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UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

**AN INVESTIGATION INTO THE SOUTH AFRICAN NATIONAL ASSEMBLY
POWERS AND PRIVILEGES STANDING COMMITTEE: IS THE COMMITTEE AN
INDEPENDENT AND IMPARTIAL TRIBUNAL OR FORUM? A COMPARATIVE
ANALYSIS WITH THE CANADIAN CONSTITUTIONAL SYSTEM**

BY

MASIBULELE CHRIS MFUNZANA

(10386743)

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I would like to thank God for the strength he has provided me with, in order to complete my studies;

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LIST OF ABBREVIATIONS

| | |
|------|-------------------------------|
| ANC | African National Congress |
| MP's | Members of Parliament |
| NA | National Assembly |
| NCOP | National Council of Provinces |
| RSA | Republic of South Africa |

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CHAPTER 1: INTRODUCTION

1.1 Introduction

Legal history reveals that before the development of the state, the public identity of individuals was determined according to their membership of the order determined by religion.¹ According to Bekink,² when the concept of the state was developed it took on a variety of forms such as monarchies and empires. It was not until the 15th century that the modern state arose.³ According to Malan,⁴ since its development a striking phenomenon of the state is that it is now almost universally the main determinant of the public identity of individuals. What this means is that in the international community in which interaction between individuals from different communities is almost unavoidable, the citizenship of each and every individual is associated with the state he/she originally comes from.

In the world to date, there are generally two main forms of the modern states that are recognised internationally, namely, the unitary state and the federal state.⁵ Examples of the unitary states are the United Kingdom and New Zealand, while United States of America, Australia and Canada are defined as federal states.⁶ According to Bekink,⁷ although authority in a unitary state may be distributed to other levels and government bodies, the national government has the highest authority in the state. By contrast, according to Hogg,⁸ in a federal state governmental power is distributed between a central government (national / federal government) and the regions

¹ Malan *Politocracy: an assessment of the coercive logic of the territorial state and ideas around a response to it* (2012) 5, hereinafter referred to as Malan (2012).

² Bekink *Principles of South African Constitutional Law* 2nd Ed (2016) 19, hereinafter referred to as Bekink (2016).

³ Bekink (2016) 20.

⁴ Malan (2012) 1.

⁵ Bekink (2016) 200.

⁶ Hogg *Constitutional Law of Canada* 3rd Ed (1992) 98, hereinafter referred to as Hogg (1992).

⁷ Bekink (2016) 201-202.

⁸ Hogg (1992) 98.

(provincial states), with each having highest authority in matters falling within their competency and neither subordinate to the other.

Regardless of their form, states are very important in the international community. They are important for sustaining their citizens as well as fulfilling their international obligations.⁹ According to Bekink,¹⁰ the most common public responsibilities of the states towards sustaining their citizens include the provision of education, housing and land, as well as health services, just to mention a few. According to James,¹¹ the importance of the state at the international level is its ability to independently speak for itself in international relations.

Crucially, since the state is generally regarded as a juristic person, it acts through government bodies.¹² According to Vidmar,¹³ a government of a state needs not only to exist as an authority but also to exercise effective control in the territory of a state, as well as to operate independently from the authority of governments of other states. However, according to Bekink,¹⁴ since a single government body cannot effectively exercise the state authority, such authority is distributed between various government bodies and spheres. In line with the doctrine of separation of powers, the various government bodies between which the state authority is distributed and exercised are legislative, executive and judicial bodies.¹⁵

Notably, the organ of state to which the legislative authority is commonly exercised is a Parliament. According to Bekink, in modern states, the functions of Parliaments generally are:

⁹ Bekink (2016) 28.

¹⁰ Bekink (2016) 29.

¹¹ James *Sovereign Statehood: The basis of international society* (1986) 53.

¹² Bekink (2016) 196.

¹³ Vidmar *Democratic Statehood in International Law: The emergence of new states in post-cold war practice* (2013) 40.

¹⁴ Bekink (2016) 198.

¹⁵ Bekink (2016) 199.

“to represent the people of the state; exercise control over the executive branch of the state; consider, debate, amend and approve both new and old laws submitted by the executive or individual members; regulate and address conflicts between the different interest groups within the national legislatures; maintain discipline within the legislature and punish members of Parliament”.¹⁶

With regard to the function of maintaining discipline and punishing members for a disorderly behaviour or conduct, Parliaments from different countries use different models. For example, in Australia the conduct of members of the House of Representatives, which is one of the two Houses constituting Parliament at national level, is regulated through the Standing Orders of the House of Representatives. In this regard, the Standing Orders of the House of Representatives provide for the establishment of a Committee of Privileges and Members’ Interests, which has the power to inquire and report on complaints of breach of privilege or contempt which may be referred to it either by the House or the Speaker.¹⁷

Also, in New Zealand the conduct of members of the House of Representatives, which is the only House constituting the National Parliament, is regulated through the Standing Orders of the House of Representatives. The Speaker of the House of Representatives is empowered by the Standing Orders of the House of Representatives to order any member whose conduct is highly disorderly to withdraw from the House.¹⁸ Alternatively, the Speaker of the House of Representatives is empowered to identify any member whose conduct is grossly disorderly and request the House to examine the conduct of the member before suspending that member.¹⁹ Once a member has been

¹⁶ Bekink (2016) 295.

¹⁷ See Standing Order 216 of the Standing Orders of the House of Representatives. https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/House_of_Representatives_Standing_Orders Accessed on 12 April 2018.

¹⁸ See Standing Order 89 of the Standing Orders of the House of Representatives. <https://www.parliament.nz/media/4384/standing-orders-2017.pdf> Accessed on 12 April 2018.

¹⁹ See Standing Order 90 of the Standing Orders of the House of Representatives. <https://www.parliament.nz/media/4384/standing-orders-2017.pdf> Accessed on 12 April 2018.

named by the Speaker and recommended for suspension from the House, no debate is allowed to take place on the matter.²⁰

In Canada, the conduct of members of the House of Commons, which is one of the two Houses constituting Parliament at national level, is a matter regulated through a framework that is provided for in various legal sources. The discussion of the Canadian legal framework for maintaining discipline and punishing members of the House of Commons is the subject of chapter 4 of the present research study. However, it is worth mentioning in the present chapter that the Canadian legal framework provides for the establishment of the Office of the Conflict of Interest and Ethics Commissioner, which is tasked with the responsibility of determining the conduct of members of the House of Commons.²¹

Similar to the United Kingdom and New Zealand, South Africa is a unitary state.²² State power is distributed by the Constitution of the Republic of South Africa, 1996,²³ between three different branches of the state namely; the legislature, the executive and the judiciary. At national level, Parliament is the body in which the highest legislative authority of the state is ultimately vested. Under the 1996 Constitution, Parliament is composed of two houses, namely, the National Assembly (NA) and the National Council of Provinces (NCOP).²⁴

²⁰ See Standing Order 91 of the Standing Orders of the House of Representatives. <https://www.parliament.nz/media/4384/standing-orders-2017.pdf> Accessed on 12 April 2018.

²¹ See section 81(1) of the Parliament of Canada Act R.S.C., 1985, c. P-1.

²² See *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995*, 1996 3 SA 289 (CC) 302D. The Court in this case, while dealing with an argument regarding the relationship between the National Parliament and provinces, held that 'unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.

²³ See sections 43, 85 and 165 of the Constitution of the Republic of South Africa 1996, hereinafter referred to as the 1996 Constitution.

²⁴ Section 42(1)(a) and (b) of the 1996 Constitution.

1.2 Thesis Statement and Research Questions

Before the new democratic dispensation, the power of the National Assembly in South Africa to discipline its members was derived from the Powers and Privileges of Parliament Act.²⁵ In particular, the 1963 Powers and Privileges Act, provided the National Assembly with the authority to enquire into, judge, pronounce upon, as well as impose punishments upon its members in relation to their commission of any act in contravention of its provisions, especially contempt.²⁶ Procedurally, complaints of contempt laid against members of the National Assembly were referred by the National Assembly to an Ad Hoc Committee specifically established for their enquiry.²⁷ Motions for the suspension of members of the National Assembly were adopted by the National Assembly on recommendation from the Ad Hoc Committee.²⁸

In the case of *De Lille v Speaker of the National Assembly*,²⁹ the Court held that the common law rules of natural justice require that an affected party must be heard by an impartial and unbiased tribunal. In discrediting the findings of the Ad Hoc Committee of the National Assembly, the Court held that:

“[t]he record clearly reveals that at no stage was the first applicant given a real and meaningful hearing. The ANC was the complainant (the aggrieved party); then the prosecutor (through the ad hoc committee which it dominated); and ultimately the judge (through the National Assembly) in its own cause. This violated the rules of natural justice.”³⁰

²⁵ Act 91 of 1963, hereinafter referred to as the 1963 Powers and Privileges Act.

²⁶ See sections 3 and 10(1) of the 1963 Powers and Privileges Act.

²⁷ *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (CPD) 440I - 441A, hereinafter referred to as the *De Lille v Speaker of the National Assembly* case.

²⁸ *De Lille v Speaker of the National Assembly* 443C-E.

²⁹ *De Lille v Speaker of the National Assembly* 444E.

³⁰ *De Lille v Speaker of the National Assembly* 445A-B.

The Court further held that the power of the National Assembly to punish its members under the 1963 Powers and Privileges Act did not include the power to suspend them.³¹

However, since the coming into operation of the 2004 Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act,³² the National Assembly has established a Standing Committee on Powers and Privileges (hereinafter referred to as the Powers and Privileges Committee) to investigate and determine complaints of contempt and misconduct laid against members of the National Assembly. It is interesting to note that suspension is still recognised as one of the penalties that the National Assembly may impose on its members as punishment for contempt.

Against this background, the main aim of this research is to investigate what South African constitutional law provides regarding the way in which the National Assembly may discipline its members. Importantly, the main research question that this study seeks to answer is whether the Powers and Privileges Committee established by the National Assembly is an independent and impartial tribunal or forum.

1.3 Study Objective

In the chapters that follow, this research examines the concepts of independence and impartiality with reference to the National Assembly's Powers and Privileges Committee established by the 2004 Powers and Privileges Act to enquire into matters of contempt by members of the National Assembly.³³ The objectives of this research are to investigate:

³¹ *De Lille v Speaker of the National Assembly* 454I.

³² Act 4 of 2004, hereinafter referred to as the 2004 Powers and Privileges Act.

³³ Section 12(2) of the 2004 Powers and Privileges Act.

- i. whether the National Assembly has any constitutional authority to appoint a committee to conduct disciplinary hearings and recommend penalties against its members;
- ii. how such power is exercised; and
- iii. how such power is checked.

1.4 Preliminary Literature Overview

The 1996 Constitution forms the basis of this research. The 1996 Constitution is further complemented by the 2004 Powers and Privileges Act. Where applicable, case law relevant to aspects such as independence and impartiality; reasonableness and procedural fairness, are discussed in detail. Also, comparative analysis is made with Canada which is a member of the Commonwealth just like South Africa. Similarly, various other sources of information such as books, commentaries and legal journals, are discussed and analysed.

1.5 Research Methodology

A desktop legal research method was used in this study. The approach is relevant to this research because this is a study of law which aims to investigate and propose legal solutions to a legal hiatus. A comparative analysis of how the office of the Conflict of Interest and Ethics Commissioner operates in Canada was conducted. In particular, the way in which that office functions independently when investigating complaints of misconduct related to conflicts of interest against members of the House of Commons in Canada, was discussed, which could serve as a benchmark for the South African system.

1.6 Limitations

This research does not aim to produce a comprehensive list of sanctions that the National Assembly can impose on its members for contempt as alternatives to suspensions. The focus here is on the reconfiguration of the Powers and Privileges Committee in order to inspire confidence on its independence and impartiality.

1.7 Structure

Chapter 1 – Introduction

Chapter one briefly introduces the topic and gives a brief background to the study. The chapter covers research questions, the problem statement, study objectives, literature overview, methodology and limitations of the study.

Chapter 2 – The current South African constitutional framework, including the composition and powers of the national legislature

Chapter two focuses on the current constitutional framework of the Republic of South Africa. The discussion on the chapter covers the legal and political changes brought by the coming into operation of first the Constitution of the Republic of South Africa,³⁴ and thereafter the Constitution of the Republic of South Africa, 1996, hereinafter referred to as the 1996 Constitution. The discussion then covers the question of constitutional powers of the National Assembly to discipline its members for contempt or misconduct.

Chapter 3 – South African legal framework for a fair and reasonable procedure during adjudication of legal disputes

In chapter 3, the question of whether the procedure adopted by the National Assembly for the exercise of its disciplinary power is fair and reasonable, is investigated.

³⁴ Act 200 of 1993, hereinafter referred to as the 1993 Interim Constitution.

Chapter 4 – Powers of the Canada House of Commons to enforce internal order and discipline

Chapter 4 discusses the legal position of the office of the Conflict of Interest and Ethics Commissioner in Canada. In particular, focus is on the requirements for appointment as the Ethics Commissioner; the mandate and powers of that office; the procedure for handling complaints laid against members of the House of Commons; as well as the nature of the orders and decisions of the Ethics Commissioner.

Chapter 5 – Critical evaluation of the South African position

This chapter analyses Canadian legal practice in comparison with the applicable South African legal position, and then provides for a critical evaluation of certain issues.

Chapter 6 – Recommendations and conclusion

Finally, chapter 6 provides a summary and conclusion. In other words, in this chapter the study's findings are presented and recommendations made in each instance where legal shortcomings have been identified in the study.

1.8 Conclusion

As was indicated above, the current discussion reveals that South Africa is a member of the international community. This is confirmed in section 1 of the 1996 Constitution, which states that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, supremacy of the constitution and the rule of law, just to mention a few. Within the international domain, Houses of Parliaments often exercise control over the discipline of their members. Therefore, in keeping with the international practice and standards, the National Assembly in South Africa is similarly empowered to develop legal instruments for the control of the

conduct of its members. In chapter 2 hereafter, the constitutional position of the South African system will be evaluated and the specific powers of the National Assembly explained.

CHAPTER 2: THE CURRENT SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK, INCLUDING THE COMPOSITION AND POWERS OF THE NATIONAL LEGISLATURE

2.1 Introduction

The purpose of the present chapter is to investigate whether the current South African constitutional framework empowers, and to what extent, the National Assembly to discipline its members for contempt and misconduct. Since the end of apartheid, South Africa has adopted two constitutional instruments: one after the other. The first was an Interim Constitution. It was promulgated on 28 January 1994 and came into operation on 27 April 1994.¹ The second constitutional instrument was, and still is, the 1996 Constitution. It came into operation on 4 February 1997.²

2.2 The 1993 Interim Constitution

The adoptions of first the Interim Constitution and thereafter the 1996 Constitution have brought a momentous change to the South African legal order. According to Motale and Ramaphosa,³ since the formation of the Union of South Africa in 1910, sovereignty of Parliament had been a major constitutional principle underpinning the South African legal framework. According to this principle, Parliament could make any law it wished and no person or institution had the authority to challenge the law on substantive grounds.⁴

Unfortunately, given the political climate that prevailed in South Africa before 1994, Parliament exercised its legislative authority to also pass a series of discriminatory statutes which perpetuated the then government's apartheid

¹ See the 1993 Interim Constitution.

² See the 1996 Constitution.

³ Motale & Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 2.

⁴ Currie & De Waal *The Bill of Rights Handbook* (2013) 2.

policy.⁵ For example, between 1976 and 1981, Parliament enacted four pieces of legislation which created the independent states of Transkei; Bophuthatswana; Venda and Ciskei (TBVC states).⁶ The majority of inhabitants in all four independent states were mainly black people. One of the negative effects of the establishment of the TBVC states was the perpetuation of discrimination along racial lines. According to Cameron,⁷ apartheid laws deprived black South Africans of their citizenship, gave them education that was inferior to whites', segregated and confined them on land both urban and rural, and relegated them to poorer jobs and economic roles.

However, the coming into operation of the 1993 Interim Constitution in 1994 put an end to the existence of the independent states of Transkei, Bophuthatswana, Venda and Ciskei.⁸ It also brought other fundamental changes in the way South Africa is governed. Importantly, the 1993 Interim Constitution provided for a constitutional framework which included, for the first time in the country's history a Bill of Rights, and other constitutional principles, which provided a basis for the development of the 1996 Constitution.⁹ Also, for the first time in the country's history, the judiciary gained the authority to review laws made by Parliament on substantive as well as procedural grounds. Principle IV of Schedule 4 of the 1993 Interim Constitution provided that:

[t]he Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

⁵ Rautenbach *LAWSA* (eds Joubert & Faris) 10 (2008) par 276. "Apartheid was characterised essentially by legislation issued by the National Party government to classify, segregate and discriminate between racial groups."

⁶ See Status of the Transkei Act 100 of 1976; Status of Bophuthatswana Act 89 of 1977; Status of Venda Act 107 of 1979; and Status of Ciskei Act 110 of 1981.

⁷ Corder, Federico & Orru (eds) *The Quest for Constitutionalism: South Africa since 1994* (2014) 95.

⁸ See schedule 7 of the Interim Constitution, which repealed all 4 statutes that established the self-governing territories of Transkei; Bophuthatswana; Venda and Ciskei.

⁹ See Constitutional Principles contained in Schedule 4 of the Interim Constitution.

2.3 The 1996 Constitution

In following on the provisions of constitutional principle IV of the 1993 Interim Constitution, section 2 of the 1996 Constitution provides that:

[t]his constitution it is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The inclusion of the supremacy clause in the 1996 Constitution means that the principle of sovereignty of Parliament has come to an end in South Africa. The principle of constitutional supremacy dictates now that the rules and principles of the Constitution are binding on all branches of the state and have priority over any other powers exercised by the government, the legislatures or the courts.¹⁰

Most importantly, in a deliberate break with the past in which South African citizens were not treated equally, the 1996 Constitution provides that the Bill of Rights is a “cornerstone of democracy in South Africa”.¹¹ In addition, the Bill of Rights expressly provides that everyone is equal before the law and has the right to equal protection and benefit of the law.¹² What this means is that every person in the country, regardless of race, gender or political views, is now legally free to enjoy the liberties provided for in the 1996 Constitution and exercise the rights he/she is entitled to in terms thereof.

Furthermore, the 1996 Constitution provides that South Africa is now a democratic state founded, among others, on the value of the rule of law.¹³ The foundational value of the rule of law is generally recognised as broad.¹⁴ According to Bachmann and Frost, it is broad simply because it is constituted

¹⁰ Currie & De Waal (2013) 9.

¹¹ Section 7(1) of the 1996 Constitution.

¹² Section 9(1) of the 1996 Constitution.

¹³ Section 1(c) of the 1996 Constitution.

¹⁴ Mpya and Ntlama “The evolution of the constitutional law principle of the ‘rule of law’ in the South African Constitutional Court” 2016 *South African Public Law Journal* 116.

of various legal principles.¹⁵ According to Malan,¹⁶ the most important legal principle that lies at the heart of the rule of law is the doctrine of legality. Malan explains that what the doctrine of legality requires is that the branches of the state should exercise no power and perform no function beyond that conferred upon them by law.¹⁷ As stated in chapter one above, the 1996 Constitution devolves state powers in South Africa between the legislature, the executive and the judiciary.¹⁸

In light of the broad framework of the 1996 Constitution as explained above, the 1996 Constitution, particularly in relation to the topic of this research, specifically establishes and empowers Parliament.¹⁹ As already stated elsewhere above, Parliament is composed of two houses, namely, the National Assembly and the National Council of Provinces.²⁰

2.3.1 Composition of the National Assembly

The 1996 Constitution requires that the National Assembly should be constituted of women and men elected as members in terms of an electoral system that results, in general, in proportional representation.²¹ In order to effectively implement proportional representation, the 1996 Constitution further requires that an Act of Parliament should provide a formula for determining the number of members of the National Assembly.²² In providing the formula for proportional representation, item 1 of schedule 3 of the Electoral Act,²³ provides that the number of seats in the National Assembly

¹⁵ Bachmann and Frost “Colonialism, justice and the rule of law: a Southern African and Australian narrative” 2012 *De Jure* 309.

¹⁶ Malan “The rule of law versus decisionism in the South African constitutional discourse” 2012 *De Jure* 275, hereinafter referred to as Malan (2012) *De Jure*.

¹⁷ Malan (2012) *De Jure* 275.

¹⁸ See sections 43, 85 and 165 of the 1996 Constitution.

¹⁹ See sections 42 and 43 of the 1996 Constitution.

²⁰ Section 42(1)(a) and (b) of the 1996 Constitution.

²¹ Section 46(1)(d) of the 1996 Constitution.

²² Section 46(2) of the 1996 Constitution.

²³ Act 73 of 1998, hereinafter referred to as the Electoral Act.

must be determined by awarding one seat for every 100 000 of the population with a minimum of 350 and a maximum of 400 seats.

Since 1994, national elections have been held on five different occasions in South Africa. The first historic democratic elections were held on 27 April 1994. These elections were followed by the second national elections which were held on 02 June 1999, the third on 14 April 2004, the fourth on 22 April 2009, and the fifth on 07 May 2014.²⁴ What this confirms is that adult South African citizens are regularly provided with opportunities to exercise their political rights to vote for their representatives in the National Assembly, as required by section 19(3)(a) of the 1996 Constitution.

Following the 2014 national elections, 13 political parties are now proportionally represented in the National Assembly.²⁵ These political parties are the African National Congress, which, as at 11 November 2017, had 249 seats in the National Assembly; the Democratic Alliance, 89 seats; the Economic Freedom Fighters, 25 seats; the Inkatha Freedom Party, ten seats; the National Freedom Party, six seats; the United Democratic Movement, four seats; the Freedom Front Plus, four seats; the Congress of the People, three seats; the African Christian Democratic Party, three seats; the African Independent Congress, three seats; Agang SA, two seats; the Pan Africanist Congress of Azania, one seat; and the African People's Convention, one seat.²⁶

²⁴ See the National and Provincial Elections Report (1999) 14; National and Provincial Elections Report (2004) 51; National and Provincial Elections Report (2009) 3; National and Provincial Elections Report (2014) 2. <http://www.elections.org.za/content/About-Us/Reports/> Accessed on 19 March 2018.

²⁵ See the Parliamentary Monitoring Group Website: <https://pmg.org.za/page/political-party-representation> Accessed on 11 November 2016.

²⁶ See the Parliamentary Monitoring Group Website: <https://pmg.org.za/page/political-party-representation> Accessed on 11 November 2016.

2.3.2 Role and functions of the National Assembly

According to the 1996 Constitution, the main role of the National Assembly is to represent the people and to ensure government by the people under the Constitution.²⁷ Most importantly, the National Assembly's function is to make laws for the country.²⁸ In the case of *UDM v Speaker of the National Assembly*,²⁹ Mogoeng CJ emphasized that the passing of legislation by the National Assembly facilitates quality service delivery to the people. Parallel to the responsibility of making laws for the country, the 1996 Constitution also provides the National Assembly with an oversight function over the executive branch of government and requires it to provide mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it.³⁰ Other functions of the National Assembly are to choose the President of the Republic of South Africa; as well as providing a national platform for public consideration of issues.³¹

In order to fulfill its various functions, the National Assembly is constitutionally empowered to establish a variety of committees to assist it in the performance of its duties. Committees play a crucial role and their composition and functioning is of particular importance to this research.

2.3.3 Composition of committees of the National Assembly

The 1996 Constitution empowers the National Assembly to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.³² Most importantly, the 1996 Constitution prescribes that the

²⁷ Section 42(3) of the 1996 Constitution. See also the National Assembly Guide to Procedure (2004) 1. <https://www.parliament.gov.za/storage/app/media/GUIDE.pdf> Accessed on 19 March 2018.

²⁸ Section 42(3) of the 1996 Constitution.

²⁹ 2017 8 BCLR 1061 (CC) 1071H.

³⁰ Section 55(2)(a)-(b)(i) of the 1996 Constitution.

³¹ Section 42(3) of the 1996 Constitution.

³² Section 57(1)(b) of the 1996 Constitution.

rules and orders of the National Assembly must provide for the establishment, composition, powers, functions, procedures and duration of its committees.³³ In chapter 12, the Rules of the National Assembly provide for the establishment of different committees of the National Assembly. Such committees, among others, are the rules committee; the programme committee; and the portfolio committees.³⁴

All the above mentioned committees are crucial to the performance of the work of the National Assembly. For example, the rules committee is the highest policy-making body of the National Assembly, while the programme committee is the one that determines and organises the business of the National Assembly.³⁵ Portfolio committees are those committees of the National Assembly before which government departments appear and are held accountable in line with mechanisms provided under section 55(2) of the 1996 Constitution to ensure their accountability to the National Assembly.

Committees of the National Assembly are only composed of members of the National Assembly.³⁶ The rules of the National Assembly provide that the terms of office of members of a committee of the National Assembly run until the National Assembly's term expires or the National Assembly is dissolved, whichever occurs first.³⁷ All committees of the National Assembly report to the National Assembly about their activities.³⁸

³³ Section 57(2)(a) of the 1996 Constitution.

³⁴ See rules 190, 205 and 225 of the Rules of the National Assembly. https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf Accessed on 20 March 2018.

³⁵ See the National Assembly Guide to Procedure (2004) 135.

<https://www.parliament.gov.za/storage/app/media/GUIDE.pdf> Accessed on 19 March 2018.

³⁶ See rule 155(1) of the Rules of the National Assembly.

https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf Accessed on 20 March 2018.

³⁷ See rule 157(1) of the Rules of the National Assembly.

https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf Accessed on 20 March 2018.

³⁸ See rule 166 of the Rules of the National Assembly.

https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf Accessed on 20 March 2018.

2.3.4 Powers of the National Assembly to discipline its members

Apart from the provisions discussed above, the 1996 Constitution also provides that the National Assembly may determine and control its internal arrangements, proceedings and procedures.³⁹ In interpreting the meaning of this provision the Supreme Court of Appeal in the case of the *Speaker of the National Assembly v De Lille* held that:

[t]here can be no doubt that this authority is wide enough to enable the Assembly to maintain internal order and discipline in its proceedings by means which it considers appropriate for this purpose.⁴⁰

As already indicated in chapter one above, Parliament enacted the 2004 Powers and Privileges Act, which provides a statutory framework for the National Assembly to exercise its constitutional power to discipline its members, as provided for in section 57(1)(a) of the 1996 Constitution. As stated in the 2004 Powers and Privileges Act itself, its purpose is:

[t]o define and declare certain powers, privileges and immunities of Parliament, provincial legislatures, members of the National Assembly, delegates to the National Council of Provinces and members of provincial legislatures; and to provide for incidental matters.

2.4 The 2004 Powers and Privileges Act

Section 12(1) of the 2004 Powers and Privileges Act provides that:

[s]ubject to this Act, the National Assembly or National Council of Provinces has all the powers which are necessary for enquiring into and pronouncing upon any act or matter declared under section 13 of the same Act to be contempt of Parliament by a member, and for taking the disciplinary action provided therefore.

Section 12(2) of the 2004 Powers and Privileges Act goes on to provide that the National Assembly or National Council of Provinces must appoint a standing committee to deal with all enquiries referred to in sub-section (1). The reference to “all enquiries referred to in sub-section (1)” above, means any matter referred by the National Assembly to its established standing

³⁹ See section 57(1)(a) of the 1996 Constitution.

⁴⁰ 1999 4 SA 863 (SCA) 869D, hereinafter referred to as the *Speaker of the National Assembly v De Lille* case.

committee for investigation and determination, where it is alleged that a member of the National Assembly had committed an offence listed in section 13 of the same 2004 Powers and Privileges Act.⁴¹

2.5 Rules of the National Assembly

As already indicated above, the National Assembly, as empowered by section 57(2)(a) of the 1996 Constitution to make rules and orders which provide for the establishment and powers of its committees, has adopted the Rules of the National Assembly. Also, as directed by section 12(2) of the 2004 Powers and Privileges Act to appoint a standing committee to deal with matters of contempt involving its members, the National Assembly through the provisions of the Rules of the National Assembly has established the Powers and Privileges Committee.⁴² In line with the provisions of the Rules of the National Assembly, the Powers and Privileges Committee is composed only of members of the National Assembly.⁴³

Similarly, in accordance with the provisions of rule 154(1) of the Rules of the National Assembly, which prescribe that committees of the National Assembly should be constituted on the basis of proportional representation, membership of the Powers and Privileges Committee is composed of representatives from five different political parties represented in the National Assembly. These political parties are: the African National Congress, six members; the Democratic Alliance, two members; the Economic Freedom

⁴¹ See section 13(d)(i)-(ii) of the 2004 Powers and Privileges Act. Such offences include contempt of Parliament; and a breach or abuse of parliamentary privilege, just to mention a few.

⁴² See rule 211 of the Rules of the National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

⁴³ See rule 155(1) of the Rules of the National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

Fighters, one member; the Inkatha Freedom Party, one member; the United Democratic Movement, one member.⁴⁴

Based on the numbers above, it is clear that the configuration of the Powers and Privileges Committee on the basis of proportional representation promotes one-party dominant democracy in South Africa. According to Choudhry one of the pathologies of a dominant party democracy is the colonisation of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage.⁴⁵

In terms of rule 214(1) of the Rules of the National Assembly the main function of the Powers and Privileges Committee is to consider any matter referred to it by the Speaker of the National Assembly relating to contempt of the National Assembly or misconduct by a member of the National Assembly. In terms of rule 214(2) of the Rules of the National Assembly, after considering a matter that was referred to it, the Powers and Privileges Committee is required to table a report in the National Assembly on its findings. In the instance of a member being found guilty, the Powers and Privileges Committee is required to also make recommendations regarding an appropriate penalty.⁴⁶

2.6 Conclusion

In conclusion, the above discussion regarding the post-apartheid South African constitutional framework, has, apart from briefly sketching the

⁴⁴ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 ALL SA 116 (WCC) para 11.

⁴⁵ Choudhry “‘He had a mandate’: The South African Constitutional Court and the African National Congress in a dominant party democracy” 2009 *Constitutional Court Review* 3.

⁴⁶ See rule 214(2)(c) of the Rules of the National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

transition from the apartheid system of governance to a democratic dispensation, also revealed that under the 1996 Constitution, the National Assembly is empowered to hold its members to account for their contempt or misconduct. In the following chapter, focus is shifted to the evaluation of the procedure adopted by the National Assembly for the exercise of its power to investigate and determine allegations of contempt and misconduct that are laid against its members. Crucial to the evaluation is whether the procedure is fair and reasonable.

CHAPTER 3: SOUTH AFRICAN LEGAL FRAMEWORK FOR A FAIR AND REASONABLE PROCEDURE DURING ADJUDICATION OF LEGAL DISPUTES

3.1 Introduction

The purpose of the present chapter is to evaluate whether the procedure adopted by the National Assembly for the exercise of its power to investigate and determine allegations of contempt and misconduct that are laid against its members is fair and reasonable. According to the 1996 Constitution, every adult citizen in South Africa has the right to stand for public office and, if elected, to hold office.¹ Against the aforementioned background, and as indicated in chapter two above, the 2004 Powers and Privileges Act empowers the National Assembly to discipline its members for contempt and misconduct.² Crucially, the 2004 Powers and Privileges Act provides for the penalties which the National Assembly may impose on its members as sanctions. Such penalties include the suspension of the member, with or without remuneration, for a period not exceeding 30 days.³

However, section 12(3)(a) of the 2004 Powers and Privileges Act prescribes that:

[b]efore a house may take any disciplinary action against a member in terms of subsection (1), the standing committee must enquire into the matter in accordance with a procedure that is reasonable and procedurally fair.

As indicated in chapter 2 above, the National Assembly has adopted its procedural rules in line with section 57(2)(a) of the 1996 Constitution. Annexed to the Rules of the National Assembly is the schedule titled "Procedure to be followed in the investigation and determination of allegations of misconduct and contempt of Parliament (hereinafter referred to as the schedule of the Rules of National Assembly)." The schedule (dealing specifically with the procedure for investigating and determining allegations of misconduct and

¹ Section 19(3)(b) of the 1996 Constitution.

² Section 12(1) of the 2004 Powers and Privileges Act.

³ Section 12(5)(g) of the 2004 Powers and Privileges Act.

contempt) is what the present chapter seeks to evaluate, whether the procedure provided therein complies with the legal requirements for fairness and reasonableness. In order to do this, it is necessary to determine fairness and reasonableness. For any official process must be reasonable and fair.

3.2 Legal characteristics of fairness and reasonableness in South Africa

In the case of *Economic Freedom Fighters v Speaker of the National Assembly*,⁴ Zondo DCJ, acknowledged that in South African law there are no rules defining the words “fair” or “reasonable”. In the case of *Permanent Secretary, Department of Education, Eastern Cape v Ed-U-College (PE) (Section 21) Inc*,⁵ the Court held that:

[d]etermining what procedural fairness and reasonableness require in a given case depends, amongst other things, on the nature of the power being exercised.

In the context of investigations and determinations of contempt and misconduct, the power exercised by the National Assembly through its Powers and Privileges Committee is disciplinary in nature. Therefore, in order to understand what is meant by fair and reasonable procedure in terms of section 12(3)(a) of the 2004 Powers and Privileges Act, guidance was sought from the decisions of the courts regarding the fairness and reasonableness of adjudication procedures generally. It was established that the following elements are needed for the process to be fair and reasonable – notice and hearing; legal representation; equality of arms; public hearing; independence and impartiality.

3.2.1 Notice and hearing

In the case of *De Beer v North Central Local Council & South Central Local Council*,⁶ the Constitutional Court held that:

⁴ 2018 3 BCLR 259 (CC) 280G-H.

⁵ 2001 2 SA 1 (CC) 14E.

⁶ 2002 1 SA 429 (CC) 440A.

[i]t is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.

In the investigation and determination of allegations of contempt and misconduct against members of the National Assembly, the Powers and Privileges Committee traditionally holds hearings as an accountability-ensuring mechanism.

Therefore, in complying with the requirement of notice and hearing during proceedings before the Powers and Privileges Committee, section 1 of the schedule of the Rules of National Assembly, requires that a member of the National Assembly charged with contempt or misconduct must be provided with a written notice at least five working days before the hearing. In addition, section 7 of the schedule of the Rules of National Assembly provides that the member of the National Assembly charged has a right to be present at the hearing, and to call witnesses.

3.2.2 Legal representation

In the case of *Nkuzi Development Association v Government of the Republic of South Africa*,⁷ it was acknowledged by the Land Claims Court that another issue that characterises fairness of the adjudication process is the presence of legal representatives for the parties during hearings. In the circumstance of members of the National Assembly, the schedule of the Rules of National Assembly provides for legal representation during hearings before the Powers and Privileges Committee. Section 3 of the schedule of the Rules of National Assembly provides that:

⁷ 2002 2 SA 733 (LCC) 735H-736A. The Land Claims Court acknowledged this in an eviction case where it held that “labour tenants and occupiers are entitled to a fair trial before they can be evicted and for the trial to be fair it is necessary that the labour tenant or occupier understands his or her rights under the law and the complexities of a trial. Where he or she does not understand, there is a need for legal representation, or at the very least, an explanation of his or her rights by the judicial officer.”

[i]n complex cases involving complicated evidence or legal issues, and where the Powers and Privileges Committee is of the view that legal representation might be essential for a fair hearing, the powers and privileges committee may allow the member charged to be represented by a legal practitioner who is not a member.

The above provision practically takes into consideration the fact that being a member of the National Assembly does not mean that the member should automatically be capable of handling all the complexities of his or her hearing; legal representation may also be required.

3.2.3 Equality of arms

In the case of *Shilubana v Nwamitwa*,⁸ the Constitutional Court confirmed that adherence to the principle of equality of arms is required for a fair trial in South Africa. It can be argued that section 5 of the schedule of the Rules of National Assembly provides for imbalances that may arise in the appointment of external members to serve on the Powers and Privileges Committee.

On the side of the “prosecution”, as it were, section 5 of the schedule to the Rules of National Assembly empowers the Powers and Privileges Committee to nominate a member of the National Assembly “or a person who is duly qualified, *but who is not a member of the committee*, to act as the initiator (prosecutor) for the duration of a hearing.” Therefore a member of the National Assembly who has to appear at a disciplinary hearing, and who is not “duly qualified” to call witnesses and cross-examine the witnesses of opposing parties, may be at a disadvantage if he or she has to face an outsider who is qualified, e.g., such as an advocate who is skilled in the art of cross-examination. This may be the case where the Powers and Privileges

⁸ 2007 9 BCLR 919 (CC) 926A-B. In granting postponement as prayed for by the respondent in that case, the court, which had noted that the appellants were effectively represented by six advocates in total as opposed to one senior counsel that the respondent had secured only a few days before the hearing, held that “the interests of the affected parties are too weighty, the importance for the community too high and the benefit of prepared argument too great, to proceed undeterred by these circumstances.”

Committee decides to appoint a duly qualified person to serve as the initiator on its side, but does not agree for whatever reason, that the case facing the charged member of the National Assembly involves complicated evidence or legal issues that warrant the appointment by him/her of a legal practitioner in terms of section 3 of the schedule of the Rules of National Assembly.

Section 1 of the Rules of the National Assembly defines a member as meaning "a member of the Assembly". What this means is that section 5 of the schedule of the Rules of the National Assembly, by empowering the Powers and Privileges Committee to nominate a person who is duly qualified but who is not a member of the Powers and Privileges Committee to act as the initiator, departs from the general rule in section 155(1) of the Rules of National Assembly, which provides for members serving in the committees of the National Assembly to be coming from within the National Assembly.

However, section 1 of the schedule of the Rules of the National Assembly redresses this imbalance. It prescribes that the notice of hearing which must be served on the charged member must also indicate to the charged member that he or she is entitled to be assisted by a fellow member of the National Assembly and that he or she (the charged member) may also request the committee to allow legal representation by a person who is not a member. In view of this, the procedure seems to ensure that there is equality of arms between the initiator (prosecutor) and the charged member of the National Assembly. The initiator can either be a member of the Powers and Privileges Committee or someone from outside of the National Assembly. Similarly, the charged member can either represent himself/herself, or be represented by a fellow member of the National Assembly, or be represented by someone from outside of the National Assembly.

3.2.4 Public hearing

In the case of *Cape Town City v South African National Roads Authority*,⁹ the Court confirmed that one more legal tenet that characterises procedural fairness during adjudication of disputes is a public hearing. In this case Ponnann JA held that:

[a]s a general rule, litigants are prejudiced when their proceedings are not held in public. That is not to say that litigants may not sometimes wish to keep their litigation private, or that there may not be situations where a court may justifiably depart from the default rule that court proceedings are public.¹⁰

What this means is that in the adjudication of disputes courts and other independent tribunals or forums should strive to ensure that hearings are held in public. Only when circumstances permit and are justifiable, the court or an independent tribunal or forum may deviate from this rule.

Conversely, with regards to hearings before the Powers and Privileges Committee, the schedule of the Rules of National Assembly does not make any provision for hearings to be in public. However, section 213 of the Rules of the National Assembly expressly states that meetings of the Powers and Privileges Committee must be held in closed session. Only if the Powers and Privileges Committee decides to open its meeting in the public interest, then its hearings shall be held in public. So the requirements for adjudications generally are that they should be held in public, unless the court deems it necessary to hear them *in camera*. The position is reversed in the case of disciplinary hearings of members of the National Assembly: the general rule is that they must be behind closed doors, unless the Powers and Privileges Committee deems it necessary to open the doors, so to speak. It can be argued that the schedule of the Rules of National Assembly provides for a public hearing *when necessary*.

⁹ 2015 3 SA 386 (SCA), hereinafter referred to as the *Cape Town City v SANRAL* case.
¹⁰ *Cape Town City v SANRAL* case 402E-F.

Although the above provision of the Rules of National Assembly is phrased somewhat differently in that it begins by giving the Powers and Privileges Committee the authority to hear cases in a closed session, it also permits that hearings should be held in public when the Powers and Privileges Committee so decides. The discretion given to the Powers and Privileges Committee to decide when to make the hearings open to public or when to close the sessions is in harmony with the findings of the court in the *Cape Town City v SANRAL* case in which Ponnar JA held that a court may justifiably depart from the default rule that court proceedings are public.¹¹

3.2.5 Independence

Coming to the legal tenets of independence and impartiality, it is recognised in the South African legal system that these are two interdependent and interrelated legal tenets of a fair trial. That is so because it is recognised that the object of independence is to achieve impartial decisions.¹² In the context of courts, judicial independence in South Africa is recognised as meaning that the court must be free from political influence.¹³

In the case of *De Lange v Smuts*,¹⁴ the Constitutional Court held that the presence of three essential conditions guarantees the independence of a court. These conditions are:

“security of tenure, which requires that the decision-maker should only be removable from office for just cause; financial security, which requires that the decision-maker should be secure from arbitrary interference by the appointing authority; and lastly institutional independence with respect to the exercise of the tribunal's judicial functions.”

In applying the above principles to the circumstance of members of the National Assembly serving in the Powers and Privileges Committee as

¹¹ *Cape Town City v SANRAL* case 402F.

¹² Howie “Judicial Independence” 2003 *SALJ* 680-681.

¹³ Ngcobo “Sustaining public confidence in the judiciary: an essential condition for realising the judicial role” 2011 *SALJ* 11.

¹⁴ 1998 3 SA 785 (CC) 813H-814A.

decision-makers it is clear that members of the National Assembly do not enjoy any security of tenure. Rule 155(1) and (2) of the Rules of National Assembly states that it is the responsibility of political parties to appoint their members to a committee of the National Assembly. Similarly, Rule 157(2) of the Rules of National Assembly states that a member of a committee of the National Assembly ceases to be a member of that committee if a Whip of his/her political party gives a written notice to the Speaker, that the member is to be replaced or withdrawn. What this means is that members of the Powers and Privileges Committee can be recalled anytime from this committee by their political parties, especially when a political party disagrees with the attitude of its member serving on the Powers and Privileges Committee.

By the same token, it is also clear that members of the National Assembly serving on the Powers and Privileges Committee may not enjoy absolute financial security. Section 1 of schedule 1A of the Electoral Act provides that registered parties contesting a general election for seats in the National Assembly must nominate candidates for such election. This means members of the National Assembly assume office through nomination by their respective political parties.¹⁵ Should such parties decide to recall their National Assembly members serving in the Powers and Privileges Committee completely from the National Assembly for any reason; such members of the National Assembly will lose their source of financial income in the form of a salary.

Similarly, with regards to institutional independence of the Powers and Privileges Committee in the exercise of its functions, there is a risk of a lack of the required objective structural independence. The Powers and Privileges Committee functions within the Parliamentary precinct just like any other

¹⁵ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC) 304H.

ordinary committee of the National Assembly, although it is not compulsory that that should be the case at all times. The Rules of National Assembly provides that:

[f]or the purpose of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly – meet at a venue determined by it, which may be a venue beyond the seat of Parliament.¹⁶

Regardless of where the meetings of the Powers and Privileges Committee take place, from time to time members of the National Assembly attend their political party caucus meetings. Attendance at these meetings by members of the Powers and Privileges Committee makes them susceptible to political influence. Taking into consideration all the above facts relating to the three essential requirements for independence, it is clear that the Powers and Privileges Committee is not an independent forum.

3.2.6 Impartiality

Another consideration relevant to the evaluation of whether the procedure followed in the investigation and determination of matters involving members of the National Assembly is fair or not, is impartiality. According to Okpaluba & Juma,¹⁷ impartiality relates to the conduct of the adjudicating judge and requires him/her when considering disputes brought before him/her to adjudicate them in an open-minded fashion and without bias.

In the case of *President of the Republic of South Africa v South African Rugby Football Union*,¹⁸ the Constitutional Court held that in assessing impartiality the question to be asked is:

¹⁶ See rule 167(g) of the Rules of National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

¹⁷ Okpaluba & Juma “The dialogue between the Bench and the Bar: implications for adjudicative impartiality” 2011 SALJ 659.

¹⁸ 1999 4 SA 147 (CC) 177B, hereinafter referred to as the *SARFU* case.

whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.

In applying the above test of impartiality to the circumstances of members of the National Assembly serving in the Powers and Privileges Committee, their impartiality in the adjudication of cases of contempt and misconduct brought before them is doubtful. In rejecting an application for the recusal of a judge in the *SARFU* case the Constitutional Court held that:

[i]n our opinion it follows that a reasonable apprehension of bias cannot be based upon political associations or activities of Judges prior to their appointment to the Bench unless the subject-matter of the litigation in question arises from such associations or activities.¹⁹

In the case of judges, their appointments to the bench are due to their qualifications and experience in law. It is believed that these qualifications absolve them from commitments related to their affiliations before appointment to the bench and promote impartiality. In contrast, the subject matter of the cases of misconduct and contempt involving members of the National Assembly always arise from thriving political associations and activities of members of the National Assembly. What this means is that in the investigation and determination of cases by the Powers and Privileges Committee a reasonable, objective and informed person would on the correct facts reasonably apprehend that some members of the Powers and Privileges Committee will not bring an impartial mind to bear on the hearing of the case. On the correct facts, loyalty to party politics by members of the Powers and Privileges Committee can therefore reasonably be expected.

¹⁹ *SARFU* case 188A.

3.2.7 Reasonableness

The Constitutional Court in the case of *Government of the Republic of South Africa v Grootboom*,²⁰ in which the government was taken to court in an attempt to force it to provide houses to the respondents in line with section 26 of the 1996 Constitution, held that in determining reasonableness the question is not whether other reasonable or favourable measures could have been adopted, the question is whether the measures that have been adopted are reasonable. The Constitutional Court further held that reasonableness must be understood in the context of the Bill of Rights as a whole.²¹

In further laying down the test for reasonableness in the *Grootboom* case, the Constitutional Court held that where the state is required by the Constitution to take legislative and other measures in order to achieve an intended result; legislative measures by themselves are not likely to constitute constitutional compliance.²² The state is obliged to act to achieve the intended result, and the legislative measures will have to be supported by policies and programmes, which policies and programmes must be reasonable both in their conception and implementation.²³

As indicated in chapter 2 of this dissertation, the National Assembly is required by section 57(1)(a) of the 1996 Constitution to determine and control its internal arrangements, proceedings and procedures. The National Assembly has taken steps towards achieving constitutional compliance with its obligation of maintaining discipline among its members by means which it considers appropriate. Parliament has enacted the 2004 Powers and Privileges Act. The implementation of the 2004 Powers and Privileges Act is

²⁰ 2001 1 SA 46 (CC) 68H-69A, hereinafter referred to as the *Grootboom* case.

²¹ *Grootboom* case 69F.

²² *Grootboom* case 69B.

²³ *Grootboom* case 69C.

supported by the Rules of National Assembly to which a schedule containing the procedure to be followed in the investigation and determination of allegations of misconduct and contempt is annexed.

The procedure laid down in the schedule of the Rules of National Assembly, which creates a legal duty on the Powers and Privileges Committee to serve notice and afford the member of the National Assembly charged, with an opportunity to be heard; to allow the member of the National Assembly charged to have access to legal representation, in an effort to achieve equality of arms during hearings; to conduct the determination of cases in open hearing, unless the interests of justice dictate otherwise, in order to inculcate trust in the processes of the Powers and Privileges Committee; is reasonable. It creates the legal framework for every member of the National Assembly to be treated equally before the law, taking into account their political right to hold public office, if elected to it.

3.3 Conclusion

In conclusion, although the National Assembly has made significant strides towards compliance with the constitutional requirements of section 57(1)(a) of the 1996 Constitution to determine and control its internal arrangements, proceedings and procedures, two fundamental shortcomings related to the independence and impartiality of the Powers and Privileges Committee have been identified in the procedural framework adopted by the National Assembly. However, before recommendations are made in the last chapter of this dissertation about how the identified procedural shortcomings can be addressed, in the following chapter a comparative investigation of how the law of Canada provides for the disciplining of members of the Canadian House of Commons is undertaken.

CHAPTER 4: POWERS OF THE CANADA HOUSE OF COMMONS TO ENFORCE INTERNAL ORDER AND DISCIPLINE

4.1 Introduction

The purpose of the present chapter is to provide an overview of the legal framework governing the functioning of the House of Commons in Canada. The main aim is to establish whether the Canadian legal framework provides the House of Commons with any authority to discipline its members for contempt and misconduct. If it does, the question arises as to what mechanisms the House of Commons has put in place in order to facilitate the exercise of its power to discipline its members, and what, if any, lessons can be learned for the South African system?

4.2 The 1867 Constitution Act

As stated previously in chapter one, Canada is a federal state.¹ According to Hogg,² in the federal state of Canada governmental power is distributed between the central government and the regions. The Canadian Constitution Act,³ declares that the Executive Authority of Canada is vested in the Queen. Interestingly, with regard to legislative authority, the 1867 Constitution Act simply provides that:

[t]here shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.⁴

In light of the above background, it is evident from the provisions of section 17 of the 1867 Constitution Act that in Canada, Parliament is composed of two houses. The one house of the Parliament of Canada that is relevant to the topic of this research is the House of Commons.

¹ Hogg *Constitutional Law of Canada* (1992) 98.

² Hogg (1992) 98.

³ See section 9 of the Constitution Act, 1867, hereinafter referred to as the 1867 Constitution Act. The 1867 Constitution Act is contained as Appendix I on Hogg (1992) 1301.

⁴ See section 17 of the 1867 Constitution Act.

However, before discussing the composition and functioning of the House of Commons, it is worth mentioning at this point that there are two applicable constitutional instruments that exist in Canada. These instruments are the 1867 Constitution Act and the 1982 Constitution Act.⁵ According to Hogg,⁶ the 1867 Constitution Act established the rules of federalism for Canada while the 1982 Constitution Act added the Bill of Rights to Canada's constitutional law. Both the 1867 Constitution Act and the 1982 Constitution Act provide authority for the establishment and empowerment of the House of Commons in Canada.

4.2.1 Composition of the House of Commons

According to the 1867 Constitution Act, the Canada House of Commons should be composed of members elected into office from Canada's provincial districts.⁷ Importantly, according to the 1982 Constitution Act, every citizen of Canada has the right to vote in an election of the members of the House of Commons.⁸ In the same way, every citizen who is eligible to vote for members of the House of Commons is qualified to be voted for as a member of the House of Commons.⁹ The 1982 Constitution Act further prescribes that the term of office for a member of the House of Commons should not continue for longer than five years.¹⁰

4.2.2 Role and functions of the House of Commons

In a federal system of government such as the one of Canada, the House of Commons is seemingly playing an important role in the governance of the country. According to the 1867 Constitution Act, the main role and function of the House of Commons is to advise the Queen and consent to the making

⁵ Constitution Act, 1982, hereinafter referred to as the 1982 Constitution Act. The 1982 Constitution Act is contained as Appendix III on Hogg (1992) 1335.

⁶ Hogg (1992) 4-7.

⁷ Section 37 of the 1867 Constitution Act.

⁸ Section 3 of the 1982 Constitution Act.

⁹ Section 3 of the 1982 Constitution Act.

¹⁰ Section 4(1) of the 1982 Constitution Act.

of laws for Peace, Order and good Government of Canada.¹¹ However, with regards to the giving of advice and consent to the Queen for the making of laws for Canada, the 1867 Constitution Act, restricts the authority of the House of Commons to only cover subject matters that are not exclusively assigned to the Provincial Legislatures, which include the Regulation of Trade and Commerce; Marriage and Divorce, to name a few.¹²

In order to fulfill its roles and functions, the House of Commons in Canada is assisted by various committees. Immediately below, this research study discusses how the existence and composition of committees of the House of Commons assists in playing a role towards the enforcement of internal order and discipline.

4.2.3 Composition of the committees of the House of Commons

Specifically, in the performance of its functions and exercise of its role, the House of Commons is assisted by Standing Committees.¹³ The Standing Orders of the House of Commons (“the Standing Orders”) require the House of Commons at the first session of the Parliament of Canada to appoint a Procedure and House Affairs Committee, which should consist of ten members.¹⁴ One of the duties of the Procedure and House Affairs Committee is to organise members of the House of Commons to serve on the Standing Committees of the House of Commons on all the subject areas of its work.¹⁵

¹¹ Section 91 of the 1867 Constitution Act.

¹² See section 91 of the 1867 Constitution Act.

¹³ Section 104(2) of the Standing Orders.

<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

¹⁴ Section 104(1) of the Standing Orders.

<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

¹⁵ Section 104(2) of the Standing Orders.

<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

In line with the provisions of section 104(2) of the Standing Orders, which require the establishment of different Standing Committees for the House of Commons along the subject lines, the Standing Committee on Access to Information, Privacy and Ethics is required to be appointed to assist the House of Commons in the performance of its functions and exercise of its roles.¹⁶ According to the Standing Orders, the power of the Standing Committee is to examine and enquire into all matters as may be referred to them by the House of Commons.¹⁷ The power of the Standing Committee on Access to Information, Privacy and Ethics, in particular, is to review and report on the effectiveness, management and operations, of the Conflict of Interest and Ethics Commissioner.¹⁸

In order to enable the Standing Committee on Access to Information, Privacy and Ethics, perform its duties of reviewing and managing the operations of the Conflict of Interest and Ethics Commissioner, the Parliament of Canada enacted the Parliament of Canada Act.¹⁹ Importantly, the 1985 Parliament of Canada Act provides for the establishment of the Office of the Conflict of Interest and Ethics Commissioner. A discussion on how the interplay between the 1985 Parliament of Canada Act and the Standing Orders of the House of Commons, provide the House of Commons with authority to discipline its members, follows below.

¹⁶ Section 108(3)(h) of the Standing Orders.
<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

¹⁷ Section 108(1)(a) of the Standing Orders.
<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

¹⁸ Section 108(h)(iii) of the Standing Orders.
<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

¹⁹ Parliament of Canada Act R.S.C., 1985, c. P-1, hereinafter referred to as the 1985 Parliament of Canada Act.

4.3 Powers of the House of Commons to discipline its members

4.3.1 1985 Parliament of Canada Act

In empowering the House of Commons to discipline its members for contempt and misconduct, the 1985 Parliament of Canada Act provides that:

[t]he Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise such and the like privileges, immunities and powers as, at the time of the passing of the Constitution Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act.²⁰

While dealing with a review of a decision to withhold allowances payable to a member of a provincial legislature, the court in the case of *Villeneuve v Northwest Territories (Legislative Assembly)*,²¹ held that:

[t]he power of a legislature to discipline its own members is indeed a sphere of activity that has been historically recognised as one that is protected by parliamentary privilege.

What the findings of the above court decision mean is that in Canada the regulation of the conduct and enforcement of discipline among members of the House of Commons is the responsibility of the House of Commons, to the exclusion of other government institutions. This is then further enforceable through the exercise and respect of the principle of parliamentary privilege.

In putting mechanisms in place for the exercise of the power by the House of Commons to discipline its members, the 1985 Parliament of Canada Act gives authority to the Governor in Council of Canada (Cabinet) to appoint a Conflict of Interest and Ethics Commissioner.²² The Conflict of Interest and Ethics Commissioner, (hereinafter referred to as the Ethics Commissioner), is appointed by the Governor in Council after consultation with the leader of

²⁰ Section 4(a) of the 1985 Parliament of Canada Act.

²¹ 2008 NWTSC 41 par 23.

²² Section 81(1) of the 1985 Parliament of Canada Act.

every recognised party in the House of Commons; and approval of the appointment is adopted by resolution of the House of Commons.²³

In order to be appointed as the Ethics Commissioner, the 1985 Parliament of Canada Act prescribes that a person must be a former judge of a superior court in Canada, or of any other court whose members are appointed under an Act of the legislature of a province.²⁴ Alternatively, it is confirmed in the 1985 Parliament of Canada Act that any person who is a former member of a federal or provincial board, commission or tribunal, who in the opinion of the Governor in Council, has demonstrated expertise in either conflict of interests, financial arrangements, professional regulation and discipline or ethics is eligible for appointment as an Ethics Commissioner.²⁵

The term of office of the Ethics Commissioner is regulated by law in Canada. In terms of the 1985 Parliament of Canada Act the Ethics Commissioner holds office during good behaviour for a term of seven years.²⁶ In *Gratton v Canada Judicial Council*,²⁷ the court confirmed that good behaviour implies the ability of the office holder to perform the functions of the office to which he or she has been appointed. What this means is that the Ethics Commissioner in Canada only enjoys the seven-year security of tenure in office on condition that he or she is competent to do the work for which he or she has been appointed to the best of his or her abilities.

4.3.2 Standing Orders of the House of Commons

In order to facilitate the exercise of its power to discipline its members, the House of Commons has developed and adopted a compendium of the

²³ Section 81(1) of the 1985 Parliament of Canada Act.

²⁴ Section 81(2)(a) of the 1985 Parliament of Canada Act.

²⁵ Section 81(2)(b)(i)-(iv) of the 1985 Parliament of Canada Act.

²⁶ Section 82(1) of the 1985 Parliament of Canada Act. In terms of section 81(3) of the 1985 Parliament of Canada Act the Ethics Commissioner is eligible to be reappointed for one or more terms of up to seven years each.

²⁷ 1994 115 DLR (4th) 81 FC 101A-D.

Standing Orders. Annexed as Appendix I to the Standing Orders is the Conflict of Interest Code for members of the House of Commons (hereinafter referred to as “the Code”).

Section 1 of the Code, among other things, states that the purpose of the Code is to:

provide for greater certainty and guidance for members in how to reconcile their private interests with their public duties and functions; and foster consensus among members by establishing common standards and by providing the means by which questions relating to proper conduct may be answered by an independent, non-partisan adviser.

In order to provide greater certainty and guidance to members in how to reconcile their private interests with their public duties and functions, section 8 of the Code provides that:

[w]hen performing parliamentary duties and functions, a member shall not act in any way to further his or her private interests or those of a member of the member's family, or to improperly further another person's or entity's private interests.

Section 9 of the Code further prescribes that:

[a] member shall not use his or her position as a member to influence a decision of another person so as to further the member's private interests or those of a member of his or her family, or to improperly further another person's or entity's private interests.

Crucially, the Code prescribes that a member of the House of Commons who has reasonable grounds to believe that another member has not complied with his or her obligations under the Code may request the Ethics Commissioner to conduct an inquiry into the matter.²⁸ The Code requires that the request should be in writing, signed, and should identify the alleged non-compliance as well as set out the reasonable grounds for the belief.²⁹

²⁸ Section 27(1) of the Code at 177. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

²⁹ Section 27(2) of the Code at 178. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017. However, complaints regarding non-compliance by members of the House of Commons may not only be lodged by individual members of the House. In section 27(3) of the Code it is enacted that “the House of Commons may, by way of

Moving forward, it is stated in section 27(2.1) read with section 27(3.1) of the Code that the Ethics Commissioner, within fourteen days after receipt of the complaint, should bring the complaint to the attention of the member who is the subject of the inquiry and such member should be given 30 days within which to respond to the allegation. Once the Ethics Commissioner is in possession of both the written complaint and a response from the member who is the subject of the inquiry, the Ethics Commissioner is required to conduct a preliminary review to determine whether any inquiry is necessary.³⁰ An outcome of the preliminary review has to be communicated within fifteen working days, after receipt of the response from the member who is the subject of the inquiry, to both parties.³¹

However, section 27(4) of the Code provides that if the Ethics Commissioner, after giving the member who is the subject of the inquiry notice and 30 days within which to respond, believes on reasonable grounds that the member has not complied with his or her obligations under the Code, the Ethics Commissioner on his or her own initiative may conduct the inquiry. On the contrary, section 27(6) of the Code provides that if the Ethics Commissioner believes that a request for an enquiry was frivolous or vexatious or not made in good faith, in the report dismissing the request the Ethics Commissioner may recommend that action be taken against the member who made the request.

However, should an inquiry go ahead as requested against a member of the House of Commons, the Ethics Commissioner is obligated to conduct it in private and give the member who is the subject of the inquiry reasonable

³⁰ resolution, direct the Ethics Commissioner to conduct an inquiry to determine whether a member has complied with his or her obligations under this code.”

³⁰ Section 27(3.2)(a) of the Code at 178.
<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

³¹ Section 27(3.2)(b) of the Code at 178.
<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

opportunity to be present during the inquiry and make representations either in writing or in person through counsel or by any other representative.³² Once the inquiry has been finalised, the Ethics Commissioner is required to submit the report flowing from the inquiry to the Speaker of the House of Commons who is also obligated to present same to the House of Commons at its next sitting.³³ In terms of section 28(2) of the Code, once the report has been tabled in the House of Commons, it can be made available to members of the public. However, if the House of Commons is in recess when the report is submitted by the Ethics Commissioner, such report may be published upon its receipt by the Speaker.³⁴

Against the aforementioned background, section 28(6) of the Code insists that should the Ethics Commissioner conclude in the report of the inquiry that the member who was the subject of the inquiry did not comply with his obligations under the Code, or that the member who laid the complaint had done so frivolously, the Ethics Commissioner must recommend appropriate sanctions in both instances. However, it is a requirement that the conclusions and recommendations of the Ethics Commissioner must be accompanied by reasons.³⁵

Most importantly, the Code requires that within ten working days after the report of the Ethics Commissioner has been tabled in the House of Commons, the member who is the subject of the report should be afforded an opportunity to make a statement in the House.³⁶ In this case a member who is the subject of the report could be a member against whom the complaint

³² Section 27(7) of the Code at 179. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

³³ Section 28(1) of the Code at 179. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

³⁴ Section 28(2) of the Code at 179. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

³⁵ Section 28(7) of the Code at 180. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

³⁶ Section 28(9) of the Code at 180. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

was laid if the report has found that he or she failed to comply with his or her duties under the Code. Alternatively, it could be the complainant who requested the inquiry if the Ethics Commissioner had found that his or her request for an inquiry was frivolous or vexatious. The opportunity provided to either of the persons to make a statement in the House of Commons is an opportunity for that person to mitigate the sanction recommended against him or her by the Ethics Commissioner.

After the member who is the subject of the report has made his statement in the House of Commons, section 28(10) of the Code prescribes that a motion to concur in the report may be moved. However, if no such motion has been moved and disposed of within 30 days from the date of the tabling of the report, section 28(12) of the Code provides that on the 30th day the Speaker of the House of Commons may deem the move to have been proposed and dispose of the motion. In other words, the report may be deemed to have been adopted by the House of Commons, if it was not referred back to the Ethics Commissioner for further consideration.³⁷

In Canada, the office of the Ethics Commissioner is legally regarded as the extension of the House of Commons.³⁸ As a result, the decisions of the Ethics Commissioner are regarded as the final decisions of the House of Commons and are not reviewable by courts of law. This unassailable status of the decisions of the Ethics Commissioner was confirmed by the court in the case of *Morin v Crawford*.³⁹

³⁷ Section 28(13) of the Code provides that “at any point before the House has dealt with the report, whether by deemed disposition or otherwise, the House may refer it back to the Commissioner for further consideration, with instruction.”
<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

³⁸ See section 86(2) of the 1985 Parliament of Canada Act.

³⁹ 14 Admin LR (3d) 287 NWTSC 317-318. Although this decision was made in the context of the Ethics Commissioner of a Provincial Legislature, the court held that “since the discipline of members is an inherent privilege of the Legislature and since the Commissioner is engaged in an investigation on behalf of the Legislature, her actions are an extension of the exercise of that privilege. Thus, they are not subject to judicial review.”

4.4 Conclusion

It is clear from the discussion above that the House of Commons in Canada is also empowered by the Canadian constitutional framework, based on the principle of parliamentary privilege, to hold its members to account. In the next chapter, a comparative analysis between the legal disciplinary mechanisms employed by the House of Commons in Canada and the National Assembly in South Africa, will be undertaken and possible lessons for South Africa will be identified.

CHAPTER 5: COMPARATIVE ANALYSIS

5.1 Introduction

The research study in chapters 2 to 4 above gives an overview of the legal frameworks governing the functioning of the National Assembly in South Africa and the House of Commons in Canada. The focus of the inquiry in the above chapters has been to explore the disciplinary mechanisms that are in place for handling cases of misconduct and/or contempt laid against members of the National Assembly and members of the House of Commons in the two countries, respectively. In the present chapter, a comparative analysis of the two disciplinary mechanisms is undertaken. The objective of the comparative analysis is to evaluate whether there are any features of the disciplinary mechanism employed by the House of Commons in Canada through the Office of the Ethics Commissioner that can be recommended for adoption by the National Assembly in South Africa in order to enhance the functional independence and impartiality of its Powers and Privileges Committee.

In order to achieve the above objective, the present chapter analyses the differences between how the Office of the Ethics Commissioner in Canada and the Powers and Privileges Committee in South Africa function. In so doing, focus is placed first on the requirements for appointment as the Ethics Commissioner in Canada, in comparison with the appointment as a member to the Powers and Privileges Committee in South Africa. Secondly, the legal mechanisms put in place in order to ensure the independence of the Office of the Ethics Commissioner, in comparison with the independence of the Powers and Privileges Committee, are discussed. Thirdly, the procedure adopted by the House of Commons in Canada to facilitate the investigation and adjudication of cases by the Office of the Ethics Commissioner, in comparison with the one adopted by the National Assembly in South Africa

in relation to its Powers and Privileges Committee, are evaluated. Lastly, certain conclusions are made.

5.2 Requirements for appointment of Ethics Commissioner in Canada *vis-à-vis* a member of the Powers and Privileges Committee in South Africa

In Canada, it is a legal requirement that the Ethics Commissioner should either be a former Judge or a former member of a Board, Commission or Tribunal whose expertise in the subject matter of professional regulation of discipline, ethics, conflicts of interest and financial management is unquestionable.¹ On the contrary, in South Africa the Rules of National Assembly prescribe no legal requirements for appointment as a member of the Powers and Privileges Committee. The Rules of National Assembly simply require political parties represented in the National Assembly to appoint their members to committees of the National Assembly and thereafter inform the Speaker of the National Assembly of their nominated candidate.² Effectively, what this means is that the Powers and Privileges Committee in the performance of its duties, unlike the Office of the Ethics Commissioner in Canada, is likely not to derive any benefit in relation to possession of educational qualifications and practical experience in the application of law from its members. In effect, that means impartiality is more likely to be compromised.

5.3 Independence of the Ethics Commissioner *vis-à-vis* the independence of members of the Powers and Privileges Committee

There are few ways in which the independence of the Ethics Commissioner in Canada is guaranteed. Firstly, an appointed Ethics Commissioner in Canada

¹ See sections 81(2)(a) and 81(2)(b)(i)-(iv) of the 1985 Parliament of Canada Act.

² See rule 155(1) of the Rules of National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

enjoys a seven-year, renewable term of office.³ This is despite the fact that the term of office for members of the House of Commons in Canada is 4 years.⁴ Furthermore, although the Ethics Commissioner is legally regarded as performing his or her legal duties on behalf of the House of Commons in Canada, he or she is legally empowered to take charge of the control and management of his or her office.⁵ Furthermore, in carrying out the work of his or her office, the Ethics Commissioner is empowered to enter into contracts and memorandums of understanding, and engage the services of any advisers and consultants that he or she deems necessary for the proper performance of that work.⁶

Conversely, the term of office of members of the Powers and Privileges Committee in South Africa is not guaranteed. Instead, it is aligned with the term of office of the sitting National Assembly.⁷ Also, members of the Powers and Privileges Committee take charge of the investigation. Only two parties, who are not members of the National Assembly, are allowed to participate in the meetings of the Powers and Privileges Committee. These parties are the Initiator (Prosecutor) and the defence counsel. The above facts imply that the Ethics Commissioner in Canada enjoys more security of tenure and greater functional independence than do the members of the Powers and Privileges Committee in South Africa.

5.4 Investigation and adjudication of cases by the Ethics Commissioner vis-à-vis these activities by the Powers and Privileges Committee

In Canada, the code for members of the House of Commons makes provision for complaints to be lodged directly with the Office of the Ethics

³ See sections 81(3) and 82(1) of the 1985 Parliament of Canada Act.

⁴ See section 56.1(2) of the Canada Elections Act, S.C. 2000, c.9.

⁵ See section 84(1) of the 1985 Parliament of Canada Act.

⁶ See sections 84(2) and 84(3) of the 1985 Parliament of Canada Act.

⁷ See rule 157(1) of the Rules of the National Assembly.

https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

Commissioner. It further provides that the Ethics Commissioner, when conducting an enquiry, may make a recommendation for the disciplining of the member who lodged the complaint if he/she finds that the complaint was lodged frivolously.⁸

Conversely, in South Africa, rule 214(1) of the Rules of the National Assembly provides that complaints against Members of the National Assembly should be lodged with the Powers and Privileges Committee via the Speaker of the National Assembly. The procedure as it stands provides the Speaker of the National Assembly, who is also a member of one of the political parties represented in the National Assembly, with an opportunity to exercise discretion on the validity of the complaint before the referral thereof to the Powers and Privileges Committee.⁹ Also, the lack of provision in the schedule of the Rules of Assembly for sanctions to be recommended against a Member of the National Assembly who submitted a frivolous complaint of misconduct or contempt against another continues to provide an opportunity for democracy to still be subverted through unjustified suspensions of Members of the National Assembly, following the lodgement of frivolous complaints by Members of the National Assembly against one another.

5.5 Conclusion

The differences between the way in which the Office of the Ethics Commissioner functions in Canada and the way in which the Powers and

⁸ Section 27(6) of the Code. <https://www.ourcommons.ca/About/StandingOrders/Index-e.htm>
Accessed on 08 November 2017.

⁹ See rule 214(1) of the Rules of the National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018, read with rules 12(a) and 14I(1)-(2) of the Joint Rules of Parliament. <https://www.parliament.gov.za/storage/app/media/JointRules/joint-rules-a51.pdf>
Accessed on 26 June 2018. These rules, when read together, empower the Speaker of the National Assembly to exercise discretion on whether to refer a National Assembly member's case to the Powers and Privileges Committee or to accept a member's written expression of regret.

Privileges Committee operates in South Africa are significant. Improvements to the functioning of South Africa's Powers and Privileges Committee can be made by adopting some of the features of the disciplinary mechanism employed by the Ethics Commissioner in Canada's House of Commons. The adoption of some of the relevant features of the disciplinary mechanism of the House of Commons is likely to strengthen the independence and impartiality of the Powers and Privileges Committee. In the next chapter, the study concludes by making recommendations regarding which features of the disciplinary mechanism of the House of Commons could be adopted in order to improve the working procedure of the Powers and Privileges Committee.

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The research question that the present study sought to answer was whether the National Assembly Powers and Privileges Standing Committee is an independent and impartial tribunal or forum. To begin the study, the first chapter, an introduction, contextualized the research problem. In the second chapter a brief analysis of the South African constitutional framework, focusing specifically on the power of the National Assembly to discipline its members, was provided. The third chapter evaluated the procedure adopted by the National Assembly for exercising its power to discipline its members. In the fourth chapter a brief overview of the Canadian legal framework governing the disciplining of members of the House of Commons was provided. In view of the context created in the preceding chapters, in chapter five the study focused on the comparative analysis of the disciplinary mechanisms employed by the National Assembly in South Africa and the House of Commons in Canada.

During the research the following facts were established: The Houses of Parliaments from different countries employ different mechanisms to discipline their members. Some Houses of Parliament discipline their members through committees specifically established for that purpose, while others discipline their members on the spot without referring the matter to any committee for investigation and determination.¹ Regardless of the difference in mechanisms, the power that Houses of each of the different countries enjoys to put mechanisms in place for the disciplining of its members is derived from a legal source. Such legal sources include the constitution of

¹ See Standing Orders 90 and 91 of the Standing Orders of the New Zealand House of Representatives. <https://www.parliament.nz/media/4384/standing-orders-2017.pdf> Accessed on 12 April 2018.

the country concerned, specific legislation and standing orders or rules of the House of Parliament concerned.

In South Africa, the National Assembly disciplines its members through the Powers and Privileges Committee, specifically established for that purpose.² The power of the National Assembly to establish the Powers and Privileges Committee is derived from the 1996 Constitution. Such power is implemented through the Constitution enhancing provisions of the 2004 Powers and Privileges Act, and the Rules of the National Assembly.³

However, it was established that although the procedure laid down in the schedule of the Rules of Assembly for investigation and determination in cases of misconduct and contempt laid against members of the National Assembly is reasonable, the procedure can be somewhat unfair. The conclusion was arrived at after it was established that members of the Powers and Privileges Committee are not necessarily independent. It was established that they do not enjoy security of tenure, and they do not enjoy financial security. Also, it was established that the functioning of the Powers and Privileges Committee within the precincts of Parliament, in particular the attendance of political party caucus meetings by the members of the Powers and Privileges Committee, compromises the objective structural independence of the Powers and Privileges Committee. It was further established that complaints of contempt and misconduct in the National Assembly usually relate to thriving political disagreements. As a result, appointing members of the National Assembly to serve in the Powers and Privileges Committee does not promote impartiality either.

² See section 12(1)-(2) of the 2004 Powers and Privileges Act.

³ See rule 211 of the Rules of the National Assembly.
https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf
Accessed on 20 March 2018.

Having compared the disciplinary mechanism employed by the House of Commons in Canada with the disciplinary mechanism employed by the National Assembly in South Africa, it was established that there are legal requirements for appointment as an Ethics Commissioner in Canada. Also, it was established that the security of tenure in Canada is guaranteed through the stipulation in the legislation of the time-frame for serving as the Ethics Commissioner.⁴ Lastly, the complaints in Canada are lodged directly with the Office of the Ethics Commissioner.

6.2 Recommendations

As stated elsewhere above, in Canada the powers of the House of Commons to discipline its members are not reviewable by the courts of law. It was established in chapter 4 above that that is so in respect of the principle of parliamentary privilege. However, in South Africa the powers of the National Assembly are reviewable by courts. According to Bekink,⁵

[i]n South Africa, Parliament functions according to the Constitution and the law, which permits Parliament to create its own internal rules and orders. The courts must and can oversee whether Parliament's rules and orders comply with the Constitution and other laws, but should not inquire whether Parliament has complied with its own internal rules, Parliament itself should control and enforce its own procedures.

What the quote illustrates is that in South Africa courts do have some powers of review with regard to the internal rules and orders created by the National Assembly. However, that review is limited. The courts may only check to see whether the Rules of the National Assembly comply with the provisions of the 1996 Constitution and any other law that has been passed by Parliament that is applicable to the exercise of the powers of the National Assembly. The Powers and Privileges Committee conducts the investigation and determination of cases of contempt and misconduct laid against members

⁴ See section 82(1) of the 1985 Parliament of Canada Act.

⁵ Bekink (2016) 339.

of the National Assembly within the framework provided in the Rules of the National Assembly.

Since the Courts cannot inquire whether the National Assembly has complied with any of its internal orders, and since it is the responsibility of the National Assembly to control and enforce its own procedures, it is clear that it is the National Assembly alone that must ensure that the composition of the Powers and Privileges Committee as well as the procedural rules that it must follow when doing its work comply with the requirements of fairness and reasonableness. Therefore, against the observation made in chapter five that the procedure for the lodgement of complaints as it stands provides the Speaker of the National Assembly, who is also a member of one of the political parties represented in the National Assembly, with an opportunity to exercise discretion on the validity of the complaint before the referral thereof to the Powers and Privileges Committee, the following recommendation is made:

Recommendation 1 – It is recommended that rule 214(1) of the Rules of National Assembly should be amended to provide for the lodgement of complaints directly to the Powers and Privileges Committee and not via the Speaker of the National Assembly. The Speaker’s Office should merely be informed about the complaint lodged against a Member of the National Assembly.

The above recommendation is in line with the findings of the Constitutional Court in the case of *Oriani-Ambrosini, v Sisulu, Speaker of the National Assembly*.⁶ In this case the Court rejected the Speaker’s requirement that a Member of the National Assembly must first obtain permission before a Bill

⁶ 2012 (6) SA 588 (CC).

can be introduced into the National Assembly. Writing for the court, Mogoeng CJ held that:

[c]ommon sense suggests that any majority party in the Assembly is likely to support its own legislative projects and not those of minority parties or any individual member. For this reason, a permission requirement boils down to a mechanism that is inescapably prone to denying individual members and minority parties the power to initiate, prepare and introduce legislation, however, well-meaning those who drafted the Rules might have been.⁷

On parity of reasons, requiring complaints to be referred to the Powers and Privileges Committee via the Speaker's Office is a procedural mechanism that is inescapably apparent may be used to deny members of other political parties represented in the National Assembly the opportunity to lodge complaints regarding contempt and misconduct against members of the majority party.

Against the observations of a lack of functional independence and impartiality made in chapter 5 against Members of the Powers and Privileges Committee, the following recommendations are made:

Recommendation 2 – Within the context of section 5 of the schedule of the Rules of National Assembly which authorises the Powers and Privileges Committee to nominate a person who is duly qualified, but who is not a member of the committee, to act as the initiator (prosecutor) for the duration of a hearing, it is recommended that the Powers and Privileges Committee should consider nominating a full committee of duly qualified independent persons who will investigate and consider the cases of contempt and misconduct and thereafter report their findings to the Powers and Privileges Committee. The Powers and Privileges Committee will then consider the report from the “independent sub-committee” before referral thereof to the National Assembly.

⁷ *Ambrosini v Speaker of the National Assembly* case 69B-C.

Recommendation 3 – It is further recommended that section 5 of the schedule of the Rules of National Assembly should be amended to provide for legal requirements and practical experience for the nomination of independent persons to be proposed as members of the sub-committee of the Powers and Privileges Committee.

Recommendation 4 - Within the context of rule 167(g) of the Rules of National Assembly which allows committees of the National Assembly to meet at any venue beyond the seat of Parliament, it is further recommended that section 5 of the schedule of the Rules of National Assembly should be amended to provide for the meetings of the sub-committee of the Powers and Privileges Committee to take place outside of the precincts of Parliament.

Recommendation 5 – It is recommended that the Rules of National Assembly should be amended to provide for the remuneration of members of the sub-committee of the Powers and Privileges Committee.

Recommendation 6 – It is recommended that, should the nomination of external persons to form the sub-committee of the Powers and Privileges Committee not be a viable option for any reason, the National Assembly should amend the 2004 Powers and Privileges Act as well as chapter 5 of the Electoral Commission Act,⁸ and provide for the referral of cases of misconduct and contempt to the Electoral Court for adjudication.

The above recommendations are encouraged by the decision of the Constitutional Court in the case of *Ambrosini v Speaker of the National*

⁸ Act 51 of 1996.

Assembly. In this case the Constitutional Court held that the National Assembly's power to make rules is limited to the regulation of process and form, as opposed to content and substance.⁹ What this finding ensures is the fact that the reports which are produced by the sub-committee of the Powers and Privileges Committee will not contravene the provisions of the 1996 Constitution, which empowers the National Assembly to determine its internal arrangements, processes and procedures. Such power is limited to what the Rules of the National Assembly are already regulating and not the contents of what is in the reports of the committees of the National Assembly.

6.3 Conclusion

The 1996 Constitution encourages a people-centred approach towards governance in South Africa. It does this by providing for anyone who is eligible to vote to also stand for public office and, if elected, to hold public office. When one is elected to the National Assembly in South Africa, what that means effectively is that one has been nominated to represent the nation in the highest office concerned with legislative enactment in the country.

As stated previously, the National Assembly is empowered by the 1996 Constitution to determine its internal arrangements, proceedings and procedures. Such power includes the power to discipline its members for contempt and misconduct. Even then, it has been established in the present study that the exercise by the National Assembly of such power should be exercised fairly and reasonably. Therefore, the mechanism put in place by the National Assembly, of establishing the Powers and Privileges Committee that is comprised of members of the National Assembly, and which has the authority to recommend the suspension of other members from the National Assembly, although allowed by law, needs to be strengthened in order to

⁹ *Ambrosini v Speaker of the National Assembly* case 606G.

avoid abuse in the hands of the majority party. For the reasons already stated above, the Powers and Privileges Committee, in its current form, is not an independent and impartial tribunal or forum.

BIBLIOGRAPHY

Books

Bekink B (2016) *Principles of South African Constitutional Law 2nd ed* Durban: LexisNexis.

Currie I & De Waal J (2013) *The Bill of Rights Handbook 6th ed* Claremont: Juta & Co, Ltd.

Hogg PW (1992) *Constitutional Law of Canada 3rd ed* Toronto: Carswell Thomson Professional Publishing.

Corder H, Federico V & Orru R (eds) (2014) *The quest for constitutionalism: South Africa since 1994* Farnham: Ashgate Publishing Limited.

James A (1986) *Sovereign Statehood: The basis of international society* London: Allen & Unwin Publishers Ltd.

Malan K (2012) *Politocracy: an assessment of the coercive logic of the territorial state and ideas around a response to it* Pretoria: Pretoria University Law Press.

Motala Z & Ramaphosa C (2002) *Constitutional law: analysis and cases* Oxford: Oxford University Press.

Vidmar J (2013) *Democratic Statehood in International Law: The emergence of new states in post-cold war practice* United Kingdom: Hart Publishing Ltd.

Journal Articles

Bachmann and Frost (2012) "Colonialism, justice and the rule of law: a Southern African and Australian narrative", *De Jure*, vol 2, 306-328.

Choudhry (2009) "'He had a mandate': The South African Constitutional Court and the African National Congress in a dominant party democracy", *Constitutional Court Review*, vol 2, 1-86.

Howie CT "Judicial Independence" (2003) 120 *South African Law Journal* 679.

Malan K (2012) "The rule of law versus decisionism in the South African constitutional discourse", *De Jure*, vol 2, 272-305.

Mpya and Ntlama (2016) "The evolution of the constitutional law principle of the 'rule of law' in the South African Constitutional Court" *South African Public Law Journal* 116.

Ngcobo S "Sustaining public confidence in the judiciary: an essential condition for realising the judicial role" (2011) 128 *South African Law Journal* 5.

Okpaluba C & Juma L "The dialogue between the bench and the bar: implications for adjudicative impartiality" (2011) 128 *South African Law Journal* 659.

Legislation

Constitution of the Republic of South Africa Act, 200 of 1993.

Constitution of the Republic of South Africa, 1996.

Electoral Act, 73 of 1998.

Electoral Commission Act, 51 of 1996.

Powers and Privileges of Parliament Act, 91 of 1963.

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

Status of Bophuthatswana Act, 89 of 1977.

Status of Ciskei Act, 110 of 1981.

Status of the Transkei Act, 100 of 1976.

Status of Venda Act, 107 of 1979.

Foreign Legislation

Constitution Act, 1867.

Constitution Act, 1982.

Canada Elections Act, S.C. 2000, c.9.

Parliament of Canada Act, R.S.C. 1985, c. P-1.

Cases

Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588
(CC).

Cape Town City v South African National Roads Authority 2015 (3) SA 386 (SCA).

De Beer v North-Central Local Council & South-Central Local Council (Umhlatuzana Civic Association Intervening) 2002 (1) SA 429 (CC).

De Lange v Smuts 1998 (3) SA 785 (CC).

De Lille v Speaker of the National Assembly 1998 (3) SA 430 (CPD).

Economic Freedom Fighters v Speaker of the National Assembly 2018 (3) BCLR 259 (CC).

Economic Freedom Fighters v Speaker of the National Assembly 2018 (2) ALL SA 116 (WCC).

Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995, 1996 (3) SA 289 (CC).

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Nkuzi Development Association v Government of the Republic of South Africa 2002 (2) SA 733 (LCC).

Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA 1 (CC).

President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC).

Shilubana v Nwamitwa 2007 (9) BCLR 919 (CC).

Speaker of the National Assembly v De Lille 1999 (4) SA 863 (SCA).

UDM v Speaker of the National Assembly 2017 (8) BCLR 1061 (CC).

Foreign Cases

Villeneuve v Northwest Territories (Legislative Assembly) 2008 NWTSC 41.

Gratton v Canada (Judicial Council) 115 D.L.R. (4th) 81 FC.

Morin v Crawford 14 Admin. L.R. (3d) 287 NWTSC.

Commentaries

Rautenbach IM (2008) "Fundamental Rights" in Joubert WA & Faris JA (eds) The Law of South Africa Durban: LexisNexis.

Official Publications

Electoral Commission of the Republic of South Africa National and Provincial Elections (1999) Report. Available online:
<http://www.elections.org.za/content/About-Us/Reports/> Accessed on 19 March 2018.

Electoral Commission of the Republic of South Africa National and Provincial Elections (2004) Report. Available online:

<http://www.elections.org.za/content/About-Us/Reports/> Accessed on 19 March 2018.

Electoral Commission of the Republic of South Africa National and Provincial Elections (2009) Report. Available online:

<http://www.elections.org.za/content/About-Us/Reports/> Accessed on 19 March 2018.

Electoral Commission of the Republic of South Africa National and Provincial Elections (2014) Report. Available online:

<http://www.elections.org.za/content/About-Us/Reports/> Accessed on 19 March 2018.

National Assembly Guide to Procedure (2004) Available online:

<https://www.parliament.gov.za/storage/app/media/GUIDE.pdf>
Accessed on 19 March 2018.

Internet Sources

Joint Rules of Parliament. Available online:

<https://www.parliament.gov.za/storage/app/media/JointRules/joint-rules-a51.pdf> Accessed on 26 June 2018.

Parliamentary Monitoring Group Website: <https://pmg.org.za/page/political-party-representation> Accessed on 11 November 2016.

Rules of the National Assembly. Available online:

<https://www.parliament.gov.za/house-rules> Accessed on 08 November 2017.

Standing Orders of the House of Commons. Available online:

<https://www.ourcommons.ca/About/StandingOrders/Index-e.htm> Accessed on 08 November 2017.

Standing Orders of the House of Representatives. Available online:

https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/House_of_Representatives_Standing_Orders

Accessed on 12 April 2018.

Standing Orders of the House of Representatives. Available online:

<https://www.parliament.nz/media/4384/standing-orders-2017.pdf> Accessed

on 12 April 2018.

Websites of the Canada House of Commons and Senate:

<http://www.ourcommons.ca/en> & <https://sencanada.ca/en/senators/>

Accessed on 19 July 2017.