. What the Rules may not do is to thwart or frustrate the steps and thereby negate a constitutional entitlement.'*⁴⁶

Thirdly, the Court confirmed that questions before the Programme Committee are to be decided according to majority vote - the Constitution does not require consensus.⁴⁷

Fourthly, the Court recognized that *"(l)obbying, bargaining and negotiating amongst political parties represented in the Assembly must be a vital feature of advancing the business and mandate of 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. That is so, because our Constitution is supreme and demands that all law and conduct must be consistent with it. We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members serving on*

⁴⁵ *Ibid* at par 57

⁴⁶ *Ibid* at par 60

⁴⁷ *Ibid* at para 50 'The plain meaning of Rule 129(2)(d) seems to be that any question before the Programme Committee must be decided by a majority vote subject to the chairperson having a deliberative and a casting vote in the event of an equality of votes. Strange as it may seem, the applicant, so too the Speaker and the Chief Whip, submitted that the Programme Committee takes decisions, not by vote, but by consensus. They contended that consensus in decision-making was a practice which the Programme Committee followed. If there was no consensus, no decision would be arrived at and the Programme Committee would consider its deliberations deadlocked. '

the Programme Committee or any other committee of the Assembly. A vote on a motion of no confidence in the President must occur in the Assembly itself."⁴⁸

2.4.6 In two cases in recent years, ***Lekota and Another v Speaker of the National Assembly and Another***⁴⁹ and ***Malema and Another v Chairperson of the National Council of Provinces and Another***⁵⁰ the court was called upon to determine whether speech that had been uttered in Parliament was protected by the freedom of speech guarantee in the Constitution or whether it forfeited such protection on account of being 'unparliamentary'. In these cases the court came to different conclusions based on the facts before them (it found in favour of Malema and against Lekota) but its decisions were based on similar reasoning.

In *Malema v NCOP*, Julius Malema MP, leader of the Economic Freedom Fighters (EFF) challenged the ruling by NCOP Chairperson, Thandi Modise, that it was 'unparliamentary and did not accord with the decorum of the House' to say in Parliament, during the joint sitting of the State of the Nation debate in June 2014, that the ANC government had massacred mine workers at Marikana, in that the police who killed them represented the ANC government. Modise had asked Malema to withdraw his statement. He refused and was ordered to leave the Assembly. Apart from asking the court to review and set aside her rulings that his statement was 'unparliamentary and did not accord with the decorum of the House', and that he withdraw from the House, Malema sought an apology, as well as an interdict to stop her '*abus(ing) her powers to protect the governing party against lawful criticism in the Parliamentary debate*'⁵¹.

The Court in *Malema* referred to the *Lekota* case where it considered a similar matter. In that case, COPE MP Mosuia Lekota had stated in a debate in May 2012 that the silence and inaction of the Presidency around the behaviour of the ANC (relating to artist Brett Murray's painting of President Zuma, called 'The Spear'), which in his view undermined the judiciary and constituted a violation of Zuma's oath of office as President. The Court found that Lekota's remarks constituted a serious attack on the office of the President and

⁴⁸ *Ibid* at par 58

⁴⁹ 2012 ZAWHC 385

⁵⁰ 12189/2014 [2015] ZAWCH 39 15 April 2015

⁵¹ *Ibid* at par 6

that the Speaker had properly exercised her discretion that the appropriate course for Lekota would have been to bring a substantive motion if he wanted to draw to the attention of the House any improper conduct by the President, a minister or another Member,

The court in *Malema* quoted the judgment in *Lekota* that it was a trite principle that *'the Speaker although affiliated to a political party, is required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament'*⁵². The Court continued *'(w)hen presiding, ...the Speaker has to maintain order and apply and interpret its rules, conventions, practices and precedents. In so doing, the Speaker should jealously guard and protect the members' rights of political expression entrenched in the Constitution'*⁵³.

The Court pointed out - as with the *Lekota* case – that two constitutional provisions had great significance in the matter. Firstly, section 58(1)(a) of the Constitution provides that 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'*. Secondly, section 42(3) provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution which it does *inter alia 'by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action'*.⁵⁴ Furthermore, the Court said that underpinning these provisions are other equally fundamental provisions of the Constitution including section 1(d) which entrenches as a founding value *'a multi-party system of democratic government, to ensure accountability, responsiveness and openness'* and section 16(1) of the Bill of Rights which guarantees the right to freedom of expression including the right to receive or impart information or ideas.

The court concluded that Rule 44 of the Rules of the National Assembly echoes the constitutional guarantee of the right to freedom of speech and debate in the National Assembly in stating that *'... there shall be freedom of speech and debate in or before this*

⁵² *Ibid* at par 6

⁵³ *Ibid* at par 6

⁵⁴ *Ibid* at par 11

*House and any joint committee of Parliament, subject only to the restrictions placed on such freedom in terms of or under the Constitution, any other law or these Rules*⁵⁵.

The Court noted that the primacy of an MP's right to freedom of speech has been consistently recognised by courts, illustrated by the portion of the judgment in *Speaker of the National Assembly v De Lille and Another* that '(t)he right of free speech in the Assembly protected by s. 58(1) is a fundamental right crucial to representative government in a democratic society. Its tenor and spirit must conform to all other provisions of the Constitution relevant to the conduct of proceedings in Parliament'.⁵⁶

The Court noted that the presiding officer had ultimately invoked Rule 14G of the Joint Rules of Parliament in ordering Malema to withdraw from the House. The Rule provides that 'if the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules, or that a member is in contempt of or is disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, he or she may order the member to withdraw immediately from the Chamber for the remainder of the sitting'⁵⁷.

According to the Court, '(t)he paramountcy of the Constitution in regard to proceedings in Parliament and the role of judicial scrutiny ... has been authoritatively emphasised, both in *Lekota* and, as appears from the following statement in *De Lille* - 'No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.'⁵⁸

In the *Lekota* case, the court had also made it clear that the duty of overseeing debates in Parliament required particular skill that was best dealt with by presiding officers. In the

⁵⁵ *Ibid* at par 12

⁵⁶ *Ibid* at par 14

⁵⁷ *Ibid* at par 17

⁵⁸ *Ibid* at par 18

Malema case, the Court concluded that after, amongst other things, '*making due allowance for the deference which must be shown by the courts to the decisions of the Speaker in their area of expertise and responsibility*', Malema's statement was nevertheless not 'unparliamentary'. In this regard, the presiding officer had argued that Malema was effectively accusing members of the National Assembly of being mass murderers as many members of the Assembly were members of the executive but the court concluded that Modise's interpretation of what Malema had said was unwarranted and that the expansive meaning given to the term "government" would place severe limitation on future debates in the National Assembly.

The above-mentioned cases inevitably raise important questions around the appropriate parameters of judicial scrutiny of matters concerning Parliament. Some commentators raise the possibility that the courts may in certain cases be exceeding their mandate and that there has been an over-reliance on taking the business of Parliament to the courts, potentially leading to "judicial creep". There will likely be differing opinions on the correctness of court judgments relating to the appropriate intrusion into Parliamentary matters by the judiciary yet the question may arise of how the courts are to be challenged when they exceed their mandate and do in fact intrude in an unwarranted manner. This is an aspect that will require attention both within Parliament and more broadly within government.

In this regard, Davis J in the *Mazibuko* case before the Cape High Court warned that '*..... (a)n overreach of the power of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the State deal with these matters, can only result in jeopardy for our Constitutional democracy*⁵⁹. The Court in the *Malema* case also noted that the power of judicial review did not mean that the courts '*should readily substitute their opinions for those of Parliament or Parliamentary officials in relation to matters entrusted to them.*⁶⁰

⁵⁹2013(4) SA 243 WCC

⁶⁰*Supra* at note 51 at par 19

3. SPECIFIC ISSUES FACING PARLIAMENT TODAY

3.1 Controversies Around the Speaker In South Africa

Allegations of political bias against the Speaker are not unique to South Africa and happen all around the world. Such allegations may form part and parcel of competitive politics or they may represent serious signs of a malfunctioning Parliament.

The office of the Speaker (and Deputy Speaker) of the National Assembly is established under section 52(4) of the Constitution. The Constitution is silent on the role and powers of the Speaker, and recourse must be had to the Rules of the National Assembly to get some direction. However, the Speaker enjoys a high-status position in the national protocol as the head of one of the three branches of government – and in terms of section 90(1)(d) may fulfil the role of Acting President (after the Deputy President, Minister designated by the President and Minister designated by the cabinet) when the President is absent from South Africa or unable to fulfil his or her duties. (A detailed description of the Speaker's role and status in South Africa is provided in section 3.4 below.)

Apart from specific controversies that may arise around a Speaker at any given time, it is critical to examine the role and characteristics of the Speakership in South Africa since the Office plays a fundamental role in upholding the rules, dignity and integrity of Parliament and therefore has direct bearing on the performance of Parliament's constitutional mandate.

A brief description of recent controversies around the current Speaker follows as these inform some of the issues currently being considered in debates around the Speakership in South Africa today.

In September 2014, opposition parties brought a motion of no confidence against Speaker Baleka Mbete on the grounds of perceived political bias, her leadership role in the ANC (she is the National Chairperson of the ANC and a member of its Parliamentary caucus), and her 'compromised' executive oversight (it is alleged that she is on record undermining the Public Protector's report on President Zuma's spending on his private homestead,

Nkandla).⁶¹ Opposition parties specifically also criticised her conduct during Presidential Question Time on 21 August 2014, saying that she failed to maintain order during a 'tense' situation; that she allowed President Jacob Zuma to evade questions around Nkandla⁶²; behaved unfairly in removing the entire EFF caucus from Parliament and suspending them without remuneration and also for her decision to call police to the Parliamentary precinct.

However, the motion of no confidence in Speaker Mbete was defeated by the ANC's Parliamentary majority.

Speaker Mbete's conduct during the President's State of the Nation Address (SONA) on 12 February 2015 also came under scrutiny in a session that saw high drama and emotion. SONA was marked by the EFF's disruptive behaviour (the party's stance appears to be that for as long as Zuma fails to account to Parliament for Nkandla and follow the Public Protector's remedial action, it will 'protest' in Parliament). Its MPs refused to accept the Speaker's ruling after she had dismissed EFF MP's points of order and points of privilege (they wanted Zuma to account for Nkandla spending), on the basis that it was irrelevant to the proceedings, but other MPs defied her ruling and continued to raise the same points of order and privilege. The EFF members did not heed the Speaker's call to leave the chamber, and she had not specifically named them. The Speaker then called police into the House to remove the EFF MPs. The DA MPs walked out in protest a short while later

⁶¹ See for example <http://www.da.org.za/2014/09/opposition-tables-motion-confidence-baleka-mbete/>

⁶² See EFF affidavit found at <http://constitutionallyspeaking.co.za/eff-founding-affidavit-in-case-against-speaker/>: "It is... mandatory for the President to attend Parliament, at least once per term. The reason for the President's attendance in Parliament is to respond to questions asked by members of Parliament, which include members of the opposition political parties such as the EFF. The President cannot decide on his own whether or not he wants to come to Parliament. Also, the President cannot decide which questions he will answer. He is required by law to attend Parliament and answer the questions put to him when he is in Parliament. Further, the answers given by the President when he has been called to Parliament to account must be meaningful. The Speaker, as the leader of the National Assembly, is constitutionally obliged to ensure that the answers given by the President are meaningful. If the President fails to provide meaningful answers in Parliament to the questions put to him, the fundamental purpose of calling the President to account in the National Assembly is defeated.....It was therefore incumbent on the Speaker to require the President to explain when he intended complying with the clear findings of the Public Protector since I had raised the matter pertinently. The Speaker failed to request the President to answer my question directly. In asking the question which I did, I was not only representing the view of the EFF; I was also raising an important issue in the public interest and in relation to the mandate of an important institution of our constitutional order, namely, the role of the Public Protector. If the reports of the Public Protector are ignored, as seems to have happened in this instance, without any rational grounds and without judicial sanction, the essence of a vital constitutional organ will be eroded. The essence of my question was to request the President to provide an explanation of the steps that he intended taking in order to give effect to the clear and unambiguous findings and recommendations of the Public Protector. This question also spoke to the issue of signal importance about the President's respect for constitutional institutions."

after failing to get answers from the presiding officers regarding the identity of the police or security personnel that had entered the chamber to remove the EFF MPs. Thus, SONA took place in the absence of the two largest opposition parties in Parliament.

Before SONA began, there was also a fracas over the jamming of signal devices in the House. The Speaker was criticized for inhibiting freedom of speech and the right of access to Parliament by allowing the executive to place devices in Parliament which had the effect of disabling cell-phone and internet signals.

Speaker Mbete also appears to be seeking higher political office and has reportedly said that South Africa 'has been ready for a women president for a long time' and that "(a)s a cadre of the African National Congress and as a leader in society', she is 'ready to play any role' she is asked to play by her party.⁶³ It has been argued that in the case where a Speaker seeks higher political office, he or she might be prone to favouring the party on which s/he is reliant to advance those political ambitions and that this is potentially at odds with the duty to act impartially.

On the other hand, the Speaker and ANC have drawn attention to the disruptive behaviour of political parties, such as the EFF, who refuse to obey her rulings and are thereby undermining both the Speaker's and Parliament's authority. They maintain that her decisions around calling police to Parliament and on discipline are lawful and fall within her powers to maintain order in the House.

On a separate occasion, Speaker Mbete commented as follows: *"From time to time, the assertion has been made that the Speaker is not insulated from party politics. The evidence suggests that this argument is baseless and redundant. The Speaker is guided by the Constitution, and the Rules, and therefore acts within the ambit of these. The Rules are applied in equal measure to all members....But I have to say ask: how does any person remain non-partisan in a developmental state – I cannot be neutral about democracy. I do not feel it is stretching the nature of the Office in which I serve to champion democracy and social and economic transformation"*.⁶⁴

⁶³ See <http://www.sowetanlive.co.za/news/2014/09/17/baleka-mbete-ready-to-be-president>

⁶⁴ See Baleka Mbete's address to SANEF at http://www.parliament.gov.za/live/content.php?Item_ID=6531

3.2 History of the Speakership and Experiences From Around the World

The term 'Speaker' originated in 14th century England in the role played by early speakers in Westminster who served as the interface between Parliament and the Crown⁶⁵. The requirement that the Speaker exhibit a high degree of impartiality emerged during the struggle for power between the House of Commons and the Crown in 1642, and crystallised in 1841 when a liberal Speaker was elected by a House dominated by conservatives. Thus, *the 'Speaker is, or should be, one of the trustees of a nation's liberties. On his fair interpretation of the rules of procedure depends the protections of the rights of members. In protecting these rights, he is protecting the political freedom of the people as a whole'*.⁶⁶

The main roles of the Speaker in most countries around the world is to preside over all sittings in the House, to maintain discipline and order, to give permission to members to ask questions and generally to embody the administrative authority and leadership of Parliament⁶⁷. While great importance is attached to maintaining the neutrality of the office - the Speaker is expected to act with fairness and without favouritism - countries differ in how they ensure such impartiality. The United Kingdom, the home of the Westminster system of government, has developed a strong set of traditions concerning the Speaker of Parliament; these have been incorporated in varying degrees by Commonwealth countries such as Canada, Australia, Uganda, India and South Africa. On the other hand, some countries with presidential systems such as the United States do not require the Speaker to serve in a non-partisan capacity.

In **BRITAIN**, with Parliament's role changing from an appointed to a representative body after the 17th century English Civil War and with the decline of the monarchy, the function of the Speaker was redefined and concrete steps were taken over the years to protect the Speaker's neutrality.⁶⁸ The House of Commons elects the Speaker from one of its

⁶⁵ See Raju and Nair 2 NUJS Law Review (2009) and also Parliament of RSA . National Assembly Guide to Procedure, 2004

⁶⁶ Philip Laundy, The Office of the Speaker in the Parliaments of the Commonwealth (10) 1984 as quoted in Hon Margaret Wilson, Reflection on the Roles of the Speaker in New Zealand 22 NZULR 545 (2007)

⁶⁷ See also G. Bergougnous, 'Presiding Officers of National Assembly Parliamentary Assemblies : A world comparative study http://www.ipu.org/PDF/publications/PRESIDING_E.pdf

⁶⁸ Supra at footnote 66

members who then resigns from his or her political party and even after their tenure as Speaker has expired takes no further part in politics⁶⁹. By giving up party affiliation and public political views, the British position is concerned to ensure the recognition of impartiality, and is predicated on a strong set of formal rules and conventions that seek to promote the impartiality underlying the Speaker's office⁷⁰. According to convention the constituency of the Speaker is not contested by political parties and the Speaker is returned unopposed as an MP.

The British ethos has been eloquently described as follows: *“And this the British Parliament believes to be right ... that, while the House of Commons is a place where, rightly, the fiercest controversy takes place, it shall take place within an ambit of mutual respect for each other’s personal honour, for ordered and regular procedure, and for the protection of all opinions, even those of the smallest minority. And because this conception lies at the heart of Parliamentary democracy, Parliament selects one of its Members, divests him of his political past, and hands over to him the dignity and authority to preserve this fundamental idea.”*⁷¹

In **INDIA**, the role of the Speaker draws historically from the Speakership in Britain. The Speaker is obliged to conduct the business of the House (the Lok Sabha) with fairness and neutrality, to represent the House with dignity and to embody the nation's collective expectations from government⁷². As such the Speaker is given considerable powers; including maintaining discipline, regulating discussions, permitting members to speak and determining the length of this, and allowing motions and resolutions to be brought. The Indian Constitution and Rules of Procedure, along with practices and conventions gives the Speaker various powers to enable the smooth conduct of Parliamentary proceedings, and a constitutional provision that states that the Speaker's salary and allowances will not be voted by Parliament (but charged to a specific fund) with the aim to protect independence and impartiality.⁷³ A convention has also evolved over the years whereby the ruling party nominates its candidate after informal consultations with the Leaders of

⁶⁹ *Ibid*

⁷⁰ *Ibid*

⁷¹ Horace King, "The Impartiality of the Speaker," *The Parliamentarian*, Vol. 47 (1966), p. 131.

⁷² *Supra* at footnote 66

⁷³ See <http://speakerloksabha.nic.in/roleofthespeaker.asp>

other Parties and Groups in the House. This aims to ensure that once elected, the Speaker carries the respect of all parties in Parliament. But unlike Britain, the Speaker is not required to waive party membership and the Speaker is typically a member of the majority party in Parliament.

Given that the Speaker has two identities – firstly, that of a neutral head of Parliament and, secondly, as a party member⁷⁴ the question has arisen as to how best the Speaker reconciles political neutrality with political loyalty. Since the Speaker may also wish to seek re-election to his or her constituency and will often depend on the party for sponsorship, attaining true independence is further compromised. Nevertheless, the neutrality of the Speaker is expected from the office in order to maintain the sanctity of that Office. The Speaker, through his or her actions, is expected to maintain the confidence of all sections of the Parliamentary house⁷⁵.

Similarly, in **CANADA**, the roots of the Speakership can be traced back to 14th century England. The requirement that the Speaker should display neutrality in the course of his or her duties was embraced early in the country's political life such that *'the presence of an impartial person devoted to applying the rules of procedure fairly and protecting the privileges of all members is generally recognized as an essential ingredient for any legislative body worthy of the name'*⁷⁶. Until the mid-1980s, the Prime Minister nominated the prospective Speaker (usually after consulting the Leader of the Opposition) and the House approved the nomination but in an historic move in 1985 a secret ballot was introduced - a measure aimed at strengthening independence. Once elected, the Speaker does not take part in party activities.⁷⁷

⁷⁴ *Supra* at footnote 66 at page 129

⁷⁵ See <http://www.lawteacher.net/free-law-essays/administrative-law/speaker-of-the-house-be-independent-administrative-law-essay.php#ixzz3XNncPOcT>

⁷⁶ See Gary Levy, A Night To Remember: The First Election of a Speaker by secret ballot , Canadian Parliamentary Review/Winter 1986-7 and Gary W. O' Brien, A declaration of ethics for presiding officers, Canadian Parliamentary Review/ Autumn 2011,

⁷⁷ Balloting continues until a single person receives at least 50 percent of the votes plus 1. Every member of the House is eligible to be elected as Speaker, and must withdraw if s/he does not want to serve as Speaker. (Night To Remember: The First Election of a Speaker by secret ballot – Gary Levy, Canadian Parliamentary Review/Winter 1986-7) In 1965 an amendment to the Standing Orders strengthened the authority of the Speaker by eliminating appeals to the House from the Speaker's decisions. The main source of the Speaker's authority is the confidence of members of the House of Commons. While she or he can set the tone

The Speaker's reputation for fairness has been celebrated at various times in the country's history and one of Canada's distinguished Clerks (J.G. Bourinot) wrote in 1878 that, *'it must be admitted that no-one can justly give an instance where a Canadian Speaker, in these later times, has ever been influenced in his conduct in the chair by the fact that he was nominated and elected by the majority in the House. It is satisfactory to know that the moment a Canadian politician becomes the presiding officer of the Commons, he lays down all his political prejudices and discharges the duties of the office with fidelity to the constitution and impartiality to all parties'*⁷⁸. Similarly, the 1982 Canadian Lefebvre Committee on Standing Orders and Procedure Report stated that: *'Thanks to the successive speakers who have occupied the Chair of the House of Commons, the Canadian Speakership has developed a tradition of impartiality and devotion to duty of which we can all be proud'*⁷⁹. It has been said that there have been very few instances where the ethical conduct of Canadian Speakers has been questioned⁸⁰.

In **AUSTRALIA**, the Speaker is responsible for enforcing 'the observance of all rules and preserving order in the proceedings of the House'⁸¹. Election to speakership is conducted by secret ballot and effectively predetermined along party lines⁸². The Speaker is required to *'exhibit a high degree of impartiality, to provide opportunities to all sections of the House to participate in the deliberations of the House, and to display an objective interpretation of the Standing Orders and Precedents, and consistent rulings for all Members'*⁸³.

The conduct of the Speaker of the House of Representatives in Australia has however proved to be a contentious matter, specifically in the context of the competitive two party system. It has been suggested that *"(d)espite protestations to the contrary, Australian speakers have found it quite difficult to maintain high degrees of impartiality, provide all*

of the proceedings by maintaining decorum and order, the Speaker cannot impose his or her will on the House.
(<http://www.parl.gc.ca/About/Parliament/Speakers/Hoc/index-e.htm>)

⁷⁸ J.G. Bourinot, 'Mr. Speaker'. The Canadian Monthly and National Review, January to June, 1878 p. 133 quoted in Gary W. O' Brien, 'A declaration of ethics for presiding officers, Canadian Parliamentary Review/ Autumn 2011, G

⁷⁹ House of Commons, Special Committee on Standing Orders and Procedure, Fourth Report, December 3, 1982

⁸⁰ See *supra* at footnote 78

⁸¹ Quoted in "A Question of dissent – Dissent from the Speaker's Rulings in the House of Representatives, 1983 to 1994

⁸² See *supra* at footnotes 83

⁸³ Quoted from Harris, IC (editor) 2005 House of Representatives Practice (5th ed) A Question of Dissent p 7-8

*with equal and adequate opportunity and present objective and consistent rulings.*⁸⁴ It has been argued that Australian speakers have had to resign when government felt they acted “too leniently” towards the opposition⁸⁵.

Controversies have been brought to the fore largely because, unlike many of its Westminster counterparts, the rulings of the Speaker in Australia are subject to appeal, in a process known as dissent. It has been argued that the dissent motion politicises the Speakership, contributing to a more partisan chair. Commentators further observe that motions of dissent have been used both as an appeal and also as a political tool to undermine the authority of the Speaker. On the other hand, it has been argued that dissent motions are an accepted feature of the House and part of parcel of Australian politics⁸⁶.

In the **UNITED STATES** the office of the Speaker has developed markedly differently to the speakership in Westminster-styled legislatures, and reflects a distinctly partisan approach. By tradition the Speaker is the head of the majority party in the House of Representatives, plays a decisive role in defining and implementing the House's legislative programme and actively promotes the party's legislative agenda. The Speaker is responsible for both the logistical administration of the institution, being the leader of the legislature, and for the majority party's political and legislative objectives, being the highest ranking member of the party. The Speaker is effectively both the presiding officer and the chief whip. The Speaker exerts direct or indirect influence on the appointment of committee members belonging to his or her party and on chairpersons⁸⁷. The Speaker has the power to send draft bills back to the committee and thus has great influence over the legislative process.

Unlike in the British system, typically the Speaker does not personally preside over debates (this duty is delegated to members of the House from the majority party), nor does she or he participate in debate and rarely votes (despite having the right). When chairing a

⁸⁴See *supra* at footnotes 83

⁸⁵See *supra* at footnotes 83

⁸⁶See *supra* footnotes at 83

⁸⁷ G. Bergougous, 'Presiding Officers of National Assembly Parliamentary Assemblies : A world comparative study
http://www.ipu.org/PDF/publications/PRESIDING_E.pdf

sitting, however, the Speaker is required to act impartially and guarantee other parties their legitimate right to expression⁸⁸.

3.3 Main Issues for Debate Regarding the Position of the Speaker in South Africa

The following questions have been raised in South Africa:

- (1) What are the roles, functions and powers of the Speaker?
- (2) Is the Speaker required to be neutral and impartial or can s/he promote the party agenda?
- (3) If neutrality is required, how far should South Africa go in protecting this? For example, should the Speaker be drawn from outside of Parliament or not? Should the Speaker be required to resign from the party? If not, should the Speaker continue to be a party member but not be a member of its caucus or have to face party discipline? On the other hand, does the fact that the Speaker continues as an active party member automatically mean that she or he will not uphold his/her mandate effectively, independently and maintain the confidence of all parties?
- (4) What does “neutrality and impartiality” entail in practice? How best should the rules of Parliament protect the impartiality of the Speaker? This is particularly pertinent as there are draft NA Rules regarding the removal of the Speaker as well as new provisions clarifying his/ her powers in debate, and freedom of expression matters as well in discipline.
- (5) Should Parliament - and therefore the Speaker – take steps to consider and reflect the views of minority parties in procedural processes and decisions and in what manner?

⁸⁸ G. Bergougous, 'Presiding Officers of National Assembly Parliamentary Assemblies : A world comparative study
http://www.ipu.org/PDF/publications/PRESIDING_E.pdf

While the South African Constitution and Rules of Parliament do not require the Speaker to resign from the party, there are clear indications in the Rules, Constitution and court judgments that (in accordance with the Westminster tradition and unlike in the United States) it is an impartial and neutral post⁸⁹. However, there are no clear answers regarding the most appropriate manner to protect the Speaker's impartiality. This is an issue that requires further consideration. Below are some factors that may inform the debate.

Firstly, there arguably does not appear to be sufficient support for the proposal (presented by some minority parties) that the Speaker should be drawn from outside Parliament, and be a non-politician such as a judge. It can be argued, for example, that a judge's skill set is insufficient and inappropriate to deal with and lead Parliamentary business. A Speaker is required to respond on the spot to political issues facing the House and must be able to read its mood; this task is more suited to an experienced politician. On the other hand, there is also no guarantee that someone elected from outside the House will necessarily be independent and not subject to political influence.

Secondly, whether there is a need for the Speaker to formally withdraw from politics on election or not is the subject of disagreement amongst commentators. Those who argue against resignation say that it is a particular manifestation of the British system and unrealistic in other contexts. Furthermore, they argue, there are other ways in which modern Parliaments have evolved to protect the Speaker's impartiality through rules and procedures. Foremost, on taking office, the Speaker makes a commitment to being impartial and placing Parliament's interest above partisan concerns. The Speaker must also demonstrate neutrality through his or her actions and decisions and maintain the confidence of the House at all times.

Thirdly, the fact that the Speaker of the National Assembly has been drawn from the majority party in itself does not compromise his or her position as Speaker - previous speakers have clearly demonstrated that one can place Parliamentary business (and impartiality) at the centre of one's role even while serving as an ANC MP. However, with Speaker Mbete, the question has arisen whether she falls into a different category because she is Chairperson of the ruling party, and whether the conflict of interest involved

⁸⁹ See Pierre De Vos, 'The Speaker's Dilemma' at <http://constitutionallyspeaking.co.za/the-speakers-dilemma>

here is reconcilable. Some are of the opinion that even if she is acting impartially, she will arguably be seen as favouring her own party.

The question of whether the Speaker can hold an official or senior position in a party requires careful consideration. Some commentators take the view that if speakers hold senior positions, they will be under enormous pressure to serve the party and the Executive, and not Parliament as a multi-party institution. This places them in a difficult position and also has the potential to hinder their Speaker-related duties⁹⁰. Others take the opposite view - that because the Speaker holds a senior position in the party she or he would have greater political clout which may well have the effect of strengthening Parliament's duty to conduct executive oversight - Government is more likely to respond to senior political figures. Yet at the same time, the fact that a Speaker is so deeply entrenched in the ruling party and holds one of the highest party positions could create the perception of bias in matters where questioning the majority party in a public forum is regarded as an important component of accountability.

Fourth, commentators emphasize that it is difficult for the Speaker in the South African system to avoid partisanship because s/he is appointed by the party in a closed list system and can be removed from that party list as an MP and thereby as Speaker.⁹¹ Thus, the following proposals have been presented as potential safeguards – (1) rules should prohibit or limit the possibility of the Speaker being removed during tenure; (2) rules should prohibit the Speaker from being a member of the caucus, (3) the Speaker on appointment should resign from executive positions in the party while remaining party representative⁹²; (4) the Speaker should be exempt from replacement under the closed party list.⁹³

In some countries, such as Uganda, the Speaker does not attend party caucuses so that there is at least no formal influence and bias is reduced, or seen to be reduced. This position recognizes that when the Speaker attends party caucuses (which might discuss policy before Parliament or strategies in Parliament) it creates the perception that the

⁹⁰ See Anele Mtwesi, 'The Speaker's Role in the South African Parliament', Helen Suzman foundation

⁹¹ See Pierre De Vos, 'The Speaker's Dilemma' at <http://constitutionallyspeaking.co.za/the-speakers-dilemma> and Anele Mtwesi, 'The Speaker's Role in the South African Parliament', Helen Suzman foundation

⁹² *Ibid*

⁹³ See Mtwesi *ibid*

Speaker may be unduly influenced. On the other hand, it has also been argued that, attendance or non-attendance may have no effect on the Speaker in practice; as being drawn from the same party the Speaker may already hold a certain belief⁹⁴.

Within the debate on how best to safeguard the Speaker's impartiality, some commentators stress that the paramount consideration is that of appointing a Speaker with integrity who is mindful of his or her duties to Parliament as an institution, and appropriately balances the delicate relationship between role as Speaker vis-a-vis political party, government, opposition and public⁹⁵.

In the final analysis, it would appear that one of the major indicators of the integrity of the South African Parliament is the ability of the Speaker to act impartially and to maintain the confidence of the House. One might ask: what is the recourse when the Speaker is perceived by opposition parties to be blatantly favouring the ruling party and/or the executive? The most obvious consequence when a Speaker loses the respect of opposition members in particular is that the Speaker will rapidly find it impossible to maintain order in the House and in debate. When that happens, the Speaker is manifestly no longer capable of carrying out his/her assigned duties, and in due course may have no option but to resign. The fact is that any presiding officer critically needs the respect and support of all members of Parliament.

Furthermore, it is imperative that the House retains the authority granted to it by the Constitution so that it may function smoothly and effectively. In this regard, its rules and orders must be fairly and effectively observed and applied and its authority must be respected by all members. If the House is not functioning smoothly, it is for the House as a collective to find solutions. Furthermore, all parties must respect and participate in processes and feel they have a stake in the workings of the House.

⁹⁴Speech by Speaker of the Ugandan Parliament

⁹⁵*Ibid*

3.4 The Position of the Speaker in South Africa

3.4.1 The Constitution provides for the election⁹⁶ and removal of the Speaker as follows: at the first sitting of the National Assembly after an election, the House elects a Speaker from one of its members in a secret ballot. The Chairperson of the National Council of Provinces is elected through a similar process. The Speaker of the NA may be removed from office by a resolution supported by a majority of NA members⁹⁷. Since nothing more than majority support is needed for removal, it is argued that this could more easily allow politically motivated removals – for example, if the Speaker is punished by the majority party for appearing to favour minority parties. The removal provision is currently being reconsidered in the Rules Review process (and is discussed in further detail below).

While the Constitution itself does not explicitly stipulate the attributes, role and functions of the Speaker, as administrative leader of the National Assembly, he or she has the implicit duty to maintain an environment in which the Assembly can properly fulfil its constitutional mandate⁹⁸ - to pass legislation in a manner that enhances participatory and representative democracy and to hold the executive to account for its conduct and policy implementation.

Section 57 of the Constitution states that the '*NA may determine and control its own internal arrangements, proceedings and procedure and make Rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement*'. As discussed above, the NA's right to

⁹⁶ Section 52(4) of the Constitution, 1996

⁹⁷ Section 52 and 64 of the Constitution read with Part A of Schedule 3 stipulates the election process for the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (NCOP) respectively. If more than one person is nominated, a vote must be taken by secret ballot and the person receiving the majority of votes must be declared Speaker by the presiding officer. If no person attains a majority, voting continues according to a process of elimination until a single candidate receives a majority of votes. The same Speaker can be elected again for a further term of office.

⁹⁸ Section 44 gives the National Assembly the power to amend the Constitution; to pass legislation (including a matter listed in Schedule 4 but excluding...a matter listed in Schedule 5); and to assign legislative powers to another branch of government, except the power to amend the Constitution. Section 55 of the Constitution states that (1) In exercising its legislative power, the National Assembly may – (a) consider, pass, amend or reject any legislation before the Assembly; (b) initiate or prepare legislation, except money Bills. Section 55 (2) provides that '(t)he National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of (i) the exercise of national executive authority including the implementation of legislation and (ii) any organ of state. The National Assembly passes legislation and holds the executive to account.'

regulate its business is not an absolute or unfettered right – the NA rules and processes must promote and reflect the above-mentioned constitutional values.

[Annexure 1 contains a list of other presiding officers and officers of Parliament]

3.4.2 Rules of the National Assembly and the office NA Guide to Procedure relating to The Speaker

In 2012, the NA's Subcommittee on the Review of Rules was given a mandate to revise the NA Rules to ensure that they comply with constitutional prescripts. This process is currently taking place.

While there is no single, specific section in the current NA Rules regarding the Speaker, the Rules in various chapters give her or him the following powers and duties:

- As the administrative head of the House, the Speaker has final authority on the interpretation and application the Rules of the NA (subject to judicial review). Rule 2(1) gives the Speaker the power to give a ruling (or frame a Rule) on any situation that is not covered by the Rules. This Ruling is final until a meeting of the Rules Committee makes a final determination. (Rule 2(2))
- The Speaker (as the presiding officer) has the power to maintain order in the House and to apply discipline (Chapter Five of the Rules)
- The Speaker presides over House meetings and debates and is the custodian of Parliamentary privileges and immunities such as freedom of speech (Chapter Five of the Rules)

The 2004 **Guide to National Assembly Procedure**⁹⁹ elaborates extensively on the Speaker's role which accordingly must be executed in manner that displays fairness and impartiality, protects the rights of all parties and advances the interests of Parliament. The NA Guide states the following:

⁹⁹*Supra* at footnote 83

- The Speaker, as head and representative (with the Chairperson of NCOP) of the legislative arm of state has manifold responsibilities that embrace constitutional, statutory, procedural and administrative powers and functions. Although affiliated to a political party, the Speaker is required to perform the functions of the office fairly and impartially in the interests of Parliament and the Assembly and to protect the rights of all parties.
- The duties of a Speaker fall into 3 categories – (1) presiding over sittings of the Assembly, maintaining order, applying the rules, conventions, practices and precedents; (2) acting as representative and spokesperson for the Assembly and Parliament in the outside world and (3) chief executive officer for Parliament. In respect of (3), section 5(1) of the Financial Management of Parliament, Act No 10 of 2009 states that the 'executive authority of Parliament is the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, acting jointly. The executive authority is accountable to Parliament for the sound management of Parliament according to section 5(2), who must also act in accordance with the Code of Ethics contained in the Act. According to the Act, the Secretary to Parliament serves as accounting officer. The Act regulates the financial management of Parliament to ensure that it is in line with the Constitution and that money is spent efficiently. To this end, the Act entrusts persons with specific responsibility to manage Parliament's finances.
- The Speaker interprets and applies the rules and responds to members points of order and gives rulings where necessary. In giving a ruling on procedure the Speaker is guided by the Rules and conventions as well as precedent. It is in her discretion to hear argument on a point of order and to decide whether she is ready to give a ruling.
- The Speaker maintains order in the House, ensures compliance with the rules and practices of the House and in general ensures the smooth conduct of proceedings. The Speaker is required to act fairly and to ensure that the rights of all parties, including minority parties, are protected. In all his or her actions, the Speaker must uphold the dignity and good name of the House.
- The Speaker is the guardian of rights and privileges in the House. These privileges and immunities afford members the freedom to raise important and contentious issues in Parliament without fear or prosecution. (The primary privileges are the

right to freedom of expression, limited by the Assembly's own rules and practices and to unfettered access by MPs to Parliament.)

The New Draft Rules¹⁰⁰ (still subject to deliberation by the Subcommittee on the Review of Rules) introduces a new section relating to the Speaker and provides a more comprehensive list of powers and duties. There is also a new clause seeking to prevent the dismissal of the Speaker on purely political grounds by requiring that the motion for removal stipulate the specific grounds on which the Speaker is to be removed.

The Draft Rules, inter alia, provide that:

'17 A (1) The Speaker must

(a) ensure that the National Assembly provides a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action in accordance with section 42(3) of the Constitution;

(b) ensure that all parties represented in the National Assembly participate effectively and efficiently in the proceedings of the Assembly and its committees and forums and facilitate public involvement in the processes of Parliament in accordance with sections 57 and 59 of the Constitution;

(c) observe and promote compliance with the principles of co-operative governance and intergovernmental relations in accordance with Chapter 3 of the Constitution; and

(d) whenever possible, consult with relevant office-bearers and structures within Parliament to achieve the efficient and effective functioning of Parliament in a transparent and accountable manner.

(2) The Speaker shall maintain and preserve the order of and the proper decorum in the House, and uphold the dignity and good name of the House.

(3) The Speaker is responsible for the strict observance of the Rules of the House and shall decide questions of order and practice in the House.

(5) The Speaker shall act fairly and impartially and ensure that the rights of all parties are protected.

¹⁰⁰Version dated February 2015

The House may remove the Speaker or Deputy Speaker from office by resolution in terms of Section 52(4) of the Constitution.

(2) A motion for the removal of the Speaker from office must comply, to the satisfaction of the Deputy Speaker, with the prescripts of any relevant law or any relevant rules and orders of the House and directives and guidelines recommended by the Rules Committee and approved by the House, before being placed on the Order Paper, and must include the grounds on which the proposed removal from office is based.”

3.5 Promoting Inclusivity and rights of Minority Parties

Various court judgments (see *DA v Masondo, Doctors for Life, Mazibuko, Oriani Ambrisono* discussed in section 2.4 above) may provide valuable insight on how Parliamentary rules should be applied. While decisions of Parliament are ultimately taken by a majority vote, the Court in a string of judgments has made it clear that minority parties must be given a meaningful opportunity to express their views and to influence decision-making. In *Oriani-Ambrosini*, the Court emphasised the constitutional requirement that the rules of Parliament concerning its business must be exercised “*with due regard to representative and participatory democracy, accountability, transparency and public involvement...*” and that the rules should cater for “*the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy*”¹⁰¹ as required by section 57 of the Constitution.

Therefore, Parliamentary rules seeking to facilitate Parliamentary processes such as debates, motions, questions, Parliamentary programming and so on - and in which the Speaker plays a fundamental role – should take into account various constitutional prescripts and court judgments that give effect to the 'deliberative' and 'inclusive' elements of our democracy. Thus, even if the majority's view on a matter or law is ultimately adopted, it is a constitutional requirement that minority parties (who represent parts of the electorate)

¹⁰¹ In this regard, section 57 of the Constitution gives the NA the power to 'determine and control its own internal arrangements, proceedings and procedures and make Rules and orders concerning its business' – and in doing so, instructs Parliament to have “due regard to representative and participatory democracy, accountability, transparency and public involvement”. *Oriani supra* at footnote 37 at par 62

have a meaningful opportunity to participate and to bear influence. Parliamentary rules must therefore aim to ensure the fair and meaningful participation of minority parties in debates and processes of Parliament¹⁰². Furthermore, the Speaker is required to act impartially when presiding over debates, Question Time and other processes and to ensure that all MPs and parties (and hence the electorate) has a fair chance to participate in proceedings¹⁰³.

3.6 Freedom of Speech

Rule 44 of the NA grants MPs a right to freedom of speech and debate in the Assembly. In countries around the world, this freedom is considered to be the cornerstone of democracy because MPs must be free to discuss and say what they will in Parliamentary chambers; they must be able to discuss contentious issues and to conduct investigations without interference.

While freedom of speech is of utmost importance, this freedom is nonetheless regulated by the Assembly's own rules and practices. Thus, Rule 63 prohibits the use of "offensive or unbecoming language" while Rule 66 prohibits members from reflecting "upon the competence or honour of a judge of a superior court, or of the holders of an office (other than member of the Government) whose removal from such office is dependent upon decisions of this House". The latter rule aims to protect the integrity and independence of judges, and other non-political office bearer such as members of chapter 9 institutions. Generally, the purpose of rules regulating speech in the Assembly is to guide debate so that it happens in an orderly and respectful fashion.

The Speaker, as the guardian of Assembly privileges, must ensure that members feel they can freely express themselves and raise contentious issues in Parliament without reprisal and threat of censure, including removal from the House. Court cases such as *De Lille*, *Lekota* and *Malema* have emphasised the primacy of free speech in Parliament. When applying and interpreting Parliamentary rules relating to freedom of speech in the

¹⁰²See *ibid* Oriania-Ambrosini, see Pierre De Vos at <http://www.dailymaverick.co.za/opinionista/2012-10-10-democracy-it-starts-in-parliament/#.VUjENWb-e2w>

¹⁰³See *ibid*

Assembly, it is of critical importance that the Speaker exercises his or her discretion carefully and judiciously so that the rules are not interpreted in a manner that silences criticism or defamatory statements. In the first instance, it is imperative that the Rules themselves do not give a presiding officer any room to clamp down on free speech.

On the other hand, it can be argued that the Rules themselves should promote robust and expansive debate, drawing in the views of all parties in the House. As discussed above, the Court in *Oriania-Ambrosini* emphasized that although Parliament takes decisions by majority vote and not by consensus, at the same time the rules and processes of Parliament must ensure meaningful participation of all parties in processes and debates.

Therefore it is important to carefully consider not only the current NA Rules, but also the New Draft Rules to ensure that they optimally protect the democratic space, which includes the rights of all parties to engage in debates and Parliamentary processes in a way that protects free speech and opinion optimally.

Some commentators have pointed to the possibility that, within the current NA rules, a ruling that certain language is 'offensive' or 'unparliamentary' can readily be abused and stifle dissent because it is a vague term¹⁰⁴. The New Draft Rules¹⁰⁵ appears to expand the 'definition' of 'unparliamentary language' (see Appendix 3) and should be carefully scrutinized.

The Draft Rules also contain a clause which restrict MPs' rights to reflect on the integrity (amongst other things) of the President, Deputy President and Cabinet (and other members). The draft rules provide that an MP who wishes to bring to the attention of the House unethical or improper conduct of another MP, the President or Deputy President must do so by way of substantive motion, which contains a properly substantiated charge that in the opinion of the Speaker warrants consideration by the House. The Draft Rules also prohibit 'disrespectful' reflections on the House or committees and its proceedings.

¹⁰⁴ See Pierre De Vos at www.constitutionallyspeaking.co.za

¹⁰⁵ Version dates February 2015

The New draft rules elaborate on the “sub-judice” rule – which in its current form (Rule 67) prevents MPs from referring to matters on which a judicial decision is pending. The New draft rule now prohibits MPs from reflecting on the *merits* of matters before courts. It has been alleged by some parties that the sub-judice rule in its current form is at times enlisted to suppress debate.

The New Draft Rules¹⁰⁶ concerning freedom of speech (and limitations) and debate are outlined in **Appendix 2**.

3.7 Maintaining Order and Discipline in the House

Chapter 5 of the NA Rules states that members are subject to the disciplinary powers of the presiding officer, namely, the Speaker. The Speaker has the important task of maintaining order and decorum in the House – in this regard, the NA Rules provide the Speaker with disciplinary powers to address breach of rules or privilege or disorderly conduct. Such disciplinary measures range from ordering an MP to withdraw 'unparliamentary' words to ordering the member to withdraw from Chamber for the remainder of a day's sitting and suspension or adjournment of the proceedings (the latter applies in the case of a 'grave disorder').

The Guide to NA Procedure explains that *“it is in the nature of Parliament that debate can be robust.....It is customary for powers to be used sparingly where possible. Usually where a member has expressed him or herself in a way deemed unacceptable by the Speaker, the relevant members will be instructed to withdraw the expression.....A more serious offence such as defying the authority of the Chair, may lead to a member being directed to withdraw from the Chamber from the rest of the day, and grave offences may lead to longer periods of suspension.”*

These sanctions such as withdrawal and suspension should be considered before the deployment of security personnel or the police, and the use of force to deal with MPs who have transgressed the Rules.

¹⁰⁶Version dates 15 February 2015

In recent times, the Speaker has had to deal with various disruptions in the House by MPs, some of whom refused to abide by her rulings. On three occasions during the Fifth Parliament, namely Question Time to the President on 21 August, the National Assembly Debate on the Report of the Ad Hoc Committee on Nkandla on 13 November 2013¹⁰⁷ and the President's State of the Nation Address on 12 February 2015, she summoned police into the House to remove EFF MPs. Following the Question Time debacle¹⁰⁸ on 21 August 2014, the Speaker, on the recommendation of the Powers and Privileges Committee, suspended the EFF caucus from the House for 30 days without remuneration, a move that was subsequently challenged in court¹⁰⁹.

The Speaker relied on the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004 when calling police into the Parliamentary precinct. Section 4 states that *“(1) members of the security services may – (a) enter upon or remain in the precincts for the purpose of performing any policing function; or perform any policing function in the precincts, only with the permission and under the authority of the Speaker of the Chairperson. (2) When there is immediate danger to life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger, and such action must as soon as possible be reported to the Speaker and the Chairperson.”*

The Speaker's decision to call police to remove EFF MPs has been criticised on the basis that regardless of whether it was lawful or not, the response was disproportionate and heavy-handed. On the other hand, some see it as an appropriate measure to reinstate order in the House and ensure the resumption of a smooth sitting. Nevertheless the entry of the police, part of the executive arm, into Parliament does raise separation of powers concerns such that the circumstances under which it would be lawful and appropriate

¹⁰⁷ See Lawson Naidoo, ‘Consensus must be the hallmark of parliamentary discipline’ at <http://www.bdlive.co.za/opinion/2014/11/17/consensus-must-be-hallmark-of-parliamentary-discipline>

¹⁰⁸ On the day in question, EFF leader Julius Malema asked Zuma whether he would comply with the Public Protector's findings and recommendations on controversial improvements that had been made at taxpayers' expense on his private homestead in Nkandla, KwaZulu-Natal. The EFF accused Zuma of evading the question and chanted 'pay back the money' in the Assembly.

¹⁰⁹ The Speaker referred the matter to the Powers and Privileges Committee, and subsequently suspended 22 EFF MPs for 30 days without remuneration. The EFF challenged the dismissal in the High Court on an urgent basis and the Court halted the process on the ground that it was unlawful to suspend EFF MPs without pay. This was an interim interdict.

should be further discussed and clarified. It is a given that police should not interfere with the work of political parties and Parliament and should not pose a threat to MPs in the course of their Parliamentary business – and should also not be perceived as doing so.

Recently, the DA went to court to seek clarity on whether the 2004 Powers and Privileges of Parliament and Provincial Legislatures Act should be interpreted in a manner that envisages the arrest of non-MPs only. Section 11 of the Act states that *“(a)ny) person who creates or takes part in any disturbance in the precincts while in Parliament or a House or committee is meeting, may be arrested and removed from the precinct, on the order of the Speaker of the Chairperson or the person designated by the Speaker or the Chairperson, by a staff member or a member of the Security services”*. The DA in its court submission stated, *‘(t)o allow the executive to use force to arrest members on the floor of the House is a serious threat to the preservation of the separation of powers, and the maintenance of the independence of Parliament’*. The respondents (the Speaker of the National Assembly, NCOP Chairperson and the Government) argued that the term “any person” should be given its plain meaning which includes MPs – they are not exempt from arrest¹¹⁰. While the counsel for Government during legal argument before the court conceded that a particular presiding officer might abuse section 11 of the Powers and Privileges Act, it argued that is an insufficient reason to find it unconstitutional and that *‘members of Parliament whose conduct in its precinct places its functioning in jeopardy by committing a ‘disturbance’ should not do so with immunity’*¹¹¹.

Alternately, the DA argued that maintaining order in the House and excluding MPs from the House does not fall under the ambit of “policing functioning” envisaged by section 4 of the Act. (see above)

On 12 May 2015 the Western Cape High Court found that Section 11 of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act of 2004 is *“inconsistent with the Constitution and invalid to the extent that it permits a member to be*

¹¹⁰ The DA argues that elsewhere the Act mentions “person” and immediately explicitly adds that “person” includes “a member”. The respondents argue that there are provisions in the Act where “any person” is used in a manner that clearly includes MPs.

¹¹¹ Jeremy Gauntlett, counsel for government quoted at <http://www.dailymaverick.co.za/article/2015-03-17-da-vs.-parliament-legal-tussle-to-ban-police-from-national-assembly-begins/#.VWV3CWb-e2w>

*arrested for conduct protected by sections 58(1)(b) and 71(1)(b) of the Constitution.*¹¹²

The court gave Parliament 12 months to remedy the defect in the Act and bring the provision in line with the Constitution. The court reasoned as follows: firstly, according to plain rules of grammar it was reasonably possible to read “persons” to include MPs and secondly, it was possible to imagine a situation where an MP was causing or creating 'a situation of such gravity that it undermines the dignity of Parliament as a whole'. However, according to the court, the definition of “disturbance” in the Act was too wide and could cover situations where MPs were exercising their right to free speech¹¹³. The court further dismissed the argument that without section 11, Parliament could be disrupted with 'impunity'. In this regard, the court said that Parliament had 'more than sufficient tools' at its disposal to maintain order¹¹⁴.

According to legal commentators, the judgment means that, 'for the most part, the police cannot be called in when MPs get unruly inside Parliament's chamber. But the judgment leaves an opening for the police to be called in — where the unruly conduct goes beyond what is protected by the Constitution's provisions on Parliamentary privilege.'¹¹⁵

Parliament officials have indicated that Parliament will appeal the court's ruling since it is concerned with 'restoring the decorum of the House to allow debate and free speech to take place in line with the Constitution'¹¹⁶. In any event the High Court's finding that s.11 is unconstitutional must be confirmed by the Constitutional Court.

The **jamming of signals** in Parliament on 12 February 2015 also drew criticism against the Speaker. Before the President's State of the Nation Address was due to begin, cell-phone signals were blocked in the Parliamentary precinct. Political parties pointed out that this constituted a violation of freedom of expression, the right to access the proceedings of Parliament and to receive and impart information and demanded to know who was responsible for the shut-down of the signal. The signals were eventually reinstated allegedly after interventions by members of the executive. It was subsequently explained

¹¹²See Franny Rabkin at <http://www.bdlive.co.za/national/law/2015/05/13/police-in-parliament-unconstitutional-court-rules>

¹¹³*Ibid*

¹¹⁴*Ibid*

¹¹⁵See Franny Rabkin at <http://www.bdlive.co.za/national/law/2015/05/13/police-in-parliament-unconstitutional-court-rules>

¹¹⁶<http://www.sabc.co.za/news/a/ab387d0048596167b744bfe1ccb64421/Parliament-to-appeal-ruling-on-Powers,-Privileges-and-Immunities-20151205>

that the executive had installed a device in Parliament (to deal with their security concerns during SONA) which had interfered with signals and reception and after the SONA incident provided an undertaking that it would not happen again.

Especially with the SONA being widely televised, the jamming of signals appeared to reflect very negatively on the independence of the Speaker, who should have direct control of the House and its security arrangements, and ensure that proceedings are open and transparent. Section 3 of the Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 states that *“the Speaker and the Chairperson [of the NCOP] subject to this Act, the standing rules and resolutions of the Houses, exercise joint control and authority over the precincts on behalf of Parliament.”* As mentioned above, section 4 (1) requires the permission of the Speaker when security services enter Parliament to perform a policing function. Thus it can be argued that the Speaker should have been aware of (and given permission for) any security arrangements in the House.

The New Draft rules¹¹⁷ relating to order and discipline are listed in **Appendix 3**.

3.8 Programming Parliamentary Business, including Debates and Question Time

The Programming Committee is responsible for selecting and prioritizing the work of the National Assembly, and is chaired by the Speaker. It is a multi-party committee composed proportionately of all parties represented in the National Assembly. The executive is represented by the Leader of Government Business. The Committee programmes legislation, debates, motions, questions, members' statements etc.

The Committee works by majority vote and is not obliged to achieve consensus¹¹⁸. However, this does not mean that consensus is not sought or may not exist. Furthermore, over the years a set of standards and conventions have emerged to guide programming decisions. Thus, bills and government business is given priority and members' motions for example are seldom accommodated in the programming (except for ceremonial-style motions).

¹¹⁷Version dated 15 February 2015

¹¹⁸ See also Mazibuko case *supra* at footnote 45

Since the Programming Committee decides which matters are tabled in the National Assembly, this is an important power which must be exercised fairly and judiciously.

The programming of Question Time¹¹⁹ during plenary (a critical mechanism for holding the Executive to account) came under intense scrutiny in the last few months. When the National Assembly failed to call President Zuma to answer questions four times a year as required by NA Rule 111, opposition parties pointed out that Parliament had blatantly failed in its constitutional duty to exercise executive oversight, and wanted the Speaker to account for it¹²⁰.

To date, there appears to be a difference of opinion on how Questions to the President is diarised. However this disagreement has led to not only political parties but also Parliament and the Executive taking greater interest in how Questions to the President are in practice arranged – and, implicitly, what level of responsibility the President owes to Parliament. Opposition parties maintain that the National Assembly must set a date and time when the President must appear, and that the President's primary commitment should be to Parliament. The ANC on the other hand maintains that a date needs to be negotiated with the President via the Speaker, since he may be engaged with international travel or important state matters and cannot be expected to appear at any time when the National Assembly sees fit. It appears that the appropriate process is still the subject of

¹¹⁹ Question Time during plenary is a Questions may be put forward for oral or written reply to the President, Deputy President and Ministers on various matters for which they hold responsibility. The President is required to answer a minimum of six questions per term. The Deputy President answers four questions during ordinary question time, generally once every two weeks, and Ministers divide into three clusters for the purposes of questions, with a cluster answering questions each week according to a system of rotation. (Independent Panel Report on Parliament, Page 50) While in theory Question Time is a powerful democratic tool which directly provides a bridge between the people (as represented by MPs) and more powerful political structures, there is a strong perception that it has not at all operated effectively to date. Shortcomings identified within the process include the Executive regularly giving vague or inadequate answers which do not address the substance of question posed; the use of questions from opposition parties solely to embarrass Ministers rather than to obtain information; and the ruling party posing questions which amount to praise singing rather than being informative or substantive in nature (See Press Gallery Submission referred to in Independent Panel on Parliament Report, Page 51). The Independent Panel Assessment of Parliament Report correctly observed in 2009 that the manner in which Question Time is conducted has direct bearing on the integrity and eminence of Parliament vis-a-vis the Executive.
http://www.gov.za/sites/www.gov.za/files/panel_assess_parl.pdf T

¹²⁰ See also Pierre De Vos at <http://constitutionallyspeaking.co.za/who-will-protect-our-parliament-against-the-president-and-his-securocrats/> and at <http://www.dailymaverick.co.za/opinionista/2014-11-25-constitution-is-clear-president-must-answer-questions-in-parliament/#.VUjJX2b-e2w> who argues there is great responsibility on the Speaker to discharge parliament's constitutional mandate to hold the executive to account and check its powers and the Speaker needs to be vigilant in doing so, especially in the context of a powerful executive and a parliament that has weakened in relevance over the years.

debate within Parliament, but what seems clear is that there is much greater pressure on Parliament's Programming Committee to take decisive steps than before.

4. CONCLUSION

4.1 Looking Back, Looking Forward

It can be said that Parliament exists within, and also supports, a particular model of South African democracy, arguably captured by Professor Roux in *Constitutional Law in South Africa*¹²¹ as follows:

“(1) Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections in which adult people are entitled to participate, exert sufficient control over their elected representatives to ensure that:

- (a) representatives are held to account for their actions;*
- (b) government listens and responds to the needs of the people in appropriate cases directly;*
- (c) collective decisions are taken by majority vote, after due consideration of the views of minority parties, and;*
- (c) the reasons for all collective decisions are publicly explained.*

(2) The rights necessary to maintain such a form of government, must be enshrined in a supreme law or Bill of Rights, enforced by an independent judiciary, which task it shall be to ensure that whenever the will of the majority expressed in the form of law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.”

In light of the various challenges facing Parliament in 2015, it seems appropriate to focus renewed attention on the fundamental purpose of the institution. In this regard, it may be

¹²¹Stuart Woolman et al Volume 1 at page 10-68

useful to reflect on the experiences of post-apartheid South Africa's first Speaker of the National Assembly, Frene Ginwala, who recounts the conundrum faced by Parliament during the initial transition to democracy as follows¹²². Amidst dramatic changes, Parliament had the important business of repealing apartheid legislation and enacting new, transformative legislation in a situation where, although the ANC held the overwhelming majority of seats, political parties represented in Parliament were former adversaries and had also been on opposite sides of the table during the transitional negotiations.

In this context, Ginwala recalls that one of her main duties as Speaker was essentially to see that Parliament kept running. President Mandela, who had tremendous respect for Parliament, had said to her, *'You must run Parliament in a way that carries on what we have done in negotiations, where we have tried to bring all parties on board, we've tried to involve everybody so that we take the whole of South Africa into this new arrangement.'* One of Ginwala's first proposals was to place minority parties on a front bench, which meant moving members of her own party, the ANC, from those benches. Her thinking was that *"Parliament is televised and people will watch it, and if they can see their leaders sitting in Parliament there will be an identification [with the institution]."*

Ginwala notes that the Parliament inherited from apartheid – both in operating style and in architectural lay-out - reflected the adversarial Westminster style of government, but there was some impetus to move away from this. There was an attempt to run the first Parliament akin to South Africa's negotiations process so that an almost equal status was given to all parties. Furthermore, where political parties did not agree, Parliament worked hard to achieve consensus, regarding this as the essence of a working Parliament. Debate was encouraged – not only in the adversarial and confrontational mode – but in a manner that allowed for respectful and thoughtful exchange – and all political parties were afforded the opportunity to debate topical issues. In this way, debate was not limited to issues around legislation. Consensus was also sought concerning the application of Parliamentary rules and processes and here Ginwala also recalls the ANC's tradition of a *lekgotla* or the idea of “talking things out” especially when starting positions were starkly different. Thus, while there were many major challenges facing Parliament in the early

¹²²Interview with Frene Ginwala on 23 April 2015

years, there was nevertheless a concerted effort to begin to transform the institution into a genuinely deliberative platform which future Parliaments could draw upon and expand.

While the political terrain has changed considerably over the last 20 years, the question should be asked whether – particularly in the fraught environment in which we find our current Parliament - we might want to demand an ethos for Parliament that genuinely recognizes it as the primary, inclusive and deliberative forum representing all people in South Africa, and one in which all political parties and the entire electorate believe that they have a stake.

Appendix 1

OTHER PRESIDING OFFICERS

The National Assembly has a number of other presiding officers although the Constitution only refers to a Deputy Speaker.

Deputy Speaker

The National Assembly elects a Deputy Speaker from one of its members at the first sitting after the election. The procedure is similar to that of the Speaker, except that the Speaker presides over the election. The Deputy Speaker assumes the chair of the National assembly whenever requested to do so by the Speaker and whenever the Speaker is absent or unable to perform his or her functions (Rule 17 of NA Rules) and possesses the same powers and functions.

Chairperson of Committees

The Chairperson of Committees is elected as a presiding official and takes the Chair whenever requested to do so by the Speaker. When both the Speaker and Deputy Speaker are absent, he or she acts as Speaker (Rule 16(2) and Rule 17). According to Rule 33 of the NA Rules, she or he may be appointed to chair an extended Public Committee. The Chairperson of Committee may participate as an ordinary member of the House except when presiding over sittings¹²³.

Deputy Chairperson of Committees

The Deputy Chairperson of Committees takes the chair whenever requested to do so by the Speaker (usually done according to a roster). According to Rule 16(2) she or he acts as the Speaker whenever the Speaker, Deputy Speaker and Chairperson of Committees are absent. According to Rule 33, the Deputy Chairperson of Committees may be appointed to chair an Extended Public Committee.

Chairperson of the National Council of Provinces

The NCOP elects a Chairperson and 2 deputy chairpersons from amongst its delegates. The Chairperson presides for a term of 5 years and provides leadership and strategic

¹²³See *ibid*

direction to the House. Together with the Speaker of the National Assembly, he or she presides over Joint Sitings of Parliament.

Whips

A whip is appointed by the Speaker on recommendation from his or her party. The number of whips a party may appoint is proportional to the number of MPs in Parliament (and determined by the NA Rules Committee). Whips receive remuneration from Parliament in addition to what is received by ordinary MPs. Small parties that do not qualify for a whip can group together and appoint a whip from amongst them. The function of the Whip is to assist the party with the smooth running of Parliamentary business, including organizing party business and keeping members informed of such business, arranging for members to speak in debates and the daily management of party members in Parliamentary processes.¹²⁴

Chief Whip and Deputy Chief Whip of the Majority Party

Apart from managing the majority party's business in the National Assembly, he or she has specific duties with regard to proceedings in the Assembly by virtue of representing the majority party. These include: arranging business on the order paper (according to directives from the Programme Committee), discipline amongst party members belonging to the majority party, chairs the Chief Whips Forum and relevant political consultations between various parties and various other matters set out in the Rules¹²⁵.

Chief Opposition Whip

The largest opposition party recommends a Chief Opposition Whip, who is appointed by the Speaker to represent and facilitate Parliamentary business for the party. He or she is an ex-officio member of the Chief Whips Forum, the Programme Committee and Joint Rules Committee.

¹²⁴ *Ibid* above at pages 25,26

¹²⁵ *Ibid* at page 26

Leader of the Opposition

Section 57(2)(d) of the Constitution and NA Rule 21 provide for this office. By convention the leader of the second largest party is accorded this special status. In debates, the leader is typically the first opposition speaker¹²⁶.

Leader of Government Business

According to section 91(4) of the Constitution the President appoints a member of Cabinet to be leader of government business in the NA. He or she oversees government business in the NA and liaises between the cabinet and Parliament. He or she is also responsible for programming government business in the NA, such as legislation, as well as arranging the attendance of cabinet ministers in the NA¹²⁷. He or she is an ex-officio member of the Programme Committee.

¹²⁶See Parliament of South Africa, Guide to National Assembly Procedure, 2004

¹²⁷See Parliament of South Africa, Guide to National Assembly Procedure, 2004

Appendix 2

Freedom of speech [and debate]

- (1) In accordance with section [55(2)] 58(1)(a) of the Constitution, [1993, there shall be freedom of speech and debate in or before this House and any committee thereof, or any joint committee of Parliament] 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[only to the restrictions placed on such freedom in terms of or under the Constitution, any other law or these Rules].
- (2) In accordance with section [55(3)] 58(1)(b) of the Constitution, [1993,] Cabinet members, Deputy Ministers and members of the National Assembly are not liable to civil or criminal proceedings, arrest imprisonment or damages for anything that they have said in, produced before or submitted to the Assembly or any of its committees, or anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees. [and subject to these Rules, a member of this House shall not be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of anything which he or she has said, produced or submitted in or before or to this House or any committee thereof, or any joint committee, or by reason of anything which may have been revealed as a result of what he or she has said, produced or submitted in or before or to this House or any such committee.

Unparliamentary or unacceptable language or gestures

No member shall use offensive, abusive, insulting, disrespectful, unbecoming or unParliamentary words or language, nor offensive or unbecoming gestures.

- a) Reflections upon members, the President and Ministers or Deputy Ministers who are not members of the Assembly
- b) No member may impute improper motives to any other member, or cast personal reflections on a member's integrity or dignity, or verbally abuse a member in any other way.
- c) A member who wishes to bring any improper or unethical conduct on the part of another member to the attention of the House, may do so only by way of a separate

substantive motion, comprising a clearly formulated and properly substantiated charge that in the opinion of the Speaker *prima facie* warrants consideration by the House.

- d) Sub rules (1) and (2) apply also to reflections upon the President and Ministers and Deputy Ministers who are not members of the House.

Reflections upon the House and its proceedings

No member may reflect in a disrespectful manner on the House or Committee and its proceedings.

Matters *sub judice*

[No member shall refer to any matter on which a judicial decision is pending.] No member may reflect on the merits of any matter on which a judicial decision is pending.]

No member may raise a point of order again or a similar point of order, if the presiding officer has ruled that it is not a point of order or that the matter is out of order.

Members may not disrupt proceedings by raising points of order that do not comply with this Rule challenged or questioned in the House.

A member who is aggrieved by a presiding officer's ruling on a point of order may subsequently in writing to the Speaker request that the principle or subject matter of the ruling be referred to the Rules Committee. The Rules Committee may deal with it as it deems fit, provided that it confines itself to the principle underlying, or subject matter of, the ruling concerned, and may not in any manner consider the specific ruling which is final and binding.

Appendix 3

50. Irrelevance or repetition

The presiding officer [after having called attention to the conduct of a member who persists in irrelevance or repetition of arguments, may direct the member to discontinue his or her speech] may order a member addressing the House to stop speaking if that member, despite warnings from the Chair, persists in irrelevant or repetitive arguments.

[Note: Wording taken from Council Rule 36].

Gross disorderly conduct

[Conduct is grossly disorderly if Member or Members concerned:]

Members may not engage in grossly disorderly conduct in the House and its forums, including -

- a) deliberately creating [an actual] serious disorder or disruption [in the House];
- b) in any manner whatsoever physically intervening, preventing, obstructing or hindering the removal of a member from the House who has been ordered to leave the House;
- c) repeatedly undermining the authority of the presiding officer or repeatedly refusing to obey rulings of the presiding officer or repeatedly disrespecting and interrupting the presiding officer while the latter is addressing the House;
- d) persisting in making serious allegations against a member without adequate substantiation or following the correct procedure;
- e) using or threatening violence against a member or other person; or
- f) acting in any other way to the serious detriment of the dignity, decorum or orderly procedure of the House.

Option: Remove (a) and (c).

Member ordered to [withdraw] leave Chamber

- (1) If the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules, or that a member is [in contempt of or is] disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, he or she

may order the member to [withdraw immediately from] leave the Chamber immediately for the remainder of the day's sitting.

- (2) A member ordered to withdraw from the Chamber shall immediately withdraw from the precincts of Parliament.

Notes: See definition of "Chamber" in Definitions Rule to cover any venue where the House may sit.

Naming or suspension of member

(1) If a presiding officer is of the opinion that a contravention committed by a member of [this] the House is of so serious a nature that an order to [withdraw from] leave the Chamber for the remainder of the day's sitting is inadequate, the presiding officer may

(a) if he or she is the Speaker

- I. order the member to leave the Chamber immediately and additionally prohibit the member from participating in any Parliamentary activities for the remainder of that day;
- II. order the member to leave the Chamber and the precincts of Parliament immediately for the remainder of that day; or
- III. suspend the member; or

(b) if he or she is not the Speaker,

[name] censure the member and order him or her to leave the Chamber immediately and not participate in any Parliamentary activities until the Speaker, after consultation with the presiding officer, has announced what action is to be taken against the member in terms of these rules, whereupon the Speaker, after consultation with the presiding officer, may take such action as he or she deems necessary.

- (2) If a member suspended in terms of Sub rules (1)(a)(iii) or (1)(b) subsequently so requests in writing to the Speaker, the Speaker must refer the request to the Powers and Privileges Committee for review of the decision to suspend, taking into account all the circumstances that led to the suspension.]

Proposed new Rule 52:

If a presiding officer is of the opinion that a contravention committed in terms of Rule 51 by a member of the House is of so serious a nature that an order to leave the Chamber for the remainder of the day's sitting is inadequate, the presiding officer may -

(a) if he or she is the Speaker, suspend the member for a period provided for in Rule 54;

or

(b) if he or she is not the Speaker, name the member and order him or her to leave the Chamber immediately and not participate in any Parliamentary activities until the Speaker, after consultation with the presiding officer, has announced what action is to be taken against the member in terms of these rules, including whether such member will be suspended for a period provided for in Rule 54.

[Note for further consideration: Should a presiding officer be able to punish/suspend a member without due process by way of a committee.]

[Member to withdraw from precincts of Parliament] Action against member to be announced in House

[(1) A member ordered to withdraw from the Chamber or suspended or named shall, subject to Sub rule (2), forthwith withdraw from the precincts of Parliament.

(2) If a presiding officer other than the Speaker orders a member of this House to withdraw from the Chamber and the member is a Minister or a Deputy Minister, the Speaker shall, after consultation with the presiding officer, order the member to withdraw from the precincts of Parliament or take such other action as the Speaker deems necessary.

(3) The action taken against a member by the Speaker under Rule 52(1)(b) [or Sub rule (1) of this Rule shall] must be announced in [this] the House.

(4) A member of this House who has been named shall not return to the precincts of Parliament before the action taken against him or her by the Speaker has been announced.]

The action taken against a member by the Speaker under Rule 52(b) must be announced in the House.

Proposed new Rule 53A:

53A. [54A] Removal of member from Chamber

- (1) If a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of these Rules, the presiding officer may instruct the Sergeant-at-Arms to remove the member from the Chamber.
- (2) If the Sergeant-at-Arms is unable in person to effect the removal of the member, the presiding officer may further direct that the Sergeant-at-Arms may call upon the assistance of the Parliamentary Protection Services in accordance with section 11 of the Powers and Privileges Act to secure the member's removal.
- (3) A Member who is removed from the Chamber in terms of sub-rules (1) or (2) is thereby immediately automatically suspended for the period applicable as provided for in Rule 54.
- (4) The House may approve guidelines, recommended by the Rules Committee, for the exercise of this function, in particular in relation to the use of any State law enforcement agency in the performance of this function.

[Notes:

- (a) There was agreement in principle that it must be possible under the authority of the Speaker to have a member removed from the Chamber.*
- (b) It was noted that the Powers and Privileges Act provides in Sec 4(2) that when there is immediate danger to life or property, the State security services may enter the precincts and take action to avert the danger without first obtaining the permission of the Presiding Officers.*
- (c) There was some concern expressed at the use of the security services in any other circumstances. A suggested option was, in the interests of the principle of the separation of powers, to create a separate security service for Parliament under Parliament's exclusive control.*
- (d) The alternative, as proposed in subrule (4), is to determine in guidelines prepared by the Rules Committee, the details of the circumstances in which permission may be*

given to the security services to perform a policing function in the precincts under the authority of the presiding officers.

(e) A definition is given of “Parliamentary Protection Services” in the Definitions Rule.

(f) One party objects strongly to the principle of allowing physical confrontation in the House except when lives are in danger.]

Rule 54 in existing form:

54. Period of suspension

50. Irrelevance or repetition

The presiding officer after having called attention to the conduct of a member who persists in irrelevance or repetition of arguments, may direct the member to discontinue his or her speech] may order a member addressing the House to stop speaking if that member, despite warnings from the Chair, persists in irrelevant or repetitive arguments.

[Note: Wording taken from Council Rule 36].

Proposed new Rule 50A:

50A. Grossly disorderly conduct.

[Conduct is grossly disorderly if Member or Members concerned:]

Members may not engage in grossly disorderly conduct in the House and its forums, including -

- (a) deliberately creating [an actual] serious disorder or disruption [in the House];
- (b) in any manner whatsoever physically intervening, preventing, obstructing or hindering the removal of a member from the House who has been ordered to leave the House;
- (c) repeatedly undermining the authority of the presiding officer or repeatedly refusing to obey rulings of the presiding officer or repeatedly disrespecting and interrupting the presiding officer while the latter is addressing the House;
- (d) persisting in making serious allegations against a member without adequate substantiation or following the correct procedure;
- (e) using or threatening violence against a member or other person; or
- (f) acting in any other way to the serious detriment of the dignity, decorum or orderly procedure of the House.

Option: Remove (a) and (c).

51. Member ordered to [withdraw] leave Chamber

(1) If the presiding officer is of the opinion that a member is deliberately contravening a provision of these Rules, or that a member is [in contempt of or is] disregarding the authority of the Chair, or that a member's conduct is grossly disorderly, he or she may order the member to [withdraw immediately from] leave the Chamber immediately for the remainder of the day's sitting.

(2) A member ordered to withdraw from the Chamber shall immediately withdraw from the precincts of Parliament.

Notes: See definition of "Chamber" in Definitions Rule to cover any venue where the House may sit.

52. Naming or suspension of member

[(1) If a presiding officer is of the opinion that a contravention committed by a member of [this] the House is of so serious a nature that an order to [withdraw from] leave the Chamber for the remainder of the day's sitting is inadequate, the presiding officer may —

(a) if he or she is the Speaker -

- (i) order the member to leave the Chamber immediately and additionally prohibit the member from participating in any Parliamentary activities for the remainder of that day;
- (ii) order the member to leave the Chamber and the precincts of Parliament immediately for the remainder of that day; or

(iii) suspend the member; or

(b) if he or she is not the Speaker, [name] censure the member and order him or her to leave the Chamber immediately and not participate in any Parliamentary activities until the Speaker, after consultation with the presiding officer, has announced what action is to be taken against the member in terms of these rules, [whereupon the Speaker, after consultation with the presiding officer, may take such action as he or she deems necessary.

(2) If a member suspended in terms of Sub rules (1)(a)(iii) or (1)(b) subsequently so requests in writing to the Speaker, the Speaker must refer the request to the Powers and

Privileges Committee for review of the decision to suspend, taking into account all the circumstances that led to the suspension.]

Proposed new Rule 52:

If a presiding officer is of the opinion that a contravention committed in terms of Rule 51 by a member of the House is of so serious a nature that an order to leave the Chamber for the remainder of the day's sitting is inadequate, the presiding officer may -

- (a) if he or she is the Speaker, suspend the member for a period provided for in Rule 54;
or
- (b) if he or she is not the Speaker, name the member and order him or her to leave the Chamber immediately and not participate in any Parliamentary activities until the Speaker, after consultation with the presiding officer, has announced what action is to be taken against the member in terms of these rules, including whether such member will be suspended for a period provided for in Rule 54.

[Note for further consideration: Should a presiding officer be able to punish/suspend a member without due process by way of a committee.]

53. [Member to withdraw from precincts of Parliament] Action against member to be announced in House

[(1) A member ordered to withdraw from the Chamber or suspended or named shall, subject to Sub rule (2), forthwith withdraw from the precincts of Parliament.

(2) If a presiding officer other than the Speaker orders a member of this House to withdraw from the Chamber and the member is a Minister or a Deputy Minister, the Speaker shall, after consultation with the presiding officer, order the member to withdraw from the precincts of Parliament or take such other action as the Speaker deems necessary.

(3) The action taken against a member by the Speaker under Rule 52(1)(b) [or Sub rule (1) of this Rule shall] must be announced in [this] the House.

(4) A member of this House who has been named shall not return to the precincts of Parliament before the action taken against him or her by the Speaker has been announced.]

The action taken against a member by the Speaker under Rule 52(b) must be announced in the House.

Proposed new Rule 53A:

53A. [54A] Removal of member from Chamber

- (1) If a member refuses to leave the Chamber when ordered to do so by the presiding officer in terms of these Rules, the presiding officer may instruct the Sergeant-at-Arms to remove the member from the Chamber.
- (2) If the Sergeant-at-Arms is unable in person to effect the removal of the member, the presiding officer may further direct that the Sergeant-at-Arms may call upon the assistance of the Parliamentary Protection Services in accordance with section 11 of the Powers and Privileges Act to secure the member's removal.
- (3) A Member who is removed from the Chamber in terms of sub-rules (1) or (2) is thereby immediately automatically suspended for the period applicable as provided for in Rule 54.
- (4) The House may approve guidelines, recommended by the Rules Committee, for the exercise of this function, in particular in relation to the use of any State law enforcement agency in the performance of this function.

[Notes:

- (a) There was agreement in principle that it must be possible under the authority of the Speaker to have a member removed from the Chamber.*
- (b) It was noted that the Powers and Privileges Act provides in Sec 4(2) that when there is immediate danger to life or property, the State security services may enter the precincts and take action to avert the danger without first obtaining the permission of the Presiding Officers.*
- (c) There was some concern expressed at the use of the security services in any other circumstances. A suggested option was, in the interests of the principle of the separation of powers, to create a separate security service for Parliament under Parliament's exclusive control.*
- (d) The alternative, as proposed in subrule (4), is to determine in guidelines prepared by the Rules Committee, the details of the circumstances in which permission may be*

given to the security services to perform a policing function in the precincts under the authority of the presiding officers.

(e) A definition is given of “Parliamentary Protection Services” in the Definitions Rule.

(f) One party objects strongly to the principle of allowing physical confrontation in the House except when lives are in danger.]

Rule 54 in existing form:

55. Period of suspension

The suspension of a member [shall] on the first occasion during a session continues for 5 [P]Parliamentary working days, on the second occasion for 10 [P]Parliamentary working days, and on any subsequent occasion for 20 [P]Parliamentary working days.

Task Team's proposal:

The period of suspension on any occasion continues for 3 Parliamentary working days.

Alternative proposal before Subcommittee:

54. Period and consequences of suspension

- (1) If a Member is suspended under rule 52 or automatically suspended under rule 53(3), then the suspension on the first occasion shall be for five working days including the day of suspension; on the second occasion during the same session for ten working days, including the day of suspension; and on the third occasion during the same session for twenty working days, including the day of suspension; or any subsequent occasion during the same session for thirty working days, including the day of suspension.
- (2) A Member who is suspended from the Assembly under Rule 52 shall forfeit all remuneration and allowances payable during the period of such suspension, unless the Speaker orders otherwise subject to any conditions he or she deems fit.
- (3) A Member who is automatically suspended from the Assembly shall forfeit all remuneration and allowances payable and any other benefits afforded to such member by Parliament during the period of such suspension.

[Notes:

- (a) Three alternatives are presented above. At issue is that punishment by suspension must have the desired outcome and protect sittings of the House. (See also Rule 52, above).*
- (b) The successively longer periods of suspension (during one annual session) and the option of withholding remuneration and possibly other benefits may at some level become subject to due process under fair administrative justice requiring a committee hearing.*
- (c) The options are to be further considered after the Judge Davis judgement of 23 December 2014 has been obtained and considered.]*

55. Expression of regret

- (1) A member of [this] the House who has been suspended or [named] censured may submit to the Speaker a written expression of regret, and if the Speaker approves such expression of regret, he or she may discharge the suspension or other action taken against the member [permit the member to take his or her seat], or reduce the period or severity of the censure, and the Speaker [shall] must inform [this] the House accordingly.

[Note: The option of reducing the “sentence” has been added.]

- (2) An expression of regret approved by the Speaker [shall] must be recorded in the Minutes of Proceedings.

56. [57.] Member to withdraw while his or her conduct is debated

Whenever a charge is made against a member, he or she [shall] must, after having been heard from his or her place, withdraw from the Chamber while such charge is being debated.

[Notes: (a) As requested, a check was made whether the eventuality provided for in this rule is covered in the Powers and Privileges Act. It is not covered in the Act.

- (b) The sequence of Rules 56 and 57 has been reversed.]*

57. [56.] Grave disorder

In the event of grave disorder at a meeting, the presiding officer may adjourn the meeting, or may suspend the proceedings for a period to be stated by him or her.

The suspension of a member [shall] on the first occasion during a session continues for 5 [P]Parliamentary working days, on the second occasion for 10 [P]Parliamentary working days, and on any subsequent occasion for 20 [P]Parliamentary working days.

Task Team's proposal:

The period of suspension on any occasion continues for 3 Parliamentary working days.

Alternative proposal before Subcommittee:

54. Period and consequences of suspension

- (3) If a Member is suspended under rule 52 or automatically suspended under rule 53(3), then the suspension on the first occasion shall be for five working days including the day of suspension; on the second occasion during the same session for ten working days, including the day of suspension; and on the third occasion during the same session for twenty working days, including the day of suspension; or any subsequent occasion during the same session for thirty working days, including the day of suspension.
- (4) A Member who is suspended from the Assembly under Rule 52 shall forfeit all remuneration and allowances payable during the period of such suspension, unless the Speaker orders otherwise subject to any conditions he or she deems fit.
- (5) A Member who is automatically suspended from the Assembly shall forfeit all remuneration and allowances payable and any other benefits afforded to such member by Parliament during the period of such suspension.

Notes:

- (a) *Three alternatives are presented above. At issue is that punishment by suspension must have the desired outcome and protect sittings of the House. (See also Rule 52, above).*
- (b) *The successively longer periods of suspension (during one annual session) and the option of withholding remuneration and possibly other benefits may at some level become subject to due process under fair administrative justice requiring a committee hearing.*

(c) The options are to be further considered after the Judge Davis judgement of 23 December 2014 has been obtained and considered.]

55. Expression of regret

- (1) A member of [this] the House who has been suspended or [named] censured may submit to the Speaker a written expression of regret, and if the Speaker approves such expression of regret, he or she may discharge the suspension or other action taken against the member [permit the member to take his or her seat], or reduce the period or severity of the censure, and the Speaker [shall] must inform [this] the House accordingly.

[Note: The option of reducing the “sentence” has been added.]

- (2) An expression of regret approved by the Speaker [shall] must be recorded in the Minutes of Proceedings.

56. [57.] Member to withdraw while his or her conduct is debated

Whenever a charge is made against a member, he or she [shall] must, after having been heard from his or her place, withdraw from the Chamber while such charge is being debated.

[Notes: (a) As requested, a check was made whether the eventuality provided for in this rule is covered in the Powers and Privileges Act. It is not covered in the Act.

(b) The sequence of Rules 56 and 57 has been reversed.]

57. [56.] Grave disorder

In the event of grave disorder at a meeting, the presiding officer may adjourn the meeting, or may suspend the proceedings for a period to be stated by him or her.