

THE DISTINCTIVENESS AND INTERRELATEDNESS OF THE PRIVILEGES AND IMMUNITIES OF PARLIAMENT: A COMPARISON OF THE NAMIBIAN AND SOUTH AFRICAN JURISDICTIONS

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SUMMARY

The terms “privileges” and “immunities” in relation to parliament are used interchangeably in the literature. A comparison of the privileges and immunities of parliament in the Namibian and the South African jurisdictions has shown that these are distinctive but interrelated. Major dissimilarities in Namibian and South African law in this regard are discernible. In the Namibian system, certain weaknesses are identified in the legal framework for the privileges and immunities of parliament. Recommendations are made based on these identified gaps with a view to improving the law relating to the privileges and immunities of parliament.

1 INTRODUCTION

The privileges and immunities of parliament have elicited wide public attention in Southern African states owing to the publicised disruption of parliamentary proceedings in South Africa. The current state of affairs in this country has been evident in extensive court litigation in which members of parliament have sought court orders reaffirming their right to freedom of speech in parliament. The privileges and immunities of parliament are provided for in the Constitution of South Africa and these include the right to freedom of speech, thus ensuring that members of parliament are immune

from civil and criminal liability when exercising such privileges.¹ In Namibia, the Constitution provides for the privilege of the president and instructs parliament to provide for the privileges and immunities of parliament. The terms “privileges” and “immunities” are, however, applied interchangeably.

Accordingly, this paper examines both the distinctiveness and interrelatedness of the terms “privileges” and “immunities”. This it does by explaining the meaning of each and the interface between the two terms. Furthermore, a comparative overview is undertaken of the Namibian and South African jurisdictions in relation to the law on parliamentary privileges and immunities. Both South Africa and Namibia were once colonised by Britain.² After independence, these countries recognised the supremacy of their constitutions, but adopted different systems of privileges and immunities of parliament. Kiekbav points out that the significance of comparison is to establish both similarities and differences in the legal phenomenon,³ and the purpose of this comparison is to attain a deeper knowledge of the systems of privileges and immunities of parliament of the two countries, so as to point out strengths and weaknesses and to perfect the system of privileges and immunities of parliament in Namibia. Finally, a conclusion is drawn and recommendations made for improving the law relating to the privileges and immunities of parliament in Namibia.

2 THE INTERFACE BETWEEN THE PRIVILEGES AND IMMUNITIES OF PARLIAMENT

In addition to its power to pass legislation, parliament acts as the voice of all citizens, including the voiceless and the least remembered. In fulfilling its mandate to be the voice of the voiceless and to oversee the conduct of the executive, free speech and debate in parliament are essential.⁴ Most democratic states provide for the privileges and immunities of parliament to enable this institution to perform its functions and control its internal affairs effectively. This is in line with the doctrine of the separation of powers, which is concerned with the separation of the three functions of government – namely, the legislative, the executive and the judiciary.⁵ The separation of powers is based on the principle that each branch of government is

¹ *Lekota v Speaker of National Assembly* 2015 (4) SA 133 (WCC) and *Democratic Alliance v Speaker of the National Assembly* (CCT86/150 [2016] ZACC 8).

² South Africa, when it was a British Colony, undertook the administration of Namibia in the then-South West Africa under the terms of Article 22 of the Covenant of the League of Nations.

³ Kiekbav “Comparative Law: Method, Science or Educative Discipline? 2013 *Electronic Journal of Comparative Law* 3.

⁴ S 55(2) of the Constitution of the Republic of South Africa, 1996 provides that the 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

(b) To maintain oversight of–

(i) The exercise of national executive authority including the implementation of legislation; and

(ii) Any organ of state.

⁵ Mojapelo “The Doctrine of Separation of Powers: A South African Perspective” 2013 *Advocate* 37.

independent and has separate powers and functions on which the others cannot infringe.⁶ The privileges and immunities of parliament protect free debate and promote democracy in parliament. This view is reinforced by Boyron, who argues that privileges and immunities allow members of parliament to express themselves in parliament without any fear of retaliation from an arbitrary government or vengeful citizens.⁷ What is meant by “privileges” and “immunities” in this context is explained next.

3 PRIVILEGES OF PARLIAMENT

The *Oxford Concise South African Dictionary* defines “privilege” as “a special right, advantage or immunity for a particular person, a special benefit or honour”.⁸ In terms of the dictionary meaning, “immunity” is a synonym for privilege. Arguably, parliamentary privileges are related to, but distinct from, immunities. In the law of evidence, privileges are understood to refer to the protection of certain communications from being used as evidence in court. According to Zeffertt and Paizes, when a successful claim of privilege is made, it is because the protection of some other higher value has been given primacy.⁹ Accordingly, in order to protect marriage between married couples, the marital privilege protects spouses at criminal proceedings from disclosing any communication that a spouse made to the other spouse during the marriage.¹⁰ Another example is the legal professional privilege, which protects the disclosure of communication between a legal adviser and his or her client if the legal adviser was acting in a professional capacity at the time.¹¹ In both cases, the privilege enables the parties to communicate freely. In turn, the parties are not compelled to give evidence in court about these communications.

In the context of parliament, the term “privilege” is applied when referring to the special rights and powers of parliament and the protection afforded to members of parliament and other participants in parliamentary proceedings.¹² These privileges are broader and include a power to require the attendance of persons to give evidence or produce documents, the power to suspend or even expel a member of parliament, and the power to impose penalties on a person who is in contempt of the house of parliament or in breach of parliamentary privileges.¹³ Parliamentary privilege is further defined as the sum of peculiar rights enjoyed by parliament collectively as an institution and by members of parliament individually, without which they

⁶ *Tlouamma v Mbetse*, *Speaker of the National Assembly of the Republic of South Africa* 2016 (1) SA 534 (WCC) par 60.

⁷ Boyron *The Constitution of France: A Contextual Analysis* (2012) 111.

⁸ The Dictionary Unit of South African English (ed) *Oxford South African Concise Dictionary* (2006) 928.

⁹ Zeffertt and Paizes *The South African Law of Evidence* (2009) 73.

¹⁰ Zeffertt and Paizes *The South African Law of Evidence* 625.

¹¹ Bellengere, Illsely, Naude, Nkutha, Palmer, Picarra, Reddi, Roberts, Theophilopoulos, Van der Merwe and Whitcher *The Law of Evidence in South Africa: Basic Principles* (2013) 308.

¹² Campbell *Parliamentary Privilege* (2003) 1.

¹³ *Ibid.*

could not discharge their functions effectively.¹⁴ According to Maingot, parliamentary privilege is a fundamental right necessary for the exercise of constitutional functions.¹⁵ In the context of parliament, the higher value protected by the privilege is freedom of speech and debate in parliament. The most important privilege afforded to parliament collectively, therefore, is freedom of speech and debate in parliament and its committees.¹⁶ This privilege is important because, without the right to speak their minds freely, members would not be able to discharge their functions properly.¹⁷

4 IMMUNITIES OF PARLIAMENT

It is said that there is no exhaustive definition of the term “immunity”.¹⁸ The *Oxford Concise South African Dictionary* defines immunity as “exemption or protection from an obligation or penalty; law officially exempted from legal proceedings or liability”.¹⁹ In a broader sense, parliamentary immunity is defined as “a legal instrument which inhibits legal action, measures of investigation, and law enforcement in civil or criminal matters against members of the legislature”.²⁰ The immunity clause may provide that the courts lack the jurisdiction to hear civil claims or criminal complaints against parliamentarians.²¹ In a criminal court, the prosecutor may offer immunity to an accused person for crimes he or she had committed if he or she testifies for the State. This procedure does not affect the validity of the claim or destroy the criminal nature of the conduct; it merely prevents the enforcement of the law.²²

Parliamentary immunity may take different forms. The two main forms of immunity are non-accountability and inviolability. Non-accountability protects “freedom of the parliamentary vote and freedom of speech in parliament or in the parliamentary context”.²³ Under non-accountability, members of parliament may not be held legally accountable for their utterances or voting behaviour in the assembly to which they belong.²⁴ This form of immunity usually cannot be lifted by parliament or renounced by an individual member.²⁵ On the other hand, “inviolability” denotes immunity from legal action, detention or investigation outside the immediate scope of the activities of members in parliament.²⁶ It often applies only while parliament is

¹⁴ Hardt *Parliamentary Immunity: A Comprehensive Study of the Systems of Parliamentary Immunity in the United Kingdom, France, and the Netherlands in a European Context* (2013) 56.

¹⁵ Maingot *Parliamentary Privilege in Canada* (1997) 11.

¹⁶ Maingot *Parliamentary Privilege in Canada* 12.

¹⁷ Hardt *Parliamentary Immunity* 63.

¹⁸ Hardt *Parliamentary Immunity* 3.

¹⁹ The Dictionary Unit of South African English (ed) *Oxford South African Concise Dictionary* 584.

²⁰ Hardt *Parliamentary Immunity* 3.

²¹ *Ibid.*

²² *Ibid.*

²³ Hardt *Parliamentary Immunity* 4.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

in session and ends with the end of the parliamentary mandate.²⁷ Inviolable immunity then has a suspensive effect in that the bar from arrest or prosecution applies during the time of a member's mandate, but he or she may be arrested and prosecuted after his or her term has ended.²⁸

Some states, especially those that were once colonised by Britain, employ the non-accountability form of immunity, while other states, mostly within the continental parliamentary tradition, employ the inviolability form.²⁹ Although immunity is distinct from privilege, the two concepts are linked and interrelated; the exercise of privilege evokes the application of immunity in that the immunity is necessary for the protection of the privilege. Despite the differences, the main purpose of both privileges and immunity is to enable parliament and its members to do their work effectively. The exemption from civil and criminal liability of members for exercising freedom of speech in parliament thus protects free speech and debate in parliament.

As stated above, different countries employ different forms of privilege and immunity.

5 THE POSITION IN NAMIBIA

The situation in Namibia is characterised by the provision of different privileges and immunities for the president and for members of parliament respectively. The Constitution provides for comprehensive privileges and immunities for the president. Article 31 provides:

- “(1) No person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her capacity as President; and
- (2) No person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.
- (3) After a President has vacated that office:
 - (a) No court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President; and
 - (b) A civil or criminal court shall have jurisdiction to entertain proceedings against him or her only in respect of acts of commission or omission alleged to have been perpetrated in his or her personal capacity whilst holding office as President, if parliament by resolution has removed the President on the grounds specified in this constitution and if a resolution is adopted by Parliament stating that any such proceedings are justified in the public interest notwithstanding any damage such proceedings might cause to the dignity of the office of President.”³⁰

²⁷ Hardt *Parliamentary Immunity* 5.

²⁸ *Ibid.*

²⁹ Hardt *Parliamentary Immunity* 5–6. The continental parliamentary tradition is employed by some European states and most states formerly dominated by France.

³⁰ Art 31(1)–(3) of the Constitution of Namibia of 2010.

The president of Namibia is afforded inviolable immunity, since he or she may not be liable for any civil or criminal misconduct while in office or after retiring as president. With regard to criminal misconduct, the immunity is not limited to acts of commission or omission relating to the president's office; the immunity applies to all forms of misconduct arising from any source. This is broadly to cover criminal misconduct such as theft. The president forfeits the immunity only if he or she is removed from office by resolution of parliament owing to misconduct specified in the Constitution. The end result is that the president of Namibia is granted life immunity, unless he or she forfeits the immunity as a result of his or her removal from office by parliament.

According to Mudge, during the drafting of the Constitution of Namibia, the South West Africa Peoples' Organisation (SWAPO) – the current governing party in Namibia – proposed a president with extensive powers assisted by ministers who would be mere advisers.³¹ Mudge further points out that, although agreement was eventually reached among the framers of the Constitution that executive power should not be unchecked, the debate regarding the presidency was not just on an ideological level but it was very much about the personality they knew. Accordingly, the background to the drafting of the Namibian Constitution shed light on the possible reasons for affording the president of Namibia inviolable immunity.

With regard to members of parliament, the Constitution provides:

“Rules providing for the privileges and immunities of members of the National Assembly shall be made by Act of Parliament, and all members shall be entitled to the protection of such privileges and immunities.”³²

Consequently, parliament adopted the Powers, Privileges and Immunities of Parliament Act to provide for the privileges and immunities of parliament.³³ The preamble to the Act declares that it “provides for the expression of the right of freedom of speech and debate in parliament; to provide for certain privileges, immunities and powers in connection with parliament”. The Act does not, however, define what the privileges and immunities of parliament are. The relevant provision of the Act provides:

“Notwithstanding the provisions of any law, no member shall be liable to any civil or criminal proceedings, arrest, imprisonment, or damages by reason of–

- (a) anything done in the exercise of that member's right to freedom of speech in Parliament;
- (b) any matter or thing which such member–
 - (i) brought by report, petition, bill, resolution, motion, or otherwise in or before Parliament;
 - (ii) said in Parliament, whether as a member or witness, or otherwise may have communicated while taking part in any proceedings in Parliament.”³⁴

³¹ Mudge “The Art of Compromise: Constitution-Making in Namibia” in Bösl, Horn and Pisani (eds) *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades* (2010) 135.

³² Art 60(3) of the Constitution of Namibia.

³³ Powers, Privileges and Immunities of Parliament Act 17 of 1996 (PPIPA).

³⁴ S 1 of PPIPA.

It should be noted that Namibia is not the only democracy in the world to use both the non-accountability and inviolability forms of immunity. According to Hardt, France applies both forms of immunities,³⁵ and the Netherlands also once applied inviolable immunity, but has since abolished it.³⁶ The inviolable immunity afforded to the president of Namibia, however, might be in direct conflict with the concepts of equality before the law and the supremacy of the Constitution.³⁷

The Constitution of Namibia guarantees everyone equality before the law and prohibits any kind of discrimination based on, among other grounds, social or economic status.³⁸ Accordingly, the immunity accorded the Namibian president may be perceived as being unjust as it enables the president to escape the law. In other jurisdictions, such as France, where inviolable immunity also applies, immunity may be lifted by parliament.³⁹ The position in Namibia is different since not even parliament may lift the immunity unless the president is removed for misconduct. Consequently, such immunity might create a perception that the president of Namibia is above the law.

As has been pointed out, inviolable immunity for life granted to the presidents of Namibia may not be in line with equality before the law. Although corruption in Namibia has not surfaced in the public domain, allegations of corruption – such as the involvement of the president's daughter in construction tenders – have recently surfaced.⁴⁰ Arguably, Namibia is one of the stable democracies on the continent. This is evident from a speech delivered by the president of Namibia at the Conference of the Heads of Anti-Corruption Agencies in Commonwealth Africa on 31 May 2016. In that speech, he publicly declared that he was the first African leader to have subjected himself and his family to an audit of his assets for public declaration by the accounting firm Price Waterhouse Coopers.⁴¹

It should be noted that, contrary to the declaration in the preamble, the Namibian PPIPA does not expressly provide for freedom of speech in parliament, although it does, arguably, cover freedom of speech indirectly in that it immunises members of parliament from civil and criminal liability for exercising the right of freedom of speech. Furthermore, the Act provides:

“No person shall be liable for damages or otherwise for anything done under the authority of parliament.”⁴²

This provision of the Act seems to be very broad in that it exempts persons from liability arising from anything done under the authority of

³⁵ Hardt *Parliamentary Immunity* 190.

³⁶ Hardt *Parliamentary Immunity* 227.

³⁷ Art 1(6) of the Constitution of Namibia provides that the Constitution shall be the supreme law of Namibia.

³⁸ Art 10(1)–(2) of the Constitution of Namibia.

³⁹ Boyron *The Constitution of France* 112 states that inviolable immunity can be lifted if the secretariat of the chamber approves the arrest of a member of parliament.

⁴⁰ Immanuel “Pohamba’s Daughter Gets N\$100m Contracts” (2014-10-21) *The Namibian*.

⁴¹ The Commonwealth “Commonwealth Heads of Anti-Corruption Agencies Meeting in Africa” (undated) <http://thecommonwealth.org/media/event/commonwealth-heads-anti-corruption-agencies-meeting-africa> (accessed 2017-03-27).

⁴² S 5 of PPIPA.

parliament. The question then arises as to whether parliament is immune from all forms of liability, which might be incongruent with constitutionalism. Namibia is a constitutional democracy in terms of which its constitution is the supreme law of the Republic of Namibia,⁴³ and the Republic of Namibia is founded on the rule of law.⁴⁴ The rule of law entails that a legal basis must be shown for every governmental action that interferes with the rights of the citizens and, by extension, this includes parliament.⁴⁵ Accordingly, in a democratic state governed by the rule of law, parliament cannot be immune from liability for all forms of acts performed outside the ambit of the law.

Furthermore, the PPIPA does not expressly provide for the privileges of parliament; instead it provides for the establishment of a committee of privileges.⁴⁶ The powers and functions of this committee of privileges include the power to issue directives and provide for disclosure by members of their financial or business affairs; the committee also investigates complaints made by the house relating to the conduct of members of parliament.⁴⁷ It is thus evident that the powers of the committee are not related to the exercise of free speech in parliament.

6 THE POSITION IN SOUTH AFRICA

The South African Constitution provides comprehensively for the privileges and immunities of parliament:

- (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:
 - (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.
- (2) Other privileges and immunities of the National Assembly, Cabinet members and members of the National Assembly may be prescribed by national legislation.⁴⁸

Unlike the Namibian position, South Africa does not grant a different form of immunity to the president; the president is granted the same immunity as the members of parliament – namely, non-accountability immunity. The Constitution provides expressly for freedom of speech in parliament and immunity from civil and criminal liability for the president and members in terms of exercising freedom of speech in parliament. In line with this,

⁴³ Art 1(6) of the Constitution of Namibia.

⁴⁴ Art 1(1) of the Constitution of Namibia.

⁴⁵ Ekins *Modern Challenges to the Rule of Law* (2011) 15.

⁴⁶ S 7(1)(a) of PPIPA.

⁴⁷ S 12 of PPIPA.

⁴⁸ S 58(1)–(2) of the Constitution of the Republic of South Africa, 1996.

parliament adopted the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act⁴⁹ to further prescribe the immunities and privileges. Neither the Constitution nor the Act defines the terms “privileges” and “immunities” of parliament. The Act extends the privileges and immunities enjoyed by members of the National Assembly to the joint sitting of the National Assembly and the National Council of Provinces.⁵⁰ Freedom of speech in parliament is protected by prohibiting certain conduct that may impede the right to freedom of speech.⁵¹ This protection is reinforced by the prohibiting of any improper influence of members of parliament.⁵² Freedom of speech and debate in parliament is further protected by immunising any person from “civil or criminal proceedings in respect of any report, paper or minutes of parliament or a house or committee by order or under the authority of the houses, or the house or committee concerned.”⁵³ This provision of the Act may be compared with the provision of the Namibian Act that exempts a person from damages in respect of anything done under the authority of parliament.⁵⁴ The South African Act narrows the protection to specific conduct that is linked to the exercise of the freedom of speech, whereas the Namibian provision is not limited to any specific conduct and is, therefore, not linked to the protection of free speech and debate in parliament.

The South African parliament has been characterised by disputes between members of parliament and the presiding parliamentary officers about the exercise of freedom of speech in parliament. These disputes have been taken to the courts for rulings on the meaning and scope of the privilege. In *Speaker of the National Assembly v De Lille MP*,⁵⁵ the applicant

⁴⁹ Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

⁵⁰ See s 6 of 4 of 2004. Furthermore, s 1 of the Act defines “Parliament” as the National Assembly and the National Council of Provinces. Parliament is, therefore, constituted by the joint sitting of the National Assembly and National Council of Provinces.

⁵¹ S 7 of 4 of 2004 provides that a person may not improperly interfere with or impede the exercise or performance by parliament or a house or committee of its authority or functions; improperly interfere with the performance by a member of his or her functions as a member; threaten or obstruct a member proceeding to or going from a meeting of parliament or a house or committee; assault or threaten a member, or deprive a member of any benefit, on account of the member’s conduct in parliament or a house or committee; while parliament or a house or committee is meeting, create or take part in any disturbance within the precincts; or fail or refuse to comply with an instruction by a duly authorised staff member regarding the presence of persons at a particular meeting in the precincts; or the possession of any article, including a firearm, in the precincts or any part thereof.

⁵² S 8(1)–(2) of 4 of 2004 provides that a person may not by fraud, intimidation, force, insult or threat of any kind, or by the offer or promise of any inducement or benefit of any kind, or by any other improper means influence a member in performance of the member’s functions as a member; induce a member to be absent from parliament or a house or committee; or attempt to compel a member to declare himself in favour of or against anything pending before or proposed or expected to be submitted to parliament or a house or committee. A member may not ask for, receive or accept any fee, compensation, gift, reward, favour or benefit, for the member or another person, for or in respect of voting in particular manner, or not voting, on any matter before a house or committee; promoting or opposing anything pending before or proposed or expected to be submitted to a house or committee; or making a representation to a house or committee.

⁵³ See s 18(1) of 4 of 2004.

⁵⁴ See s 5 of PPIPA.

⁵⁵ [1999] 4 ALL SA 241 (A).

– a member of parliament (MP) – was suspended by parliament for 15 days without pay for making serious allegations against members of the National Assembly. The applicant launched an application in the Cape High Court for an order impugning the resolution of the Assembly that had led to her suspension. The resolution of the National Assembly was subsequently declared invalid and set aside on the grounds that the Powers and Privileges of Parliament Act⁵⁶ did not make provision for suspension as punishment for a member who had been found guilty of contempt of parliament.⁵⁷ Accordingly, this judgment protects the freedom of speech in parliament, in that it endorses the principle of the rule of law that parliament may not interfere with the freedom of speech of members contrary to the precepts of the law.

In *Democratic Alliance v Speaker of the National Assembly*,⁵⁸ the DA sought an order declaring section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act constitutionally invalid. This section provides that a person who creates or takes part in any disturbance in the precincts while parliament or a house or committee is meeting may be arrested and removed. The basis for the application for the declaration of the constitutional invalidity of section 11 is that it impermissibly curtails a member's privilege of free speech in parliament by providing for the arrest of MPs who create or take part in a disturbance. The court found that since section 11 might lead to a member being arrested, detained in police or prison cells and charged with a possibility of being convicted of a criminal offence, it would have a chilling effect on robust debate, and it would limit free speech.⁵⁹ It was thus found that section 11 infringes the immunity from criminal proceedings, arrest and imprisonment enjoyed by members in terms of section 58 of the Constitution.⁶⁰

In the case of *Chairperson of the National Council of Provinces v Malema*,⁶¹ the presiding officer of parliament ordered the applicant, an MP, to leave the house after he had refused to withdraw a statement he had made to the effect that the ANC had massacred people in Marikana, which the presiding officer interpreted as being unparliamentary. The applicant contended that the ruling by the presiding officer that the statement he made was unparliamentary was unlawful, and that he was, therefore, justified in refusing to withdraw it. The Supreme Court of Appeal found that the applicant was engaged in robust criticism of the government's conduct, and his words were protected political speech under section 58(1) of the Constitution.⁶² Accordingly, freedom of speech includes robust debate conducted within the parameters of the law.

⁵⁶ Powers and Privileges of Parliament Act 91 of 1963, which was in operation and which regulated the powers and privileges of members of parliament at the time of the hearing of this case.

⁵⁷ *Speaker of the National Assembly v De Lille MP supra* par 25.

⁵⁸ *Democratic Alliance v Speaker of the National Assembly supra*.

⁵⁹ See *Democratic Alliance v Speaker of the National Assembly supra* par 40. S 11 of 4 of 2004 criminalised the taking part in a disturbance by an MP.

⁶⁰ See *Democratic Alliance v Speaker of the National Assembly supra* par 52.

⁶¹ *Chairperson of the National Council of Provinces v Malema* 2016 (5) SA 335 (SCA).

⁶² See *Chairperson of the National Council of Provinces v Malema supra* par 25.

The courts have not only protected freedom of speech in parliament but have emphasised that freedom of speech should not be exercised arbitrarily but within the confines of the rules of parliament. In the judgment of *Lekota v Speaker of National Assembly*,⁶³ the applicant, an MP, had refused to withdraw a statement he had made about the President of the Republic. The speaker ruled that the statement made by the applicant was out of order and contrary to the standing order of parliament that provides that members may not impute improper or unworthy motives or conduct to other members unless by way of a separate, and clearly formalised and properly motivated, substantive motion. The applicant subsequently approached the High Court for an order declaring the rulings of the speaker unlawful and inconsistent with the Constitution. In dismissing the applicant's case, the court found that the speaker was correct in ruling that the remarks made by the applicant were out of order.⁶⁴ The court further reaffirmed that members of the Assembly may exercise their right to freedom of speech in the Assembly subject to its rules and orders.⁶⁵

Although in the pre-1994 constitutional dispensation, local government was not afforded equal privileges and immunities in its municipal councils, the new democratic dispensation does afford municipalities such privileges and immunities.⁶⁶ For example, in the case of *Swartbooï v Brink*,⁶⁷ the appellants, who were councillors of Nala Local Municipality, had been ordered by the High Court to pay costs for taking part in deliberations and voting in favour of decisions that affected the respondents who were also members of the council. This council resolution had been set aside by the High Court on the basis that it was unlawful. The appellants approached the Constitutional Court, contending that the High Court order that required them to pay costs for voting on the resolution in council contravened the privileges and immunities afforded to members of council by the Constitution and legislation.⁶⁸ In setting aside the High Court order, the Constitutional Court held that the purpose of the privileges and immunities of municipal councils is to encourage vigorous and open debate in the process of decision-making.⁶⁹ The purpose of the privileges and immunities afforded to members of legislative assemblies was further explained in the case of *Dikoko v Mokhatla*⁷⁰ where the court held that immunising the conduct of members from criminal and civil liability is a bulwark of democracy in that it promotes freedom of speech and expression and encourages democratic, full and effective deliberation.⁷¹ Although the *Swartbooï* and *Dikoko* cases relate to

⁶³ *Lekota v Speaker of National Assembly* 2015 (4) SA 133 (WCC).

⁶⁴ *Lekota v Speaker of National Assembly supra* par 39.

⁶⁵ *Lekota v Speaker of National Assembly supra* par 13.

⁶⁶ S 161 of the Constitution of the Republic of South Africa, 1996.

⁶⁷ 2006 (1) SA 203 (CC).

⁶⁸ S 161 of the Constitution allows provincial legislation within the framework of national legislation to provide for privileges and immunities of municipal councils, and s 28(1) of the Local Government: Municipal Structures Act of 1998 affords to councillors freedom of speech in a municipal council and exempts them from liability to civil or criminal proceedings, or arrest, imprisonment or damages.

⁶⁹ *Swartbooï v Brink supra* par 20.

⁷⁰ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

⁷¹ *Dikoko v Mokhatla supra* par 39.

privileges and immunities of municipal councils, the principle regarding protection of freedom of speech applies equally to the protection of the privileges and immunities of parliament.

7 CONCLUSION

This study has shown that immunities and privileges are essential tools for preserving freedom of speech and debate and for promoting democracy in parliament. Although these terms are interrelated, they are distinct, since members enjoy the privilege they are assured of by exercising free speech and debate in parliament as well as enjoying immunity from civil and criminal liability for exercising such freedom. The value of the privileges and immunities of parliament is evident from the amount of court litigation by members of parliament for relief regarding the content and scope of the privileges and immunities of parliament in South Africa. These court cases have contributed tremendously to jurisprudence on this matter.

Furthermore, this paper has revealed a gap in the legal framework of the privileges and immunities in Namibia. Firstly, since privileges and immunities of parliament are not enshrined in the Namibian Constitution, these tools for promoting democracy are rendered weak and could be done away with if parliament had a mind to do so. More particularly, save for mandating parliament to provide for privileges and immunities, the Constitution does not lay down a foundation or prescribe the content of such privileges and immunities of parliament. Consequently, parliament has wide discretion on the content and scope of these privileges and immunities. Secondly, the legislation that ought to provide for these privileges and immunities fails to provide expressly for the exercise of free speech and debate in parliament. Given that free speech is not expressly provided for, it is possible that democracy could be stifled in parliament, since members may second guess the content and scope of free speech in that institution.

Thirdly, apart from the fact that the inviolability of immunity accorded to the president of Namibia might not be in line with the equality before the law provision enshrined in the Constitution of Namibia, it should not be taken for granted that all future presidents of Namibia will not engage in corruption. Precautions should, therefore, be taken to protect the nation from future presidents who might take advantage of the immunity to shield themselves from justice.

Consequently, it is submitted that the Namibian Constitution should be amended to abolish the inviolability of immunity or, alternatively, it could limit the immunity to the term of the president. Furthermore, for the better protection of the privileges and immunities of members of parliament, the Constitution of Namibia could adequately provide for the privileges and immunities of parliament instead of entrusting parliament with the power to protect such privileges and immunities through legislation. It is hoped that the proposals presented here, relating to the law on the privileges and immunities of the Namibian parliament, could help to tighten legislation in this regard and promote debate and democracy in parliament.