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Mr Mzameni Mdakane
Chairperson: Subcommittee on Review of the National Assembly Rules
Parliament
Cape Town.
8000.

Dear Chairperson Mdakane,

**Part A: IMPEACHMENT PROCEDURES IN FOREIGN JURISDICTIONS; AND
Part B: CAN THE DECISIONS OF THE SPEAKER OF PARLIAMENT BE REVIEWED
IN OTHER COUNTRIES**

We have considered the above issues and, herein, provide you with information relating to those issues.

The first part of this letter deals with impeachment proceedings in respect of a president in Nigeria, Ghana, India, Korea, United Kingdom and the United States of America.

The second part of this letter deals with whether in some other countries the decisions of the Speaker of Parliament can be reviewed by a court.

Section 89 of the Constitution

Section 89 of the Constitution provides as follows:

“Removal of President

89. (1) *The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—*

- (a) A serious violation of the Constitution or the law;*
- (b) Serious misconduct; or*
- (c) Inability to perform the functions of office.*

(2) *Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b), may not receive any benefits of that office, and may not serve in any public office.*"

It is important to note that the above section talks about removal and not impeachment. However it seems that according South African law the terms "impeachment" and "removal" are used interchangeably.¹ It is not the case in all the jurisdictions discussed below. For example, in Nigeria the Supreme Court held that the procedure set out in section 188 of the Constitution of that country for the removal of a Governor or Deputy Governor should not be called an impeachment, because this was an imported word and a foreign legal concept.²

Section 143 of the 1999 Constitution of Nigeria also uses the word "remove" in relation to the President and the Vice-President. It would therefore be safe to assume that though the Supreme Court was dealing with the removal of the Governor-General in that case, the same principle would apply in the case of the removal of the President and the Vice-President.

Since our Constitutional Court has used the words "removal" and "impeachment" interchangeably this memorandum considers the procedures followed in all the countries below regardless of whether they use the word "impeachment" or "removal"

Part A: IMPEACHMENT PROCEDURES IN FOREIGN JURISDICTIONS

(a) Nigeria

Section 143 of the Constitution governs the impeachment of the President and the Vice-President while section 188 governs the impeachment of the Governors and Deputy Governors.³ The provisions of these two sections are identical except with the substitution of the words 'Governor' for 'President,' 'Deputy Governor' for 'Vice President,' 'State House of Assembly' for 'National Assembly' and 'Chief Judge of the State' for the 'Chief Justice of Nigeria' respectively.⁴

Section 143.1-2 of the Constitution of Nigeria provides as follows:

- 143.** 1. *The President or Vice-President may be removed from office in accordance with the provisions of this section.*
2. *Whenever a notice of any allegation in writing signed by not less than one-third of the members of the National Assembly:-*
- a. *is presented to the President of the Senate;*
 - b. *stating that the holder of the office of President or Vice-President is guilty of gross misconduct in the performance of the functions*

¹ *Lindiwe Mazibuko, MP, Leader of the Opposition in the National Assembly v Maxwell Vuyisile Sisulu, MP, Speaker of the National Assembly and Another* CCT 115/12, Para 40.

² *HON. MUYIWA INAKOJU, IBADAN SOUTH EAST and 17 OTHERS (DEFENDANTS/APPELLANTS) v. HON. ADELEKE (SPEAKER) and 3 OTHERS (PLAINTIFFS/RESPONDENTS)* (2007) 1 All N.L.R. 65

³ (2009) MLJ VOL.3, ISSUE 2, JUDICIAL REVIEW OF THE IMPEACHMENT PROCEDURE IN NIGERIA, Elijah Adewale Taiwo

⁴ *ibid*

of his office, detailed particulars of which shall be specified, the President of the Senate shall within seven days of the receipt of the notice cause a copy thereof to be served on the holder of the office and on each member of the National Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office to be served on each member of the National Assembly.

The legal Procedure of Impeachment of the President and Vice-President in Nigeria

Section 143. 3. - 11 of the Constitution of Nigeria sets out the procedure of removal of the President and the Vice President as follows:

3. Within fourteen days of the presentation of the notice to the President of the Senate (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice) each House of the National Assembly shall resolve by motion without any debate whether or not the allegation shall be investigated.

4. A motion of the National Assembly that the allegation be investigated shall not be declared as having been passed, unless it is supported by the votes of not less than two-thirds majority of all the members of each House of the National Assembly.

5. Within seven days of the passing of a motion under the foregoing provisions, the Chief Justice of Nigeria shall at the request of the President of the Senate appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

6. The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person and be represented before the Panel by legal practitioners of his own choice.

7. A Panel appointed under this section shall-

- a. have such powers and exercise its functions in accordance with such procedure as may be prescribed by the National Assembly; and
- b. within three months of its appointment report its findings to each House of the National Assembly.

8. Where the Panel reports to each House of the National Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

9. Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report at the House the National Assembly shall consider the report, and if by a resolution of each House of the National Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

10. No proceedings or determination of the Panel or of the National Assembly or any matter relating thereto shall be entertained or questioned in any court.

11. In this section- "gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct

of such nature as amounts in the opinion of the National Assembly to gross misconduct.”.

(b) Ghana

Article 69 of the Constitution of Ghana deals with the procedure to be followed when the President is removed from office. This provision states as follows:

“1. The President shall be removed from office if he is found, in accordance with the provisions of this article

a. to have acted in willful violation of the oath of allegiance and the presidential oath set out in the Second Schedule to, or in willful violation of any other provision of, this Constitution; or

b. to have conducted himself in a manner-

i. which brings or is likely to bring the high office of President into disrepute, ridicule or contempt; or

ii. prejudicial or inimical to the economy or the security of the State; or

c. To be incapable of performing the functions of his office by reason of infirmity of body or mind.

2. For the purposes of the removal from office of the President, a notice in writing

a. signed by not less than one-third of all the members of Parliament, and

b. stating that the conduct or the physical or mental capacity of the President be investigated on any of the grounds specified in clause (1) of this article, shall be given to the Speaker who shall immediately inform the Chief Justice and deliver the notice to him copied to the President.

3. The notice referred to in clause (2) of this article shall be accompanied by a statement in writing setting out in detail the facts, supported by the necessary documents, on which it is claimed that the conduct or the physical or mental capacity of the President be investigated for the purposes of his removal from office.

4. Subject to clause (5) of this article, the Chief Justice shall, by constitutional instrument, immediately convene a tribunal consisting of the Chief Justice as Chairman and the four most senior Justices of the Supreme Court and the tribunal shall inquire, in camera, whether there is a prima facie case for the removal of the President.

5. Where a notice under clause (2) of this article is delivered to the Chief Justice in respect of the removal from of tile President, on the grounds of physical or mental incapacity Chief Justice shall, in consultation with the professional head of the Ghana Health Services, cause a medical board to be convened which shall consist of not less than four eminent medical specialists and the President shall be informed accordingly.

6. The President shall be invited to submit himself for examination by the medical board within fourteen days after the appointment of the board.

7. The President shall be entitled during the proceedings of the tribunal or of the medical board to be heard in his defence by himself or by a lawyer or other expert or person as the case may be, of his own choice.

8. The Rules of Court Committee shall, by constitutional instrument, make rules for the practice and procedure of the tribunal or of the medical board for the removal of the President.

9. Where the tribunal or medical board specified in clauses (4) and (5) of this article determines that there is a prima facie case for the removal of the President or that the President is by reason of physical or mental incapacity unable to perform the functions of his office, the findings shall immediately be submitted to the Speaker of Parliament through the Chief Justice and copied to the President.

10. Parliament shall, within fourteen days after the date of the findings of the tribunal or medical board, move a resolution whether or not the President shall be removed from office.

11. The resolution for the removal from office of the President shall be by a secret ballot and shall be taken to be approved by Parliament if supported by the votes of not less than two-thirds of all the members of Parliament after prior debate.

12. The proceedings of Parliament for the removal of the President shall not be held in camera except where Parliament otherwise orders in the interest of national security.

13. The President shall cease to hold office as President on the date Parliament decides that he be removed from office."

(c) India

Article 61 in The Constitution of India 1949 provides as follows:

"(1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament

(2) No such charge shall be preferred unless

(a) the proposal to prefer such charge is contained in a resolution which has been moved after at least fourteen days notice in writing signed by not less than one fourth of the total number of members of the House has been given of their intention to move the resolution, and

(b) Such resolution has been passed by a majority of not less than two thirds of the total membership of the House

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented as such investigation

(4) If as a result of the investigation a resolution is passed by a majority of not less than two thirds of the total membership of the House by which the charge was investigated or cause to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed."

(d) The Republic of Korea

The impeachment of the President in Korea is regulated by the Constitution, the Constitutional Court Act and the National Assembly Act⁵.

The Korean Constitution stipulates that the National Assembly may pass a motion for the impeachment of the President if he has violated the Constitution or other Acts in the performance of official duties.⁶

⁵ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by, CHAU Pak-kwan, Research and Library Services Division Legislative Council Secretariat, Page 18

⁶ Ibid, Page 19

In 2004, for the first time in Korean history, the National Assembly impeached President Roh Moo-Hyun and brought about his temporary suspension as president. President Roh was later reinstated by the Constitutional Court of Korea.⁷

Under the Korean Constitution, a motion for impeachment of the President shall be proposed by a majority of the Members of the National Assembly.⁸

Under Article 130 (1) of the National Assembly Act, the Speaker of the National Assembly is required to inform the Assembly immediately when a proposition of impeachment prosecution is filed. The proposition may be referred to the Legislation and Judiciary Committee for investigation by a resolution.⁹

If the Assembly fails to refer the proposition motion to the Legislation and Judiciary Committee, the motion will lapse when it has not been voted by ballot at the Assembly's plenary session within 24 to 72 hours of the filing of the motion.¹⁰

If the proposition motion is referred to the Legislation and Judiciary Committee, the Inspection and Investigation of State Administration applies *mutatis mutandis* applies to this committee's investigation. The National Assembly Act does not specify how the result of the investigation should be reported to the National Assembly.¹¹

In President Roh's impeachment case, the National Assembly did not conduct any investigation prior to its voting on the impeachment motion. When the impeachment case was subsequently adjudicated, the Constitutional Court of Korea held that the National Assembly had its own discretion and "even if the National Assembly did not perform a separate investigation..., this was not in violation of the Constitution or statutes."¹²

The Korean Constitution requires that a motion for impeachment of the President shall be approved by two-thirds or more of the Members of the National Assembly.¹³

When the National Assembly passes the impeachment motion, the Speaker is required to notify, without delay, both the chairman of the Legislation and Judiciary Committee and the Constitutional Court. The power of the President will automatically be suspended.¹⁴

⁷ Page 19

⁸ Ibid, Page 19

⁹ Ibid, Page 19

¹⁰ Ibid, Page 19

¹¹ Ibid, Page 19

¹² Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005 Prepared by, CHAU Pak-kwan, Research and Library Services, Division, Legislative Council Secretariat, Page 20

¹³ Ibid, Page 20

¹⁴ Ibid, Page 20

The Constitutional Court of Korea has jurisdiction over impeachment proceedings. When the National Assembly passes the impeachment motion; the President is suspended until the impeachment has been adjudicated by the Constitutional Court.¹⁵

Under the Constitutional Court Act, the Court must hear oral arguments when adjudicating on impeachments and must abide by "the laws and regulations relating to the criminal litigation *mutatis mutandis*" during the proceedings. The chairman of the Legislation and Judiciary Committee of the National Assembly acts as the impeachment prosecutor before the Court.¹⁶

In order to confirm the impeachment, six out of nine justices of the Constitutional Court must vote in favour. Before making such a decision, the Constitutional Court must prove that "there is a valid ground for the petition for impeachment adjudication." A judgment upholding impeachment does not exempt the person impeached from other civil or penal liabilities. Any person who is removed by impeachment is prohibited from being a public official for the next five years.¹⁷

(e) United Kingdom

There have been about seventy impeachments during the whole course of English history. Impeachment was relatively common in the following two periods; firstly in the fourteenth century under the Tudor dynasty, and secondly in the seventeenth and eighteenth centuries. The last impeachment occurred in 1806 when Lord Melvill was charged by the House of Commons but acquitted of misappropriating official funds.¹⁸

In the past, impeachments were usually directed against Ministers of the Crown. With the development of the doctrine of collective responsibility and the practice of confidence motions, the impeachment process has gradually fallen into disuse in modern times.¹⁹

The 1967 Select Committee on Parliamentary Privilege of the House of Commons recommended that the right to impeach should be formally abandoned and legislation should be introduced for that purpose. However, no such legislation was introduced.²⁰ A Joint Committee on Parliamentary Privilege in 1999 stated that "[t]he circumstances in which impeachment have taken place is now so remote from the present that the

¹⁵ Ibid, Page 20

¹⁶ Ibid, Page 20

¹⁷ Ibid, Page 21

¹⁸ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by CHAU Pak-kwan, Page 5

¹⁹ Ibid, Page 6

²⁰ Ibid, Page 6

procedure may be considered obsolete." Although the power to impeach is now of historical rather than current interest in the UK, this power has not been formally abolished (*sic*).²¹

The legal Procedure of impeachment in the UK

In the English system, the impeachment is initiated in the House of Commons while the trial is held in the House of Lords. According to an early edition of Erskine May Parliamentary Practice, "the Commons, as a great representative inquest of the nation, first find the crime and then, as prosecutors, support their charge before the Lords, exercising at once the functions of a high court of justice and of a jury, try and adjudicate upon the charge preferred." Since impeachment has not taken place in the UK since 1806, details of its procedure are not available in current publications.²²

Under the ancient procedure of impeachment, all persons may be prosecuted and tried by the two Houses. The House of Commons determines when an impeachment should be instituted. The process starts with an MP charging the accused with high treason, or certain other crimes and misdemeanours and providing supporting evidence. The MP may then move for impeachment.²³

If the accusation is found, on examination by the House, to have sufficient grounds to justify further proceedings, the motion is put to the House.²⁴

If the motion is agreed to by the House, one or more MPs are ordered by the House of Commons to go to the bar of the House of Lords. There, in the name of the House of Commons and of all the commons of the UK, the MPs impeach the accused person. A committee of the House of Commons is then appointed to draw up articles of impeachment which are debated. When the House reaches an agreement on the articles, they are delivered to the House of Lords.²⁵

After receiving the impeachment articles, the House of Lords may ask the accused for written answers. The House of Lords communicates the answers received to the House of Commons. The House of Commons may send a reply to the House of Lords.²⁶

The trial is held at the House of Lords, with the Lord Chancellor presiding. The House of Commons appoints 'managers' (prosecutors) for the trial to prepare the evidence; but it

²¹ Ibid, Page 6

²² Ibid Page 6

²³ Ibid, Page 6

²⁴ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by CHAU Pak-kwan, Page 7

²⁵ Ibid, Page 7

²⁶ Ibid, Page 7

is the House of Lords that summons witnesses. The accused may call witnesses and present evidence, and is entitled to defence by counsel.²⁷

If found guilty, judgment is not pronounced unless and until demanded by the House of Commons (which may, at this stage, pardon the accused)²⁸

An impeachment may continue from one parliamentary session to another session, or over dissolution. Conviction under the old English impeachment system could result in punishment by imprisonment, fine or even death. Under the Act of Settlement, a royal pardon cannot excuse the accused from trial, but a pardon may relieve a convicted person.²⁹

(f) United States of America

Legal procedure for impeachment in the U.S

Under Article II, Section 4 of the US Constitution, "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."³⁰

Throughout the US history, Congress has launched more than sixty impeachment investigations of US public officers. The House of Representatives (House) has formally impeached public officers 17 times. Two cases involved a President. The Senate only convicted (that is, removed) seven public officers on the House charges, but a President has never been removed.³¹

In 1868, President Andrew Johnson was impeached by the House and was acquitted by the Senate. In 1974, President Richard Nixon resigned from office shortly after the Committee of the Judiciary of the House of Representatives (House Judiciary Committee) had approved three articles of impeachment against him. In 1999, President William Clinton was impeached by the House and was acquitted by the Senate.³²

Under Article I, Section 2, Clause 5 of the US Constitution, "[t]he House of Representatives...shall have the sole Power of Impeachment." The power to determine whether impeachment is appropriate in a given time rests solely with the House. The basic procedures to be followed by the House are prescribed in the Constitution,

²⁷ Ibid, Page 7

²⁸ Ibid, Page 7

²⁹ Ibid, Page 7

³⁰ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by CHAU Pak-kwan, Page 12

³¹ Ibid, Page 12

³² Ibid, Page 12

Jefferson's Manual, and Rules of the House of Representatives, previous congressional reports and precedents.³³

The impeachment process may commence in the House by a Member making a charge of impeachment on the floor on his own initiative, by a Member presenting a memorial listing charges under oath, or by a Member depositing a resolution in the hopper (a box that is used to collect resolutions), which is then referred to the appropriate committee.³⁴

If it is a resolution impeaching a specific person, it would usually be referred directly to the House Judiciary Committee. If it is a resolution requesting an inquiry into whether impeachment would be appropriate to a particular person, it would usually be referred to the House Committee on Rules, which would then generally refer it to the House Judiciary Committee.³⁵

The impeachment process may also be triggered by non-Members, such as by charges from a state or territorial legislature or grand jury, by an independent counsel advising the House of any significant information which he believes might constitute grounds for impeachment, by petitions or by the Judicial Conference of the US when the impeachment involves a federal judge.³⁶

President Nixon's impeachment investigation began with a referral of materials to the House relating to the possible impeachable offences by a special prosecutor appointed by the Attorney General. President Clinton's impeachment was triggered by evidence presented to the House by an independent counsel appointed pursuant to the independent counsel provisions of the federal law.³⁷

Although the House Judiciary Committee usually conducts impeachment investigations, such matters can be referred to another committee or to a special or select committee. In addition, the House Judiciary Committee may refer an impeachment investigation to one of its subcommittees or to a specially created subcommittee.³⁸

The focus of the impeachment inquiry is to determine whether the person involved has engaged in treason, bribery, or other "high crimes and misdemeanours". The House Judiciary Committee in the impeachment inquiry of President Nixon prepared a lengthy

³³ Ibid, Page 12

³⁴ Ibid, Page 12

³⁵ Ibid, Page 12

³⁶ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by CHAU Pak-kwan, Page 12

³⁷ Ibid, Page 12

³⁸ Ibid, Page 13

report on what constituted an impeachable offence and recommended that the full House impeached President Nixon.³⁹

In President Clinton's case, the House undertook no independent fact finding and relied on the evidence presented by the independent counsel. The Committee on the Constitution, a subcommittee of the House Judiciary Committee, held hearings to explore the questions of what constituted an impeachable offence.⁴⁰

The House Judiciary Committee will propose an impeachment resolution with articles of impeachment if it determines that grounds for impeachment exist. Articles of impeachment are detailed statements of alleged violations that require, in the view of the House, the removal of a President from his post. The proposed impeachment resolution has to be agreed to by a majority vote of the House Judiciary Committee, which must be accompanied by a written report of the Committee containing minority views of Committee members.⁴¹

The impeachment resolution will be reported to the full House of Representatives and debated. The House may consider the resolution as a whole, or may vote on each article separately. The House may vote to impeach even if the House Judiciary Committee does not recommend impeachment. A vote to impeach by the House requires a simple majority of those present (so long as quorum is present).⁴²

If the House votes to impeach, impeachment managers are appointed through the adoption of a privileged resolution. The House will also adopt a resolution to notify the Senate. When the Senate is ready, the appointed managers will appear before the bar of the Senate to impeach the individual involved and exhibit the articles against him.⁴³

Impeachment trial

According to Article I, Section 3, Clause 6 of the US Constitution, "[t]he Senate shall have the sole Power to try all Impeachments (*sic*). When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside....."⁴⁴

³⁹ Ibid, Page 13

⁴⁰ Ibid, Page 13

⁴¹ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by CHAU Pak-kwan, Page 13

⁴² Ibid, Page 13

⁴³ Ibid, Page 14

⁴⁴ Ibid, Page 14

Impeachment proceedings in the Senate are governed by the Rules of Procedure and Practice in the Senate when sitting on Impeachment Trials (Senate Rules for Impeachment Trials). The Senate may amend or modify the impeachment rules. In impeachment trials, the full Senate may receive evidence and take testimony, or may appoint a committee to serve this purpose.⁴⁵

During the course of the trial, evidence is presented and witnesses may be examined and cross-examined. The Senate has not adopted standard rules of evidence for use during an impeachment trial. The Presiding Officer possesses the authority to rule on evidence and incidental questions. However, the Presiding Officer may also choose to put any such question to a vote before the Senate.⁴⁶

After the managers and counsel for the accused have made their closing arguments, the Senate deliberates the impeachment in closed session. The Senate will then vote on the articles of impeachment in open session. A conviction on an article of impeachment requires a two-thirds vote of those Senators present. If convicted on any article of impeachment, the President is automatically removed from the office. The Senate is not required to vote on all the articles. The Senate can decide not to vote on the remaining articles if the accused has already been convicted on one or more of the articles.⁴⁷

Part B CAN THE DECISIONS OF THE SPEAKER OF PARLIAMENT BE REVIEWED IN OTHER COUNTRIES?

Introduction

Cabinet members and members of Parliament have freedom of speech and debate in or before Parliament and any of its committees and are not liable to civil or criminal proceedings, arrest, imprisonment or damages.⁴⁸ This immunity applies to anything said in, produced before or submitted to Parliament or any of its committees or to anything revealed as a result of any of the foregoing actions.⁴⁹

Section 58 (1) of our Constitution provides as follows:

- “(1) Cabinet members, Deputy Ministers and members of the National Assembly—*
- (a) Have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and*
 - (b) Are not liable to civil or criminal proceedings, arrest, imprisonment or damages for—*

⁴⁵ Ibid, Page 14

⁴⁶ Ibid, Page 14

⁴⁷ Prevention of Corruption and Impeachment of Head of State/Government in the United Kingdom, the United States and Korea, 14 December 2005, Prepared by CHAU Pak-kwan, Page 14

⁴⁸ Law of South Africa, Volume 11 - Second Edition Volume, IMMUNITIES, Author: H.A. Strydom BLur LLB LLM LLD Professor of law, University of the Free State

⁴⁹ Ibid

- (i) Anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
- (ii) Anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.”.

Freedom of speech conferred by section 58(1) of the Constitution is an absolute freedom in the sense that it is subject only to the rules and orders of Parliament and not subject to the limitation clause in section 36 of the Constitution. However, Professor Strydom states that the exercise of parliamentary privilege must be consonant with the Constitution and is therefore not immune from constitutional review.⁵⁰

The question that arises then is where does this constitutional review place the rulings and decisions of the Speaker of Parliament? Are they also subject to Constitutional review?

Privilege is derived from English law which recognised an absolute parliamentary privilege of freedom of speech and debate and prevented members of Parliament from being sued for damages or criminally prosecuted for communications during parliamentary proceedings. This privilege rested on two bases: (a) complete control by Parliament over its proceedings and members; and (b) a complete right of free speech without any fear that anything a member said will be held against him or her.⁵¹

Parliamentary privilege is derived from English law which is also one of the sources of South African law. The English concept of Parliamentary privilege is shared throughout the Commonwealth by those institutions which, in various ways, have developed from the Westminster model.⁵²

Unlike the UK itself, and much like South Africa, many Commonwealth countries have codified constitutions and the protection of Parliamentary privilege is invariably cited in those constitutions as well as being set out in specific statutes.⁵³

(a) Malawi

Redson E Kapindu, in his article titled “*Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities*”, does not necessarily discuss privilege. However, on page 133 he makes mention of the case of *Nseula v Attorney-General*.⁵⁴ The issue before the Court related to the declaration as

⁵⁰ Law of South Africa, Volume 11 - Second Edition Volume, IMMUNITIES, Author: H.A. Strydom Blur LLB LLM LLD Professor of law, University of the Free State

⁵¹ Law of South Africa, Volume 11 - Second Edition Volume, IMMUNITIES, Author: H.A. Strydom Blur LLB LLM LLD Professor of law, University of the Free State; *Poovalingam v Rajbansi* 1992 1 All SA 230 (A); 1992 1 SA 283 (AD)

⁵² Parliamentary privilege: Evolution or codification? Richard Gordon Q.C. And Sir Malcolm Jack KCB, PhD, FSA, 2013

⁵³ Ibid, Page 23

⁵⁴ Civil Cause 63 of 1996 (HC, PR) (unreported)

vacant of the seat of the applicant, a Member of Parliament, by the Speaker of Parliament on account of his alleged floor-crossing in Parliament in terms of section 65(1) of the Constitution. The main point of the state's argument was that the decision of the Speaker of Parliament was immune from judicial scrutiny based on parliamentary privilege. The Court held:

"There is an acceptance of the existence of immunities, privileges and powers of the House. Others are not in the purview of the courts, others are. What a court cannot do under the Constitution is to allow the National Assembly to masquerade behind powers and privileges of Parliament where there is a violation of human rights. Where there is a violation of rights of a citizen, be it to a member of the House or not, courts will on the generality of provisions in our Constitution be seized of the case if only to vindicate the rights of the citizen protected under the Constitution which the citizen alleges have been violated either by legislation or legislative action, resolution or decision. Mr Nseula was elected by his constituency to fulfil certain constitutional functions. He has a constitutional right to perform the duties. This is work. Under article 29 of the Constitution he is entitled to engage in economic activity, to work and to pursue a livelihood. Under article 28(1) his position in Parliament entitles him to a salary and pension – property – for which he cannot be arbitrarily deprived. In my opinion there is a threat or violation of fundamental rights. The only institution under our Constitution that can protect his rights if he claims his rights have been violated is this court, not Parliament. When there is such a threat to a citizen's rights, human or otherwise, it is idle to plead privilege or immunity of Parliament."

The Court held that the powers of the Speaker were reviewable where there was a violation or a threat of violation of a constitutional right [own emphasis]. The Court found that there was at least a threat of such violation in respect of the right to work and the right to property and, based on such violation, it was idle to plead parliamentary privilege in this case.

On the other hand in the more recent decision in the case of *Tembo (J Z U) and Another v Speaker of National Assembly*⁵⁵ the facts were as follows:

"On 17th June, 2002, Mkandawire, J., sitting at the Principal Registry in Blantyre granted an order of injunction against the appellants. The injunction restrained the appellants from holding a Malawi Congress Party Convention on 22nd June, 2002 at the Natural Resources College in Lilongwe. Despite the fact that they were duly served with the order of injunction, the appellants defied the injunction and proceeded to conduct the Convention. Following contempt of court proceedings brought before the High Court at Blantyre Principal Registry, Mkandawire, J, on 11th October, 2002 found the appellants guilty of contempt of court for wilfully disobeying an order of injunction. The learned judge ordered each appellant to pay a fine of K200, 000.00 or serve 12 months imprisonment with hard labour in default of paying the fine. The appellants were also ordered to pay costs of the court proceedings. The fines were paid by the appellants.

On 12th December, 2002, Hon. Paul Maulidi, Member of Parliament for Blantyre North and also Deputy Secretary General of the United Democratic Front Party successfully moved the National Assembly sitting at Lilongwe to pass a resolution requiring the removal of the appellants from Parliament on the ground that they had been convicted of a criminal offence involving dishonesty or moral

⁵⁵ M.S.C.A. Civil Appeal No. 1 of 2003)

turpitude. Hon. Maulidi claimed, and Parliament agreed, that the conviction for contempt of court constituted a conviction of a crime involving dishonesty or moral turpitude. The Speaker of the National Assembly was then mandated to cause publication in the Government Gazette that the two appellants had vacated their parliamentary seats. Such publication would pave the way for holding bye-elections in the appellants' respective constituencies. The appellants would be barred from contesting in such bye-elections.

On 18th December, 2002 Mr. Mvalo representing the appellants brought before the High Court, Lilongwe Registry, an application for leave to commence judicial review proceedings. He was seeking the court's intervention to consider whether the National Assembly was correct when it decided that a conviction of contempt of court constituted a conviction of a crime involving dishonestly or moral turpitude. The appellants also claimed that events in Parliament prior to the passing of the motion in question showed that the National Assembly violated rules of natural justice. At the same time, learned Counsel for the appellants applied for an interlocutory injunction to restrain the National Assembly from executing the motion which it passed. On the same day, 18th December, 2002 Kumange, J., granted, in favour of the appellants, leave to apply for judicial review of the decision of the National Assembly and an order of interlocutory injunction.

On 24th December, 2002, Hon. Attorney General and Hon. Maulidi applied to the same court which granted the order of interlocutory injunction to have the order vacated. The application was heard on 27th December. It was successful."

The two principal arguments were made by learned Counsel for the Appellants. One was that the Speaker of the National Assembly was rightly sued when he was made a defendant in judicial review proceedings. He argued further that the purpose of the judicial review proceedings was to call upon the court to review the decision of Parliament which required the appellants to vacate their parliamentary seats on the ground that they had been convicted of a criminal offence involving dishonesty or moral turpitude.

The Malawi Supreme Court of Appeal held as follows:

"There is no doubt that the appellants were wrong to sue the Speaker of the National Assembly in the present case. The question whether the Speaker of the National Assembly can be sued as a party in judicial proceedings for a decision made or an act done by him in his official capacity was authoritatively decided in the case of the PRESIDENT OF MALAWI and the SPEAKER OF THE NATIONAL ASSEMBLY v. KACHERE and Others M.S.C.A. CIVIL APPEAL NO. 20 of 1995. That case decided that it would be wrong to sue the Speaker of the National Assembly where a decision made or an act done by him in his official capacity is in issue. The correct party is the Attorney General. It is our view that any decision of the High Court which decides or purports to decide to the contrary is clearly wrong. That disposes of the first argument."

(b) Canada

The exclusive right of the House of Commons to regulate its own internal affairs refers to its control of its own debates, agenda and proceedings as they relate to its legislative and deliberative functions.⁵⁶ This right was affirmed in 1993 in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*⁵⁷ and has since been reaffirmed in a number of important court decisions, including *Canada (House of Commons) v. Vaid*⁵⁸ in 2005 and *Knopf v. Canada (House of Commons)*⁵⁹ in 2006. Indeed, in the *Vaid* decision, the Supreme Court noted that the categories of privilege include:

*"... control by the Houses of Parliament over 'debates or proceedings in Parliament' (as guaranteed by the Bill of Rights of 1689) including day-to-day procedure in the House, for example the practice of the Ontario legislature to start the day's sitting with the Lord's Prayer...."*⁶⁰

The House of Commons can make and change its own rules and manage its internal affairs without outside interference. Its internal procedures and rules as contained in the Standing Orders, special orders or Speaker's rulings are protected by parliamentary privilege and cannot be questioned by the courts or any place outside of Parliament [own emphasis].⁶¹ The House of Commons is free from judicial review of its decisions when these are made pursuant to Standing Order, special order, sessional order or resolution. Recent attempts to review the actions and decisions of the House of Commons or its committees have been rejected by the courts.⁶² In 1999, the Ontario Court (General Division) dismissed an action brought against the House for a resolution it had adopted restricting an individual from the precincts of Parliament.⁶³ In 2006, the Federal Court upheld the right of parliamentary committees to adopt and enforce their own internal procedures.⁶⁴

This is also true of Speakers' rulings interpreting such orders or resolutions.⁶⁵ Thus, if Members feel that the rules of the House are not being applied as they would wish,

⁵⁶ <http://www.parl.gc.ca>

⁵⁷ *Ibid.*, [1993] 1 S.C.R. 319

⁵⁸ *Ibid.*, [2005] 1 S.C.R. 667

⁵⁹ *Ibid.*, 2006 FC 808

⁶⁰ *Ibid.*, *Vaid*, Par. 29.10

⁶¹ *Ibid.*

⁶² <http://www.parl.gc.ca>

⁶³ *Ibid.*; On June 4, 1998, the House adopted the following Order: "That this House order that Ernst Zündel be denied admittance to the precinct of the House of Commons during the present Session" (*Journals*, p. 937, *Debates*, pp. 7608-9, 7616). The House had adopted this Order to prevent Mr. Zündel, a noted Holocaust denier, from holding a press conference in the Press Gallery's Conference Room in the Centre Block of the Parliament Buildings. Mr. Zündel had brought an action against the political parties represented in the House of Commons, as well as a number of Members of Parliament, seeking a declaration that the defendants had violated his right to freedom of expression guaranteed under section 2(b) of the Canadian Charter of Rights and Freedoms. The lawyer for the plaintiff questioned whether the resolution denying Mr. Zündel the right to use the precinct of Parliament for a speech was necessary to the proper functioning of the House. In dismissing the action, the Court found, among other reasons, that the House of Commons was exercising its parliamentary privilege in restricting the precinct of the House of Commons and had not prohibited Mr. Zündel from speaking. The Court concluded that it should not interfere with the decision of the House (*Zündel*, Court File No. 98-CV-7845, January 22, 1999).

⁶⁴ <http://www.parl.gc.ca>

⁶⁵ *Ibid.*

there is no appeal to the courts.⁶⁶ If the Standing Orders are breached, the only place to raise the point of order is in the House of Commons. Neither is a Speaker's ruling on such a point of order reviewable by the courts.⁶⁷

The right to regulate its own internal affairs does not mean that the House is above the law.⁶⁸ However, where the application of statute law relates to a proceeding in Parliament or a matter covered by privilege, it is the House itself which decides how the law is to apply and the House's decision cannot be reviewed in the courts.⁶⁹ Where the question arises in relation to administration, outside of a proceeding or parliamentary function, the law may be enforceable against the House.⁷⁰

(c) India

In *Kihoto Hollohan v. Zachillhur* (1992 Supp (2) SCC 651, 715, para 120) another Constitution Bench, while examining the validity of para 7 of the Tenth Schedule to the Constitution which excluded judicial review of the decision of the Speaker/Chairman on the question of disqualification of MLAs and MPs, observed that it was unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and para 7 of the Tenth Schedule violated such basic structure.⁷¹

Subsequently, in *L. Chandra Kumar v. Union of India* ((1997) 3 SCC 261) a larger Bench of seven Judges unequivocally declared:

"that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure".

However an article on the News website of India Today titled "**Speaker's decision not open to judicial review: SC**", dated August 9, 2014 states that the Supreme Court of India said that a decision taken by the speaker in the House is not open to judicial review. The article provides the following quote from the judgment:

"A ruling given by the Speaker in the chamber of the House is not amenable to judicial review."

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ <http://www.mondaq.com>

We have not been able to obtain the actual judgement.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Enver Daniels', written in a cursive style.

**ENVER DANIELS
CHIEF STATE LAW ADVISER**