



**A CRITICAL EVALUATION OF THE DISCRETION OF THE SOUTH
AFRICAN PARLIAMENT TO BROADCAST ITS OWN PROCEEDINGS**

by

PHUMUDZO ASHLEY MANAGA

Student no: 12342018

Submitted in partial fulfilment of the requirement for the degree of:

MAGISTER LEGUM

in the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

SUPERVISOR: PROF B BEKINK



ACKNOWLEDGEMENTS

First and foremost, I thank God for the opportunity to study.

Secondly, I would like to express my sincere gratitude to my Supervisor, Prof B Bekink, for his support, patience, motivation and contribution. Your guidance has been invaluable.

Thirdly, I would like to thank my beautiful wife, Fhatu Managa, for her love and support.

To my siblings, Shoni, Fhatu, Michael and Ndivhudza, I would like to thank you for your support and encouragement.

Lastly but not least, I would like to thank the following people, Maria Nel and Steven Budlender SC.



Abstract

This research is essentially aimed at critically evaluating a discretion of Parliament to broadcast its own proceedings within the current constitutional framework. In doing so, it draws a distinction between the role of Parliament in a Westminster system and the current South Africa's constitutional democracy. South Africa's constitutional democracy is designed such that the marginalised or voiceless people of the country have a mechanism to be heard. In order to give voice to these marginalised people, Parliament must endeavour to reach as many people as possible. In the modern age of technology, this will include broadcasting of its own proceedings to enable people who do not live or work close to Parliament, to watch the proceedings on television or through other media platforms. This is in line with the nature of South Africa's democracy and its parliamentary system, which obliges that state institutions must be open and transparent.

This research will explain and highlight the legal obligations that Parliament has in terms of sections 59 and 72 of the Constitution to conduct its affairs in an open and transparent manner. These obligations must be read together with an obligation to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights. This research will argue that Parliament must take all reasonable steps to ensure that its proceedings are easily and freely available to all who are interested in them, including broadcasting of any disruption by the members of Parliament. Thus, Parliament cannot prevent or unreasonably limit media access for the purpose of broadcasting its own proceeding as it could well be in contravention of the founding principles of SA's constitutional democracy.



TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION.....	6
1.1 INTRODUCTION	6
1.2 RATIONALE AND BACKGROUND	10
1.3 THESIS STATEMENT AND RESEARCH QUESTION.....	13
1.4 IMPORTANCE OF THE STUDY.....	14
1.5 PRELIMINARY LITERATURE OVERVIEW.....	15
1.6 RESEARCH METHODOLOGY.....	16
1.7 SCOPE	17
1.8 DEFINITIONS	17
1.9 STRUCTURE.....	18
1.10 CONCLUSION	19
CHAPTER 2: BRIEF SUMMARY OF CERTAIN KEY PRINCIPLES OF THE SOUTH AFRICAN CONSTITUTION	20
2.1 INTRODUCTION	20
2.2 CORE CONSTITUTIONAL PRINCIPLES.....	22
2.2.1. SUPREMACY OF THE CONSTITUTION	22
2.2.2. FUNDAMENTAL RIGHTS AND VALUES.....	24
2.2.3. THE RULE OF LAW	25
2.2.4. SEPARATION OF POWERS.....	27
2.2.5. DEMOCRACY.....	29
2.2.6. JUDICIAL REVIEW AND ROLE OF COURTS	30
2.3 CONCLUSION	31
CHAPTER 3: GENERAL POWERS OF THE SOUTH AFRICAN PARLIAMENT	32
3.1 INTRODUCTION	32
3.2 CONSTITUTIONAL MANDATE OF PARLIAMENT	32
3.3 THE POWERS OF EACH HOUSE OF PARLIAMENT	35
3.3.1 NATIONAL ASSEMBLY.....	35
3.3.2 NATIONAL COUNCIL OF PROVINCES.....	39
3.4 CONCLUSION	42
CHAPTER 4: OVERVIEW AND ANALYSIS OF SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK RELATING TO THE BROADCASTING OF PARLIAMENTARY PROCEEDINGS	44



4.1	INTRODUCTION	44
4.2	THE CONSTITUTION.....	44
4.3	THE POWERS AND PRIVILEGES ACT.....	50
4.4	CONCLUSION	51
	CHAPTER 5: SUMMARY AND CONCLUSION.....	53
	BIBLIOGRAPHY	56
	PRIMARY SOURCES.....	56
	ACTS AND REGULATIONS.....	56
	CASE LAW	56
	SECONDARY AND OTHER SOURCES.....	57



CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

Twenty-five years have passed since the dawn of a truly democratic system of government in South Africa, one that is based on the rule of law, transparency, openness and the will of the people.¹ One of the institutions that now underpins South African democracy is the National Parliament (hereafter referred to as Parliament). Parliament comprises two houses – the National Assembly and the National Council of Provinces.² The role of Parliament is to act as a legislative body for the national sphere of government.³ Parliament has various functions and responsibilities, which include the responsibility to uphold the values that underpin the Constitution.⁴ The Constitution also imposes an obligation on Parliament, and all state institutions, to conduct their business in an open and transparent manner.⁵ It is submitted and crucial to this

¹ See Preamble of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as “the Constitution”). The Preamble of the Constitution reads: “We the people of South Africa, lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.” Section 1 provides that “The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedom.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

² See s 42(1)(a) and (b) of the Constitution.

³ See s 43(a) of the Constitution.

⁴ See s 7(2) of the Constitution.

⁵ See ss 59 and 72 of the Constitution.

research, that the values that underpin the Constitution give the people of the Republic the right to see and hear what happens in Parliament.⁶

As a general introduction, the practice of media broadcasting of parliamentary proceedings is common across the globe and has, in recent years, become an integral part of the democratic dispensation in many countries that subscribe to the principle of democracy.⁷ The extent to which such broadcasting can be undertaken depends on the nature of the democracy of the country however.⁸ Thus, for example, the Scottish Parliament has adopted media protocols that allow media houses, both local and international, to apply to the Scottish Parliament for permission to broadcast its proceedings.⁹ Another example on the African continent is Kenya, which recognises the need for broadcasting of parliamentary proceedings. Section 118 of the Kenyan Constitution requires its Parliament to conduct its business in an open and transparent manner.¹⁰

⁶ *Primedia Broadcasting (A division of Primedia (Pty) Ltd) v Speaker of National Assembly* 2016 4 All SA 793 (SCA), at para 1 at 2 (hereafter referred to as “*Primedia Broadcasting No.1*”). The Court stated that South African democracy is based on an open government in which all the people are entitled to participate. The Constitution affords all citizens the right to see and hear what happens in Parliament.

⁷ Kenya adopted a new Constitution that is similar to the South African Constitution. Section 118 of the Kenyan Constitution mirrors sections 59 and 72 of the South African Constitution. Constitution of Kenya, 2010. (2010). Retrieved 10 March 2019, from <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> (hereafter referred to as “the Kenyan Constitution”).

⁸ See para 51 at 19 of *Primedia Broadcasting No. 1*.

⁹ Brown, C. (n.d.). Media Protocols. Visited on March 10 2019, from <https://www.parliament.scot/newsandmediacentre/30950.aspx>.

¹⁰ See again s 118 of the Kenyan Constitution. It is submitted that the parliamentary obligation to broadcast its own proceedings is more efficient in countries which subscribe to the principle of constitutional democracy, where Parliament is subjected to the authority of the Constitution. This is contrary to systems such as the United Kingdom that has a parliamentary supremacy system referred to as the Westminster system, which affords Parliament supremacy over all other institutions of state. See Pierre De Vos and Warren Freedman and others “*South African Constitutional Law in Context*”, (2018) at p 42 (hereafter referred to as De Vos and Freedman (2018)). Such a system allows Parliament to restrict the right of the people to see and hear what happens in Parliament without special constitutional constraint.

In the context of the South African parliamentary system, members of the public have a right to see and hear what is said and by whom, in order for their right to vote to be meaningful.¹¹ It is common knowledge that most South Africans cannot attend the sittings of Parliament, with the only access available to them being through live publication in the form of television, via Twitter and other forms of broadcasting.¹² Broadcasting of parliamentary proceedings is aimed at ensuring that members of the public are informed on how their representatives conduct themselves and represent their interests in Parliament. Such access offers the public a further right to assure themselves that the proceedings of Parliament are conducted fairly and that all members of Parliament are treated equally and with respect.¹³ The right to see and hear what happens in Parliament is further inextricably linked to other constitutional rights afforded to members of the public.¹⁴

Under the South African constitutional framework, the direct parliamentary obligation to conduct its business in an open and transparent manner can be traced initially to section 67 of the Interim Constitution.¹⁵ Section 67 of the Interim Constitution had similar

¹¹ Refer to para 29 at 12 of *Primedia Broadcasting No.1*. The Court held that “The right to vote held by all adult citizens in the country can be exercised meaningfully only if the voters know what their representatives do and say in Parliament. And since the vast majority of people are not actually in Parliament, they must rely on public reports and broadcasts. As Cameron J also said in *Democratic Alliance* (above, para 135), the right of individuals to make political choices is ‘made more meaningfully by challenging, vigorous and fractious debate’. Whether the broadcasts relayed to the public in the manner dictated by the rules and the policy are sufficiently informative and accurate, is the essential question.”

¹² See paras 1 and 2 at 2-3 of *Primedia Broadcasting No.1*.

¹³ *Primedia Broadcasting v Speaker of National Assembly* 2015 (4) SA 525 (WCC), para 15 at 10 (hereafter referred to as “*Primedia Broadcasting No.2*”).

¹⁴ See ss 16, 19 and 32 of the Constitution. For example, citizens must know what happens in Parliament in order to decide which political party to vote for (see again *Primedia Broadcasting No. 1*, para 29 at 12). The right to receive or impart information can be best afforded to the citizens by affording them a right to know what happens in Parliament.

¹⁵ See s 67 of the Interim Constitution, Act 200 of 1993 (hereafter referred to as “the Interim Constitution”).



provisions to sections 59 and 72 of the Constitution. In order to give effect to the values of transparency and openness, as indicated in section 59 and 72 of the Constitution, Parliament decided to pass legislation titled the Powers, Privileges and Immunities of Parliament and Legislatures Act.¹⁶ In order to provide the ambit within which the latter could be applied, Parliament adopted certain rules and policies that set out guidelines on how the Speaker can exercise her powers, which are listed in the Powers and Privileges Act.¹⁷

Against the aforementioned background, this research focuses on the legal requirements underpinning the authority of the South African Parliament to broadcast its own proceedings. Both the meaning and importance of sections 59 and 72 of the Constitution, within the context of the South African Parliament's discretion to broadcast its own proceedings, will be discussed. Public participation in the law-making of the country will also be analysed within a new legal framework of judicial jurisprudence.¹⁸

¹⁶ Act 4 of 2004, (hereafter referred to as "the Powers and Privileges Act"). See again para 2 at 3 of *Primedia Broadcasting No.1*.

¹⁷ See para 19 at 8-9 of *Primedia Broadcasting No.1* regarding the Rules of Parliament. It should be noted however that the Rules of Parliament regulating television broadcasting and broadcasting policy were declared unconstitutional in *Primedia Broadcasting No.1*. Unfortunately, the policy is no longer on the internet. This research relied on the copy provided by the office of the Secretary of Parliament: Parliament's Policy on Filming and Broadcasting, (hereafter referred to as "the broadcasting policy"). The Policy indicates that "This policy seeks to strengthen the relationship between Parliament and the media and provide guidelines on managing media relations in Parliament."

¹⁸ See *Doctors for Life International v The Speaker of the National Assembly* 2006 (6) SA 416 (CC), para 137 at 76, (hereafter referred to as "*Doctors for Life International*"). The Court stated that "Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables the members of the public to familiarize themselves with the law-making process and thus be able to participate in the future." This case underscores the importance of the right of the people to see and hear how their respective representatives conduct themselves in Parliament. This dissertation seeks to address the challenges of those who cannot access Parliament except through television or other forms.

1.2 RATIONALE AND BACKGROUND

Given South Africa's constitutional history, South Africa's parliamentary system was originally influenced by the parliamentary system of the United Kingdom,¹⁹ which is based on the Westminster system that promotes parliamentary sovereignty over any other arms of state. The Westminster system assumes that Parliament receives a mandate from the electorate and the courts do not have powers to gainsay any legislation passed by it, unless due procedure was not followed in passing such legislation.²⁰

In *Primedia Broadcasting No.1*, Parliament argued that the disruption provisions in the broadcasting policy meet international standards as they were taken directly from the rules of Parliament in the United Kingdom.²¹ However, it is submitted that the move by Parliament to use the Westminster parliamentary system as a point of reference in crafting the broadcasting rules and policy lacked consideration of the nature of the democracy of these two countries, as well as the extend of the powers of the respective Parliaments. The question is: Why was it important for Parliament to consider the powers of the United Kingdom's Parliament, before adopting the broadcasting policy and rules which are similar to it? As mentioned above, the Westminster system is predicated on the principle of parliamentary sovereignty, meaning the powers of Parliament to pass laws and govern its own internal arrangement are not subject to any scrutiny by any other arm of state, including courts, unless

¹⁹ Ian Currie and Johann De Waal "The Bill of Rights Handbook" (2013) at 2 (hereafter referred to as "(Ian Currie and Johann De Waal (2013))").

²⁰ See Ian Currie and Johann De Waal (2013) at 3.

²¹ See *Primedia Broadcasting No.1*, para 51 at 19. The Court stated that the question of whether the disruption provisions are best international standard might be correct, but that does not mean that the rules are consonant with the South African Constitution. It is therefore submitted that this is an important consideration for countries that were under British colonial rule, namely: that if they wish to have a democratic state which is predicated on constitutional democracy, they cannot rely on the United Kingdom model.

procedure was not followed.²² However, in South Africa, Parliament's powers are subject to the Constitution – including the power to determine its own internal arrangement.²³

The Constitution has a default position in the form of sections 59 and 72 of the Constitution. Over the years, these sections have been misinterpreted by Parliament in the form of broadcasting rules and policy adopted, ostensibly to give effect to them. Such misinterpretation has seemingly led to Parliament adopting a disruption clause in the broadcasting policy which, firstly, gives power to Parliament not to televise disruptions in the gallery until order has been restored,²⁴ and secondly, to focus the camera on the occupant of chair in the event of unparliamentary behaviour.²⁵ These clauses were ventilated for the first time in the Western Cape High Court between Parliament and the

²² *Doctors for life*, para 208 at 109. The Court stated that the legislation must conform with the Constitution in terms of both its substance and procedure lest it be declared invalid. It should be noted however that *Doctors For Life* referred to both “the content and the manner in which it was adopted” in the context of the constitutional democracy. The Court referenced the case of *Harris v Minister of the Interior* 1952 (2) SA 428 (A) at 456E-G, wherein the Court stated that “If Act 46 of 1951 has been passed before the Statute of Westminster, it is clear from the reasons given in the decision of this Court in *Rex v Ndobe*, supra, that the Act would not have been a valid Act, as it was not passed in accordance with the procedure prescribed by sections 35(1) and 152 of the South Africa Act. That decision was not questioned on behalf of the respondents and there is reason to doubt its soundness. The Court in declaring that such a Statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by Statute; its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging the duty is controlling the Legislature.” Therefore, the powers of the Court in a Westminster system are limited to ruling on the manner in which the legislation is adopted. See also Ian Currie and Johann De Waal at 3.

²³ See s 57 of the Constitution. As stated earlier, sections 57 and 70 of the Constitution affords Parliament powers to determine its own proceedings including the power to direct how broadcasting of its own proceedings should be conducted, but the exercise of those powers must comply with the Constitution lest it is invalid. Put differently, the Act and Policy passed to give effect to sections 59 and 72 of the Constitution must comply with the Constitution.

²⁴ See Broadcasting Policy 8.3.3.2(a)(i).

²⁵ See Broadcasting Policy 8.3.3.2(a)(ii).



Economic Freedom Fighters.²⁶ The issue before the Court was whether the rules and policy of Parliament regarding broadcasting are consistent with sections 59 and 72 of the Constitution and section 21 of the Powers and Privilege Act.²⁷

Based on different views regarding Parliament's broadcasting policy, it is therefore important to discuss the constitutional provisions which deal with the discretion of Parliament to broadcast its own proceedings within the context of the South African constitutional democracy. For a very long time the discretion of Parliament to broadcast its own proceedings was discussed in the context of the Westminster system.²⁸ Because of its obvious importance in South Africa's democratic order, this research will emphasise the importance and effect of the discretion of Parliament to broadcast its own proceedings within the South African constitutional framework, with specific reference to sections 59 and 72 of the Constitution and other rights that are contingent upon the proper exercising of these sections. Since this position is a recent constitutional development, there is limited literature that deals with this question. For this reason, the dissertation will focus mainly on both the *Primedia Broadcasting No. 1* and *2* Court decisions.

²⁶ See 2015 (4) SA 525 (WCC). This case was brought up for the first time in the Western Cape (see *Primedia Broadcasting 2*) before it was appealed to the Supreme Court of Appeal (see *Primedia Broadcasting No. 1*).

²⁷ The Western Cape High Court held that the limitation placed by the policy were reasonable. This judgment was subsequently overturned in the Supreme Court of Appeal. The Supreme Court stated that the disruption clauses failed to pass constitutional muster and are therefore unconstitutional (see *Primedia Broadcasting No. 1* para 52 at 19).

²⁸ The clauses of the Broadcasting Policy, more particularly the disruption clauses are not consonant with the Constitution because they afford Parliament powers which it does not have in terms of the Constitution i.e. sections 59 and 72 of the Constitution require Parliament to conduct its business in an open and transparent manner. Contrary to the latter, Broadcasting Policy regards openness and transparency as an exception rather than a default position.



1.3 THESIS STATEMENT AND RESEARCH QUESTION

As is confirmed in section 1 of the South African Constitution, the Constitution is the supreme law of the Republic of South Africa. South Africa's democracy is founded on openness and transparency, where all citizens have a right to participate, including to witness and hear what happens in Parliament.²⁹ It is important that this right to witness and hear what occurs in Parliament is clearly defined due to its importance in the democratic dispensation. In *Primedia Broadcasting 1*, the Court has declared the broadcasting rules and policy of Parliament unconstitutional for being non-compliant with sections 59 and 72 of the Constitution.³⁰ These sections are intertwined with other individual rights, for example: freedom of speech,³¹ the right to vote,³² and access to information.³³ Therefore, all these important rights can only be exercised meaningfully if Parliament conducts its business openly, as envisaged in sections 59 and 72 of the Constitution.³⁴

It is an obvious fact that most South Africans cannot attend the sittings of Parliament. However, with the use of television, Twitter and other social media platforms, they can acquire meaningful access to the proceedings of Parliament.³⁵ In view of *Primedia Broadcasting 1*, it was important to determine the extent to which sections 59 and 72 of the

²⁹ *Primedia Broadcasting No. 1*, para 1 at 2-3.

³⁰ *Primedia Broadcasting 1*, para 52 at 19. The Court declared the disruption clauses in the Broadcasting Policy unconstitutional because the justification proffered in the Policy and rules for limiting the right to open Parliament cannot survive constitutional scrutiny.

³¹ See s 16 of the Constitution.

³² See s 19(3)(a) of the Constitution.

³³ See s 32 of the Constitution.

³⁴ Note para 29 at 12 of *Primedia Broadcasting No. 1*. For instance, for citizens to decide which political party to vote for, they must know how members of Parliament conduct themselves in Parliament.

³⁵ See *Primedia Broadcasting No. 1*, para 2 at 3.

Constitution can be interpreted. In order to do that, the following question must be asked:

- What is the importance and effect of broadcasting parliamentary proceedings in the South African constitutional democracy?

1.4 IMPORTANCE OF THE STUDY

Parliament has encountered many challenges in recent years, which ranged from disruptions by its own members to the jamming of devices by state security officers. Thus, for example, during the 2015 State of Nation Address (SONA),³⁶ Parliament decided to implement a broadcasting policy and rules that give it the right to not cover what it considers to be disruptive behaviour, including conduct that is not part of the parliamentary business.³⁷ It will be argued that it is important in an era of open democracy and public accountability that Parliament understands that for it to reach many South Africans, it must pass rules and policies that are informed by the values of openness and transparency as a default position, instead of a restrictive approach that is at odds with the Constitution. It will further be argued that the Westminster system of government is not applicable anymore to South Africa's new constitutional dispensation and that is furthermore not the best model for formulating policies and rules regarding the broadcasting of parliamentary proceedings in South Africa parliamentary proceedings. This study is therefore of importance in the quest for Parliament to understand and fulfil its constitutional role and obligations.

³⁶ Note para 1 at 1-2 of the *Primedia Broadcasting No. 2*.

³⁷ Note clause 8.3.3.2(a)(i) and (ii) of the Broadcasting Policy.

1.5 PRELIMINARY LITERATURE OVERVIEW

As stated above, the broadcasting of parliamentary proceedings has only become topical in recent years. Furthermore, there is very limited literature that specifically deals with this topic – at least in the context of the South African constitutional framework. This research will seek to place more emphasis on the constitutional provisions that require Parliament to conduct its business in an open and transparent manner.³⁸ It will discuss the interpretation of sections 57 and 72 of the Constitution with reference to the specific case law on the topic.

This research will analyse various cases that dealt with the obligation of Parliament to conduct its business openly. Even though the theme of the research is the broadcasting of parliamentary proceedings, the importance and effect of this obligation in relation to the other rights of the electorate – i.e. freedom of expression,³⁹ freedom of speech,⁴⁰ the right to vote⁴¹ and access to information,⁴² will also be considered. This is an integral aspect of the Constitution, as it affirms an individual's entitlement to be properly informed before making a political judgment. The media plays an important role in safeguarding this position by using broadcasting, print and electronic media to convey information to the electorate.⁴³ This research will also analyse the powers of each body of

³⁸ See again ss 59 and 72 of the Constitution.

³⁹ See again s 16 of the Constitution.

⁴⁰ See again s 16 of the Constitution.

⁴¹ See again s 19(3)(a) of the Constitution.

⁴² See again s 32 of the Constitution.

⁴³ See *Khumalo v Holomisa* 2002 (8) BCLR 771 CC, paras 21 and 22 at 17-20 (hereinafter referred to as “the *Khumalo* case”). The Court stated that “The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate.” As stated, the right to see and hear what

Parliament in order to define the ambit within which Parliament can exercise its discretion to possibly restrict the broadcasting of its proceedings.

This research will finally evaluate the broadcasting policy and rules prior to and after the judgments of *Primedia Broadcasting 1* and 2, which will be read together with section 21 of the Powers and Privileges Act.⁴⁴ It should be pointed out that Parliament is required to draft a new broadcasting policy in order to address the findings of the *Primedia Broadcasting 1* judgment.⁴⁵

1.6 RESEARCH METHODOLOGY

The research follows a desktop approach in which the applicable primary sources are researched and critically analysed. As broadcasting of parliamentary proceedings falls within the constitutional obligations set out in sections 59 and 72 of the Constitution, this research will evaluate the foundational values upon which the Constitution is founded. It will further evaluate the powers of Parliament afforded by the Constitution. In so doing, it will critically analyse the provisions which are relevant to the broadcasting of parliamentary proceedings.

happens in Parliament is important for citizens to exercise their rights in the Bill of Rights. The restrictions on what media can cover deny citizens an opportunity to know how their representatives are conducting themselves in Parliament, which is against the foundational values of the Constitution.

⁴⁴ See also para 18 of *Primedia Broadcasting No. 1*.

⁴⁵ Note para 66 at 23 of *Primedia Broadcasting No.1*. The Court ordered that clause 8.3.3.2 of Parliament's Policy on Broadcasting and Rule 2 of Parliament's Television Broadcasting Rules of Coverage, headed 'Disorder on the Floor of the House' are unconstitutional and unlawful as they are not consonant with the right to an open Parliament.



1.7 SCOPE

The research will seek to critically evaluate the discretion and extent of Parliament to broadcast its own proceedings within the South African constitutional framework.

1.8 DEFINITIONS

South African Parliament – the national legislature of the South African state, which is constituted of both the National Assembly and the National Council of Provinces.⁴⁶

National Council of Provinces – a democratically elected house of the South African Parliament composed of a single delegation from each province and responsible for ensuring that provincial interests are catered for in the national sphere of government.⁴⁷

National Assembly – the democratically elected lower house of the South African Parliament, which consists of no less than 350 and no more than 400 men and women.⁴⁸

Constitution – the Constitution of the Republic of South Africa, 1996.⁴⁹

Broadcasting Policy – the policy on filming and broadcasting of the South African Parliament.⁵⁰

⁴⁶ See s 43 (a) of the Constitution.

⁴⁷ See s 42(4) and 60(1) of the Constitution.

⁴⁸ See s 46 (1) of the Constitution.

⁴⁹ See the Constitution.

⁵⁰ See again Broadcasting Policy.

The Powers and Privileges Act – the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.⁵¹

1.9 STRUCTURE

Chapter 1: Introduction

Chapter 1 provides a synopsis of the research. It discusses various subjects under different headings: Rationale and Background, Thesis Statement and Research Question, Importance of the Study, Preliminary Literature Review, Research Methodology and Scope.

Chapter 2: Brief summary of the South African Constitution

Chapter 2 provides a summary of South Africa's Constitution. It evaluates the foundational values upon which the Constitution is founded.

Chapter 3: Critical analysis of the powers of both houses of Parliament

Chapter 3 deals with the powers of each house of Parliament, with reference to the Constitution and case laws.

Chapter 4: Brief overview of South Africa's constitutional framework relevant to the broadcasting of parliamentary proceedings

Chapter 4 explains the constitutional and other legislative frameworks that regulate the discretion of Parliament to broadcast its own

⁵¹ See again the Powers and Privileges Act.



proceedings. It provides an extensive interpretation of the main constitutional provisions that deal with the subject matter.

Chapter 5: Summary and conclusion

Chapter 5 provides a summary of the research and presents comments in the context of the current constitutional dispensation.

1.10 CONCLUSION

As stated, South Africa's democracy is premised on an open government where all people have a right, *inter alia*, to see and hear what their representatives say in Parliament.⁵² The right of the citizens to hear and see what happens in Parliament is of paramount importance in advancing the foundational values of the Constitution. The next chapter will therefore evaluate the foundational values upon which the right to see and hear what happens in the South African Parliament is founded.

⁵² See again para 1 at 2-3 of *Primedia Broadcasting No. 2*. Open government is an integral feature of accountability and transparency which form part of the foundational values of the Constitution.



CHAPTER 2: BRIEF SUMMARY OF CERTAIN KEY PRINCIPLES OF THE SOUTH AFRICAN CONSTITUTION

2.1 INTRODUCTION

Before the advent of a truly democratic system of government, South Africa operated under a system called the Westminster system which was brought by the British during colonization.⁵³ Parliamentary supremacy was an integral part of the Westminster system.⁵⁴ Under this system, South African Parliament enjoyed legitimacy over other institutions of the state because it was considered as a body elected by the people.⁵⁵ This gave Parliament powers to legislate any law it considers appropriate.⁵⁶ These unfettered powers led to South African Parliament legislating repressive laws in order to maintain its unjust system of apartheid.⁵⁷ In order to heal the division of the past caused by the said laws, the democratic government decided to adopt the Constitution.⁵⁸ Chapter 1 of the Constitution gives an overview of the society it envisages under constitutional democracy.

⁵³ W A Joubert and J A Faris “The Law of South Africa” (2004), at 5 (hereafter referred to as Joubert and Faris LAWSA (2004))

⁵⁴ Ian Currie and Johan De Waal (2013), at 2. For more information read Joubert and Faris (2004) at 5 – 7.

⁵⁵ See again Ian Currie and Johan De Waal (2013), at 3. Compare with Joubert and Faris (2004) at 4 – 7.

⁵⁶ This is so because Britain does not have a written Constitution. What is considered to be the British Constitution is a series of conventions and ordinary laws in the form of statutes, common law and case law that regulate state power as well the relationship between the state and citizens. See Pierre De Vos and Warren Freedman *et al* “South African Constitutional Law *in Context*” (2018), at 42 (hereafter referred to as “De Vos and Freedman” (2018)). Consider also Ian Currie and Johan De Waal (2013), at 2 – 3.

⁵⁷ For instance, some of the laws passed by the apartheid government are as follows: segregation in education and separate development and Bantustans *et al*.

⁵⁸ Joubert and Faris (2004) at 31 argued that “although the Constitution is not a product of a revolutionary or political hiatus, as is required in a technical sense for a genuine autochthonous Constitution, in a very real sense the Constitution is sprung from the native African soil.” See also Ian Currie and Johan De Waal (2013), at 4 – 5.



Section 1 provides that South Africa is a constitutional democracy based on the core values of human dignity, the achievement of equality for all and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule of law and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, openness and responsiveness.⁵⁹ These abstract foundational values find expression in the Bill of Rights.⁶⁰ It is these crucial foundational values upon which the Constitution is founded, and which serve as a guide on how it must be interpreted.⁶¹ It is submitted that these values are consonant with the population's right to see and hear what happens in Parliament. Therefore, this chapter evaluates the certain key principles of the South African Constitution that are relevant to the obligations of Parliament in terms of sections 59 and 72 of the Constitution.

⁵⁹ See again s 1 of the Constitution. Note the remarks of Moseneke J in *Independent Newspaper v Minister of Intelligence Services: in re Masetla v President of the Republic of South Africa* 2005 ZA CC 14; 2006 (2) SA 311 (CC), para 40 at 23-24, wherein he stated: "This system requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of state function."

⁶⁰ See also Ian Currie and Johan De Waal (2013), at 7 – 8.

⁶¹ Note the case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re – Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC), para 21 at 10 (hereafter referred to as "*Minister of Home Affairs case*"). The Court stated that: "The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights."

2.2 CORE CONSTITUTIONAL PRINCIPLES

2.2.1. SUPREMACY OF THE CONSTITUTION

As South Africa was under British colonial rule, the promulgation of the statute of Westminster by the imperial Parliament in 1931 afforded South African Parliament's sovereignty a right to surrender potential dictatorial powers to the executive arm of the state.⁶² It is argued that this allowed the apartheid government to pass repressive laws against majority of the people in South Africa. Given this history, the democratic government decided to adopt the Constitution to address the dire impact of the repressive laws of the apartheid government.⁶³ Section 2 of the Constitution provides that the Constitution is a supreme law of the land and any law inconsistent with it is invalid. Section 2 denotes all government powers and exercise of the rights can only be done according to the Constitution. Joubert and Faris, concur that supremacy of the Constitution means that authority must be exercised according to the Constitution.⁶⁴ The idea was to create a constitutional state with supremacy of the Constitution as one of its features.⁶⁵ Unlike the Westminster system, this principle requires government to derive its authority from the Constitution.⁶⁶ This principle is strengthened by other foundational values of the Constitution.⁶⁷ Some of the important judicial

⁶² See Joubert and Faris (2004), at 34.

⁶³ See again the preamble to the Constitution.

⁶⁴ See again Joubert and Faris (2004), at 34.

⁶⁵ B Bekink "Principles of South African Constitutional Law" (2016), at 244 – 246 (hereafter referred to as "B Bekink (2016)").

⁶⁶ See also Joubert and Faris (2004), at 34.

⁶⁷ For instance, Rule of law: this principle requires every citizen including government to comply with the law. it presupposes that no one is above the law. See also De Vos and Freedman (2018), at 78 – 79. See also Rautenbach and Venter "Constitutional Law" (2018), (hereafter referred to as ("Rautenbach and Venter (2018)")), at 10 -11. The writers argued that it is also important to remember that South Africa is a constitutional state, in which the principle of constitutionalism is also incorporated. Even though the Constitution does not

reference dealing with the supremacy of the Constitution can be found in the following cases:

In *Economic Freedom Fighters v Speaker of the National Assembly* and *Democratic Alliance v Speaker of National Assembly*,⁶⁸ the Constitutional Court invoked the supremacy of the Constitution.⁶⁹ The Court indicated that the first point of inquiry is the provisions of the Constitution, which is the original source of the powers of the Public Protector and not the Public Protector Act No. 23 of 1994.⁷⁰ It is therefore argued that in the instance where the Constitution affords powers to any functionary that those powers cannot be change by subsequent legislation and this, in a nutshell, defines the supremacy of the Constitution.

In re: Certification of the Constitution of the RSA,⁷¹ the Court also emphasized the supremacy of the Constitution by stating that the institution, status and role of the traditional leaders will be subjected to the supremacy of the Constitution.⁷² This again demonstrates a

refer to a constitutional state, all constitutional principles of a constitutional state are contained in the Constitution.

⁶⁸ 2016 (3) SA 580 (CC), hereafter referred as “*EFF v NA No. 1*”.

⁶⁹ *EFF v NA No 1*, para 57 at 29. The National Assembly made this argument in reference to the wording of section 182(1) which states that “the Public Protector has the power, as regulated by national legislation”. Secondly, section 182(2) states that “the Public Protector has the additional powers and functions prescribed by national legislation”.

⁷⁰ Note para 58 at 29 of *EFF v NA No. 1*. The Court stated that “The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take remedial action. Section 182(1) and (2) recognize the pre-existing national legislation which does regulate these powers and confer additional powers and functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution.”

⁷¹ 1996 (4) SA 744 (CC), (hereafter referred to as “*First certification case*”).

⁷² See *First certification case*, para 194 at 113.

constitutional state based on the rule of law. In *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa*,⁷³ in reference to common law and the Constitution, the Court stated that there are no two systems of law which exist parallel. The Court stated further that there is only one system of law, namely, the Constitution.⁷⁴

Compare with the *Minister of Health v New Clicks South Africa*⁷⁵ where the Court stated that exercise of public power must be subject to the constitutional control.⁷⁶ See also *Affordable Medicines Trust v Minister of Health*,⁷⁷ where the Court stated that the exercise of public power must be subject to the authority of the Constitution which is the supreme law of the land.⁷⁸

2.2.2. FUNDAMENTAL RIGHTS AND VALUES

Given the importance of the fundamental rights to human existence, the Constitution included the Bill of Rights which provides for basic and fundamental rights afforded to everyone.⁷⁹ These rights cannot be taken away from anyone unless there are special circumstances that justify such action by the state, e.g. state of emergency.⁸⁰ The state has an obligation to respect, promote and protect these rights.⁸¹ The Bill of

⁷³ 2000 (2) SA 674 (CC), (hereafter referred to as “*Pharmaceutical Manufacturers case*”).

⁷⁴ See *Pharmaceutical Manufacturers case*, para 44 at 36.

⁷⁵ 2006 (2) SA 311 (CC), (hereafter referred to as “*New Clicks case*”).

⁷⁶ See *New Clicks case*, para 588 at 298.

⁷⁷ 2006 (3) SA 247 (CC), (hereafter referred to as “*Affordable Medicines case*”).

⁷⁸ *Affordable Medicines case*, para 49 at 25.

⁷⁹ See Chapter 2, ss 7-39 of the Constitution.

⁸⁰ See s 37 of the Constitution.

⁸¹ See s 7 of the Constitution.



Rights which contains these rights, is a cornerstone of democracy in South Africa. It further affords everyone the right and affirms democratic values of human dignity equality and freedom.⁸²Therefore, it is submitted that it follows that the state has an obligation to protect and promote these important fundamental rights in the Bill of Rights. This obligation does not only lie with the state but also extends to private relationships.⁸³ Some of these rights are right to equality,⁸⁴ dignity,⁸⁵ life,⁸⁶ privacy,⁸⁷ freedom of speech and press.⁸⁸

2.2.3. THE RULE OF LAW

Another important principle of the new South African Constitution is the rule of law. This principle denotes no one maybe deprived of basic rights through arbitrary and exercise of wide discretionary powers of the state.⁸⁹ In this regard, see Rautenbach and Venter, wherein the writers state that the doctrine of rule of law has in some cases been defined as a doctrine, which includes the right not to be deprived of personal freedom arbitrarily and without just cause, not be detained without a trial, the independence of the judiciary, the principle against self-help, and the principle that the legislatures and executives may exercise no power and

⁸² The first words of Chapter 2 reads: See s 7(1) of the Constitution.

⁸³ B Bekink (2016),at 261.

⁸⁴ See s 9 of the Constitution.

⁸⁵ See s 10 of the Constitution.

⁸⁶ See s 11 of the Constitution.

⁸⁷ See s 14 of the Constitution.

⁸⁸ See s 16 of the Constitution.

⁸⁹ See B Bekink (2015), at 118.



perform no function over and above those provided for in the legislation.⁹⁰

The following judicial precedents regarding the rule of law have been developed. In the case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁹¹ when the Court assessing the constitutional validity of a legislation, it stated that there is nothing startling about the proposition that section 174(3) and (4) of the Interim Constitution imply that local government cannot act outside the powers lawfully conferred upon it as it is a general principle of constitutional law.⁹² Section 1 of the Constitution also recognises the principle of rule of law as one of the founding values of the South African democracy. This principle connotes that in a constitutional order, the powers of the legislature and executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred by the law.⁹³ In the case of *EFF v NA No.1*, the Court stated that no decision taken in terms of the law might be ignored based on subjective views that an individual holds. The Court stated further that it is not open to individual persons which law to comply with and which one not to. Furthermore, the doctrine of rule of law requires everyone to comply with the law.⁹⁴ This principle also finds expression in section 33 of the Constitution which affords everyone a right to just administrative action that is just and lawful.⁹⁵ Section 34 of the Constitution also

⁹⁰ Rautenbach and Venter (2018), at 9.

⁹¹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), (hereafter referred to as “*Fedsure case*”).

⁹² See *Fedsure case*, para 55-56 at 44-45.

⁹³ *Fedsure case*, para 58 at 48.

⁹⁴ *EFF v NA No.1 case*, para 75 at 38.

⁹⁵ See section 33 of the Constitution. Section 33 provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given

requires the Courts to adjudicate the disputes between the parties by application of the law.

In the case of *Chief Lesapo v North West Agricultural Bank*,⁹⁶ the Court stated that the rule against self-help is important for the protection of the individuals against arbitrary and subjective decisions and conduct of an adversary. It is stated further that the rule of law warrants against partiality and injustice which may results from such.⁹⁷ See also *De Beer NO v North – Central Local Council ETC*,⁹⁸ wherein the Court stated that the right to fair hearing in terms of section 34 of the Constitution affirms the principle of rule of law.⁹⁹

2.2.4. SEPARATION OF POWERS

The doctrine of separation of powers is an integral part of the constitutional state.¹⁰⁰ It was developed by French political philosopher Charles-Louis Montesquieu.¹⁰¹ Bekink reiterated Montesquieu's explanation that in terms of this doctrine, the governmental powers

written reasons. The Promotion of Administrative Act, 3 of 2000 was passed in order to give effect to these rights stated in section 33 of the Constitution.

⁹⁶ 2000 (1) SA 409 (CC), (hereafter referred to as "*Chief Lesapo case*").

⁹⁷ See *Chief Lesapo case*, para 18 at 14.

⁹⁸ 2002 (1) SA 429 (CC), (hereafter referred to as "*De Beer case*").

⁹⁹ *De Beer case*, para 10-11 at 13-14.

¹⁰⁰ Refer to B Bekink (2016), at 117 wherein he argued that "The concept of a constitutional state is similar to the principle of constitutionalism. The concept originated in German constitutional law and is said to embody everything that is good in a state. This includes many other constitutional principles, such as the separation of powers doctrine, the supremacy of the constitution, the principle of legality, legal certainty, access to independent courts, enforceable fundamental rights and multi-party democratic government." See B Bekink (2016), at 117-118.

¹⁰¹ Montesquieu's theory was influenced by misconception of the government of England, and as a result, his work didn't become prominent in the Westminster system as it was in the United State of America. See Joubert and Faris (2004), at 12-13.



should be divided into legislature, executive and judicial powers.¹⁰² The writer confirms further that the purpose of this doctrine is to prevent over-concentration of power in one person or body. It is therefore Montesquieu's theory that political freedom cannot be achieved in an instance where one person or body creates the law, implement and adjudicate disputes about it.¹⁰³ In South African context, this doctrine has been incorporated in the Constitution: the legislative authority is vested in Parliament, provincial legislatures and municipality councils,¹⁰⁴ executive authority is vested in the President, premiers of the provinces and municipal councils¹⁰⁵ and judicial authority of the country is vested in the Courts.¹⁰⁶

Separation of powers is part of the principle of constitutionalism, which recognises the functional independence of the three branches of the State to prevent one arm of the State usurping the powers of another arm.¹⁰⁷ However, the constitutional scheme does not provide for a complete separation of powers.¹⁰⁸ Refer also to *First certification*

¹⁰² See also Joubert and Faris (2014), at 12-13.

¹⁰³ B Bekink (2016), at 100.

¹⁰⁴ Note section 43 which in turn refers to ss 44,104 and 156 of the Constitution.

¹⁰⁵ See s 85, 125 and 151(2) of the Constitution.

¹⁰⁶ See s 181 and s 165(1) of the Constitution.

¹⁰⁷ See also *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), para 109-113 at 67-70, in which the Court stated that the formal purpose of this judgment was to pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new Constitution comply with certain principles contained in the country's Interim Constitution. In doing so, the Court stated that the doctrine of separation of powers is not a fixed and rigid constitutional doctrine. Put differently, there is no complete separation between state functionaries (note para 111 at 68 of *First Certification Judgment*). Note also Cora Hoexter "Administrative Law in South Africa", (2013) at 24, hereafter referred to as Hoexter (2013).

¹⁰⁸ See Schedule 4 to the Interim Constitution. In terms of this schedule it is stated that: "There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

judgement wherein the court stated that the principle of separation of powers should not be applied rigidly.¹⁰⁹

2.2.5. DEMOCRACY

According to Joubert and Faris, democracy originated in the political conduct of the city states of ancient Greece where citizen body constituted a legislature.¹¹⁰ This principle is considered to be one of the most important features of constitutional law.¹¹¹ According to the writers, the meaning of the democracy in the Constitution depends on the context.¹¹² Bekink stated that the principle was developed from the idea that no person or institution has the divine right to govern over others.¹¹³ This principle is consonant with the traditional view of democracy, to wit, that the legitimate government must be informed by the will of the majority of the people.¹¹⁴ In a South African context, this principle has

¹⁰⁹ Note again para 111 at 68 of *First Certification Judgment*. The Constitutional Court has delivered Judgment on the application of separation of powers. See *South African Association of Personal Injury Lawyers v Health* 2001 1 SA 883 (CC), at paras 38, 45 and 46; *S v Dodo* 2001 3 SA 382 (CC), paras 22-25; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC), para 104; *Glenister v President of the RSA* 2009 1 SA 287 (CC), paras 40, 49 and 50; *NSPCA v Minister of Agriculture, Forestry and Fisheries* 2013 5 SA 571 (CC), Para 38; *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC), para 223 (hereafter refer to as *EFF v NA No. 2*).

¹¹⁰ See Joubert and Faris (2004), at 23. Refer to B Bekink (2006), at 79, where the writer stated that the principle of democracy is said to have been introduced in the city states of ancient Greece some 2400 years ago.

¹¹¹ See B Bekink (2016), at 78. See again paras 117-118.

¹¹² See again Joubert and Faris (2004), at 23. Refer to Bekink (2016), at 78-79, wherein he concurred that democracy is a universal recognized principle which does not have a definitive meaning. He however noted that its meaning differs from person to person.

¹¹³ See B Bekink (2016), at 78.

¹¹⁴ See again B Bekink (2016), at 78. He argued that the even though there is no common definition of the principle, the general understanding seem to suggest that it includes the principle of equality, political freedom and compliance with the rule of law.

been integrated in many parts of the Constitution.¹¹⁵ It is argued that the sustainability of this principle is contingent on holding regular elections and involving people in the affairs of government.

The Constitution recognises three forms of democracy – representative democracy, participatory democracy and direct democracy.¹¹⁶ Therefore, democracy allows people to govern (ruled by people) themselves, either directly or through a system of representation.¹¹⁷

2.2.6. JUDICIAL REVIEW AND ROLE OF COURTS

In terms of the separation of powers, the Judiciary is the third arm of the state.¹¹⁸ The Constitution enjoins the judiciary to apply the law without fear, favour or prejudice and to remain independent from both the legislature and executive branch of government.¹¹⁹ Furthermore, the independence of the Judiciary is an integral part of the doctrine of separation of powers.¹²⁰ The Constitution imposes an obligation on everyone not to interfere with the functioning of Courts.¹²¹ The state must assist Courts by passing legislations which promote the independence,

¹¹⁵ The principles of democracy are embedded in the following provisions of the Constitution, ss 17, 36, 39, 57, 59, 61, 70, 72, 116, 118, 152, 160, 195, 234, 236 and the whole of Chapter 9 of the Constitution.

¹¹⁶ See Ian Currie and Johan De Waal (2013), at 15.

¹¹⁷ See again B Bekink (2016), at 78-79.

¹¹⁸ See again B Bekink (2016), at 469.

¹¹⁹ See s 165(2) of the Constitution.

¹²⁰ See Joubert and Faris (2014), at 341.

¹²¹ See s 165(3) of the Constitution.

impartiality, dignity, accessibility, and effectiveness.¹²² The order or judgment given by the Court is binding on anyone whom it applies.¹²³

2.3 CONCLUSION

The foundational values of the Constitution are lodestar for how the Constitution must be interpreted.¹²⁴ The institutions of the state have an obligation to conduct themselves in a way that promotes these values.¹²⁵ In the same vein, Parliament has a concomitant obligation to formulate the rules and policy which promote these foundational values. Moreover, in interpreting these rules and policy, Parliament has an obligation to do so in line with these foundational values.¹²⁶ The next chapter will evaluate the powers of the South African Parliament in a constitutional democracy.

¹²² See s 165(4) of the Constitution.

¹²³ See s 165(5) of the Constitution. This section is consonant with the principle of rule of law which demands that everyone must comply with the law.

¹²⁴ See again para 21 at 10 of *Home affairs* case.

¹²⁵ See again s 7 of the Constitution.

¹²⁶ As stated, South African constitutional democracy requires Parliament to comply with the Constitution and interpret it according to the foundational values of the Constitution. Section 7 of the Constitution imposes similar obligation.



CHAPTER 3: GENERAL POWERS OF THE SOUTH AFRICAN PARLIAMENT

3.1 INTRODUCTION

The Constitution affords Parliament discretionary powers to regulate its own proceedings, including the powers to set up rules that will regulate how it conducts its own business.¹²⁷ In so doing, Parliament must ensure that it complies with the Constitution.¹²⁸ As with any other arm of the state, the Constitution requires Parliament to exercise its roles and responsibilities in an open and transparent manner.¹²⁹ This means that Parliament is required to ensure that it introduces rules and regulations that comply with the Constitution. This chapter evaluates the general powers of Parliament with reference to the Constitution.

3.2 CONSTITUTIONAL MANDATE OF PARLIAMENT

Parliament plays an integral role in the SA constitutional democracy as it is the legislative authority of the national sphere.¹³⁰ Parliament comprises two houses: the National Assembly and the National Council of Provinces.¹³¹ Both houses of Parliament participate in the legislative process in the manner described in the Constitution,¹³² and are obliged to protect and promote the rights in the Bill of Rights.¹³³ This obligation

¹²⁷ Section 70 of the Constitution.

¹²⁸ Contrary to United Kingdom, which has a parliamentary supremacy system, South Africa is since 1994 a constitutional democracy which requires all state institutions, including Parliament, to comply with the Constitution.

¹²⁹ Sections 59 and 72. These sections are informed by the foundational values of the Constitution, including transparency and accountability.

¹³⁰ See s 43(a) of the Constitution.

¹³¹ See s 42(1) of the Constitution.

¹³² See s 42(2) of the Constitution.

¹³³ See s 7 of the Constitution.



includes passing legislation which promotes the right of individuals to access information, freedom of speech and the right to participate in politics and stand for office.¹³⁴ The representatives in Parliament are elected through an electoral process in which all citizens who are qualified to vote are able to participate.¹³⁵ Representatives who stand for public office and are so elected,¹³⁶ must attend the first sitting of the National Assembly.¹³⁷

South Africa's constitutional democracy is a government of the people, elected by the people in order to benefit the people by way of constitutional means.¹³⁸ As stated, it envisages a country that is based on the rule of law, an open society, freedom and unity amongst races.¹³⁹ The term "open society" denotes that an institution like Parliament must conduct its affairs in compliance with the constitutional values of openness, transparency and accountability.¹⁴⁰ As mentioned already, Parliament derives its powers from the Constitution.¹⁴¹ However, the nature of South Africa's democracy must be understood in the context of South African history, in which the majority of the people were denied the rights to participate in the activities of Parliament.¹⁴² In the *Doctors for*

¹³⁴ See ss 32, 16 and 19 of the Constitution. Section 7 employs Parliament to ensure that it conduct its affairs in a way that advances these rights. Failure by Parliament to comply with this obligation is considered to be a failure contemplated in section 167(4)(e) of the Constitution.

¹³⁵ *United Democratic Front v Speaker of National Assembly* 2017 (5) SA 300 (CC): para 5 at 5 (hereafter referred to as "UDM case").

¹³⁶ See ss 19 and 47 of the Constitution.

¹³⁷ See s 51 of the Constitution.

¹³⁸ *UDM case* para 1 and 2 at 3-4.

¹³⁹ See again s 1 of the Constitution.

¹⁴⁰ See again s 59 and 72 of the Constitution.

¹⁴¹ See Preamble of the Constitution, which declares the Constitution as the supreme law of the land. Read also s 2 of the Constitution.

¹⁴² *Doctors For Life International*, para 112 at 62.



Life International case, Ngcobo J stated that sections 59 and 72 of the Constitution created an obligation for Parliament to involve the public in law-making.¹⁴³ Over a period of years the question of openness and transparency of Parliament was only discussed in the context of the right of individuals to have physical access to the proceedings of Parliament and being consulted about the process of making laws.¹⁴⁴ In recent years, this has included the right of the people to see and hear what happens in Parliament through television, social media and live feed.¹⁴⁵ As mentioned, Parliament derives its powers from the Constitution in contrast to the United Kingdom's Parliament, which has the Westminster system of government that is predicated on parliamentary supremacy. This is a very important distinction, as it determines the extent to which Parliament can exercise its powers.

In the South African context, the Constitution affords Parliament the discretion to determine and control its own arrangement.¹⁴⁶ In order for it to exercise such discretion, it must enjoy some level of autonomy so as to ensure the smooth running of Parliament's business.¹⁴⁷ However, the obligation of Parliament as envisaged in sections 57 and 70 of the Constitution can only be exercised within the limit of the Constitution.¹⁴⁸

¹⁴³ *Doctors For Life International*, para 29 at 17.

¹⁴⁴ For instance, in *Doctors For Life International* the issues arose out of the complaint brought to the Constitutional Court by Doctors for Life International – that the National Council of Provinces (“NCOP”), in passing certain health bills, failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees (note *Doctors For Life International* case at 2-3).

¹⁴⁵ See *Primedia Broadcasting* 1 at 1.

¹⁴⁶ Sections 57 and 70 of the Constitution.

¹⁴⁷ Note again *Doctors For Life International*, para 36 at 20.

¹⁴⁸ Note again s 1 of the Constitution.

In addition, Parliament has an obligation to ensure that its activities are open to the public in terms of the impact it has on the individual rights that the public exercises – for instance, the right to vote, freedom of speech and the right to access information.¹⁴⁹ The more informed the citizens are, the more their power to exercise their right to vote becomes meaningful, as they will be able to better judge the conduct of their respective representatives.

3.3 THE POWERS OF EACH HOUSE OF PARLIAMENT

3.3.1 NATIONAL ASSEMBLY

The National Assembly is comprised of not less than 350 and no more than 400 members, both men and women, elected in terms of South Africa's electoral system,¹⁵⁰ and is elected for a five-year period.¹⁵¹ The majority of members of the House must be present themselves during voting on a Bill or amendment.¹⁵² A minimum of one third of the members of the National Assembly is required to vote on any other issues and the majority of the votes cast constitute a decision.¹⁵³ The speaker who presides at a meeting of the Assembly can only vote when there is an equal number of votes on each side of a matter, and may cast a deliberative vote when an issue must be decided with a supporting vote of at least two thirds of the members of the National Assembly. However,

¹⁴⁹ Note again *Primedia Broadcasting No. 2*, para 29 at 12.

¹⁵⁰ See s 46(1) of the Constitution.

¹⁵¹ See s 49(1) of the Constitution.

¹⁵² See s 53(1)(a) of the Constitution.

¹⁵³ See s 53(1)(b) and (c) of the Constitution.

he or she does not have a deliberative vote save for the circumstances alluded to.¹⁵⁴

Section 55(1) of the Constitution provides that, as part of its role, the National Assembly has discretionary powers to pass, amend or reject any legislation before the Assembly and to initiate or prepare legislation except for Money Bills.¹⁵⁵ The National Assembly has a duty to ensure that government institutions in a national sphere are responsive and accountable and has to provide mechanisms to give effect to this important obligation.¹⁵⁶

The Constitution also requires the National Assembly to provide mechanisms for accountability and oversight.¹⁵⁷ This obligation was evaluated by the Constitutional Court in the case of *Economic Freedom Fighters v Speaker of the National Assembly*,¹⁵⁸ when an application was

¹⁵⁴ See s 53(2) of the Constitution.

¹⁵⁵ Section 55(1) of the Constitution reads:

“In exercising its legislative power, the National Assembly may –

- (a) consider, pass, amend or reject any legislation before the Assembly; and
- (b) initiate or prepare legislation, except money Bills.”

¹⁵⁶ See s 55(2) of the Constitution.

¹⁵⁷ The obligation arises from section 55(2) of the Constitution. The provision reads;

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of –
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state.”

¹⁵⁸ 2018 (2) SA 571 (CC), hereafter referred to as “*EFF v NA No. 2*”. The background issue before Court was the upgrade made to the private residence of President Jacob Zuma. On 19 March 2014, the Public Protector released a report on her investigation into the upgrades to the President’s private residence. That report ended with the Public Protector’s remedial action against the President. Part of the remedial action against the President was that the President had to “pay a reasonable percentage of the cost of the non-security measures”

brought against the National Assembly for its failure to fulfil its constitutional obligation to provide mechanisms to hold the President of the Republic of South Africa accountable and the constitutional obligation of the National Assembly to hold him accountable.¹⁵⁹ Over and above providing mechanisms for accountability and oversight, the National Assembly has a constitutional obligation to hold the members of the executive accountable. Some of these mechanisms include calling Ministers to appear before the parliamentary portfolio and *ad hoc* committee and availing themselves to respond to parliamentary questions.¹⁶⁰

The Constitutional Court has observed that these mechanism might be viewed as less effective by the members of the National Assembly to whom the President is accountable, more so in an instance where there is complete disregard of the constitutional obligation by the President. In such a case, members of the National Assembly may resort to removal of the President.¹⁶¹

The Constitution affords discretionary powers to the National Assembly to determine and control its own internal arrangements, proceedings and procedures and to make rules and orders concerning its business, with due regard to representative and participatory democracy,

effected in his private residence as determined with the assistance of the National Treasury and reprimand the Ministers responsible for the appalling manner in which the Nkandla project was handled and funds were abused. For a long time after the Public Protector had taken remedial action against the President, the President did not implement the Public Protector's remedial action. The applicants' application is a follow up on the *EFF v NA No. 1*- which declared the President to have failed to respect, protect, respect and fulfil the rights in the Bill of Rights.

¹⁵⁹ *EFF v NA 2*, para at 3.

¹⁶⁰ Note para 40 at 17 of the *UDM* case. These mechanisms were considered in *EFF v NA 2*.

¹⁶¹ Note para 41 at 17-18 of the *UDM* case. For information regarding the removal of the President, read para 42-48 at 18-20 together with section 102 of the Constitution.

accountability, transparency and public involvement.¹⁶² The question of how these mechanisms are implemented for the purpose of holding the executive to account falls outside the scope of the judiciary and should be left to the National Assembly to decide.¹⁶³ Courts can only rule on the question whether mechanisms were employed or not to hold the executive accountable, but the how and which mechanism must be employed falls mainly within the scope of the National Assembly.¹⁶⁴

The Constitutional Court stated in the case of *Doctors For Life International* that the power of the National Assembly to determine its own internal arrangement under South Africa's constitutional democracy is limited to the Constitution.¹⁶⁵ In addition, with the obligation envisaged in section 59 of the Constitution, the National Assembly is required to conduct its affairs in an open and transparent manner. It is submitted that

¹⁶² See s 57(1) of the Constitution. Section 57 (1) (a) (b) provides:

“(1) The National Assembly may –

(a) determine and control internal arrangements, proceedings and procedures;

and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.”

¹⁶³ Note para 93 at 45-46 of the *EFF v NA No. 1*.

¹⁶⁴ Note para 37-38 at 20-21 of the *Doctors For Life International*. The Court stated that the constitutional principles of separation of powers require that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle has important consequences for the way in which and by which power the institutions can be exercised. The Court must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

¹⁶⁵ Note para 38 at 21 of the *Doctors For Life International* case.

this section is consonant with the foundational values of the Constitution, i.e. transparency and accountability.¹⁶⁶

3.3.2 NATIONAL COUNCIL OF PROVINCES

Section 42(4) of the Constitution defines the role of the National Council of Provinces as a body responsible for provincial interests in the national sphere of government.¹⁶⁷ The roles of the National Council of Provinces and the National Assembly overlap, but from the distinct vantage point of the provinces.¹⁶⁸ The role of the National Council of Provinces highlights how the South African government is structured – i.e. in the form of national, provincial and local governments – as “spheres within a single

¹⁶⁶ Section 59 of the Constitution:

“(1) The National Assembly must –

- 4.1 facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- 4.2 conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –
 - (i) to regulate public access, including access of the media, to the Assembly and its committees; and
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

¹⁶⁷ Section 42(4) provides “The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participation in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.”

¹⁶⁸ See s 55(1) of the Constitution which applies to the National Assembly. Similarly, section 68 of the Constitution provides: “In exercising its legislative power, the National Council of Provinces may –

- (a) consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and
- (b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76(3), but may not initiate or prepare money Bills.”



whole”, which enjoy some level of autonomy yet are interdependent in material respects. Even though the role of the National Council of Provinces is to represent the interests of the provinces, it also engages provinces and provincial legislature with regard to the national policy.¹⁶⁹

The procedure for passing legislation in South Africa requires some level of co-operation and communication between the two houses of Parliament, i.e. the National Council of Provinces and National Assembly. This is because the Constitution envisages that provincial interests should be considered in the law-making of the country. Hence, if there is no co-operation and communication between the two houses, the national legislative forum could be compromised. Based on its composition, the National Council of Provinces represents all nine provinces in the legislative process and other national matters as a way of fostering co-operation and communication as envisaged in the Constitution.¹⁷⁰ The National Council of Provinces also allows non-voting members of each local government to participate in its proceedings.¹⁷¹

As mentioned, the Constitution requires the National Council of Provinces to co-operate and communicate with the National Assembly in order to ensure a smooth legislative programme.¹⁷² This obligation on both houses of Parliament dovetails with the principle of co-operative government in chapter 3 of the Constitution.¹⁷³ The National Council of Provinces is comprised of 10 members of each of the nine provinces, including six permanent delegates and four special delegates. The

¹⁶⁹ See *Doctors For Life International*, para 79 at 42.

¹⁷⁰ See *Doctors For Life International*, para 80 at 42.

¹⁷¹ See s 67 of the Constitution provides: “Not more than part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.”

¹⁷² See also *Doctors For Life International*, para 80 at 42.

¹⁷³ See *Doctors For Life International*, para 82 at 44.

manner in which they are selected and vote on legislation affecting the various provinces, provides the provinces with a significant voice in national legislature.¹⁷⁴ The delegation from each province is led by the Premier of the Province.¹⁷⁵ Other delegates are appointed by provincial legislatures in each province on a proportional basis.¹⁷⁶ During voting on legislation that affects provinces, only the head of the delegation of each province is allowed to vote in the National Council of Provinces.¹⁷⁷ The manner in which the delegates vote is informed by the mandate of the respective provinces.¹⁷⁸

Any Bill that is passed by the National Assembly is referred to the National Council of Provinces, which can then pass the Bill or do so subject to amendment, or else completely reject the Bill.¹⁷⁹ In the event that both houses cannot agree on the content of the Bill or otherwise, a mediation committee is established to fast track resolution of the disputes between the two houses.¹⁸⁰ The Bill will lapse if both houses do not find common ground following mediation. In some instances a Bill can be passed by a two-thirds majority by the National Assembly only.¹⁸¹

It is of particular importance to this dissertation to note that the Constitution also requires the National Council of Provinces to conduct its affairs in an open and transparent manner.¹⁸² It is submitted that both

¹⁷⁴ See *Doctors For Life International*, para 83 at 44-45.

¹⁷⁵ See s 60(3) of the Constitution.

¹⁷⁶ See s 61(1) and (2) of the Constitution.

¹⁷⁷ See s 65(1)(a) of the Constitution.

¹⁷⁸ See s 65(2) of the Constitution.

¹⁷⁹ See *Doctors For Life International*, para 85 at 46.

¹⁸⁰ See s 76(1)(a) of the Constitution.

¹⁸¹ See s 76(1)(e) of the Constitution.

¹⁸² Section 72 of the Constitution states:

sections 59 and 72 of the Constitution are consonant with the values of transparency and accountability. The Constitution also gives discretionary powers to the National Council of Provinces to determine and control its own internal arrangements, proceedings and procedures and to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.¹⁸³ As stated afore, the National Council of Provinces has similar obligations to develop mechanisms in order to hold members of the executive accountable.¹⁸⁴

3.4 CONCLUSION

It is clear that both houses of Parliament have distinct powers, but they also depend on each other to execute their respective responsibilities.

“(1) The National Council of Provinces must –

- (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –
 - (i) to regulate public access, including access of the media, to the Assembly and its committees; and
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of any person.
- (2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.”

¹⁸³ Section 70 of the Constitution provides:

“(1) The National Council of Provinces may –

- (a) determine and control its internal arrangements, proceedings and procedures;
and
- (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.”

¹⁸⁴ See s 70 of the Constitution.



As stated above, these powers must be consonant with the Constitution lest they could be declared unlawful and unconstitutional. This is one of the features that distinguishes the powers of Parliament in a constitutional democracy from those in a system of parliamentary supremacy. In the next chapter the specific constitutional provisions which deal with the obligation by Parliament to broadcast its own proceedings, will be evaluated.

CHAPTER 4: OVERVIEW AND ANALYSIS OF SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK RELATING TO THE BROADCASTING OF PARLIAMENTARY PROCEEDINGS

4.1 INTRODUCTION

The purpose of this chapter is to provide a brief review of the constitutional framework relating to the broadcasting of parliamentary proceedings. In doing so, it will seek to critically evaluate the provisions of the Constitution dealing with parliamentary discretion to broadcast its own proceedings together with the Powers and Privileges Act and the extent to which it seemingly complies with the Constitution.

4.2 THE CONSTITUTION

The obligation by Parliament to broadcast its own proceedings was initially provided by the Interim Constitution, which was adopted through multi-party agreement.¹⁸⁵ It imposed an obligation on Parliament or any house as part of Parliament to conduct its proceedings in an open and transparent manner.¹⁸⁶ This provision of the Interim Constitution was then incorporated into the Constitution, 1996.¹⁸⁷ All these provisions denote the people's right to see and hear what happens in Parliament is predicated on the structural provision that requires Parliament to conduct its proceedings in an open and transparent manner. Sections 59(1)(b) and 72(1)(b) of the Constitution require the National Assembly and National Council of Provinces to conduct business in an open manner,

¹⁸⁵ See s 67 of the Interim Constitution: "Sitting of the National Assembly or the Senate and joint sittings of the National Assembly and the Senate shall be held in public, and the public, including the media, shall have access to such sittings: Provided that reasonable measures may be taken to regulate such access and to provide for the search and, where to appropriate, the refusal of entry or the removal of any person." See also Ian Currie and Johan De Waal (2013) at 5.

¹⁸⁶ Sections 59 and 72 of the Constitution are the successors of s 67 of the Interim Constitution.

¹⁸⁷ See again ss 59 and 72 of the Constitution.

and hold their sittings, and those committees, in public.¹⁸⁸ They may take measures to regulate public access, including access of the media, but those measures must be reasonable.¹⁸⁹

In *Cape Town City v Southern National Roads Authority*, the Court stated that the values of transparency, openness and accountability apply to all other state institutions including courts. It stated further that openness and transparency operate as a default position in respect of the question of parliamentary access. It also stated that it does not support any argument that proceeds from a position of secrecy.¹⁹⁰ Section 59(1)(a) of the Constitution requires the National Assembly, at all levels of its processes, to conduct its business in an open and transparent manner. Similarly, sections 59(2) and 72(2) prohibit Parliament from denying the public, including the media, access to any sittings of Parliament, unless it is reasonable and justifiable to do so in an open and democratic society. The right to see and hear what happens in Parliament underpins the right to public participation in law-making, freedom of speech,¹⁹¹ access to information¹⁹² and other processes of the National Assembly and National Council of Provinces, which are guaranteed in sections 59(1)(a) and 72(1)(a) of the Constitution. In a broader perspective, sections 59 and 72 of the Constitution along with public access to Parliament are fundamental aspects that underpin the right of the public to be involved in any law-making process, as they allow the public to attend to the

¹⁸⁸ See also *Doctors For Life International* para 26 at 15–16.

¹⁸⁹ See also *Primedia Broadcasting No. 1* para 15 at 7.

¹⁹⁰ 2015 (3) SA 386 (SCA), para 16 at 16, hereafter refer to as “*Cape Town City v Sanral*”. The principle in this case underscores the scope and importance of the foundational values of openness, transparency and accountability as it is not limited to Parliament. Therefore, sections 59 and 72 of the Constitution require the institution to approach the question of transparency as a default position rather than an exception.

¹⁹¹ See s 16 of the Constitution.

¹⁹² See s 27 of the Constitution.



proceedings of Parliament and see how laws are made.¹⁹³ Section 19 of the Constitution affords the citizens of the Republic of South Africa a right to political participation, but these rights cannot be meaningfully exercised if, for example, the public cannot see and hear what happens in Parliament.¹⁹⁴ The case of *Primedia Broadcasting No. 1*,¹⁹⁵ has demonstrated how these rights can be curtailed and rendered meaningless by restrictive interpretation of sections 59 and 72 of the Constitution.¹⁹⁶ It is therefore submitted that it is important for Parliament to be aware of the correct interpretation of sections 59 and 72 of the Constitution when formulating broadcasting any policy and rules. The openness and transparency envisaged in both sections should be understood to be a default position and not an exception.¹⁹⁷

As stated, sections 57 and 70 of the Constitution allow Parliament to determine its own internal proceedings, including formulating its own rules and policy in order, amongst others, to give effect to sections 59 and 72 of the Constitution. The latter sections do not provide details regarding how Parliament should develop rules and policy to give effect

¹⁹³ See *Doctors For Life International*, para 137 at 76.

¹⁹⁴ It is submitted that active citizenry is contingent upon Parliament complying with its obligation to conduct its affairs in an open and transparent manner. In a modern day of technology, it includes broadcasting of its own proceedings. Note also *DA v ANC*, para 122-125 at 53 and 55, where it was held that citizens' right to see and hear what happens in Parliament reinforces a debate among the citizens of the country and helps expose any wrongdoing. Furthermore, the court stated that the individual's right to speak freely is inextricably linked to the right to vote and stand for office, and if the right to freedom of speech is curtailed it renders the right to make a political choice inefficient. The court further emphasised the right to vote and express opinion and "confirm the importance, both for a democracy and the individuals who comprise it, of being able to form and express opinions – particularly controversial or unpopular views, or those that inconvenience the powerful".

¹⁹⁵ Note paras 47-52 at 18-19 of *Primedia Broadcasting No 1*.

¹⁹⁶ Note paras 42-44 at 17 of *Primedia Broadcasting No. 1*. Parliament's argument was that broadcasting disruption on the floor will impair the dignity of Parliament and that members of the public are only entitled to view legitimate business of Parliament. It is submitted that Parliament flies in the face of the principle referenced in the case of *Cape Town City v Sanral* because it renders access to Parliament as an exception and not as a default position.

¹⁹⁷ Note again para 16 at 16 of *Cape Town City v Sanral* case.



to the obligation created by them.¹⁹⁸ The Constitution provides further that the state has an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.¹⁹⁹ To begin with, this provision denotes Parliament, in determining its own procedures, must respect the rights in the Bill of Rights, including freedom of speech,²⁰⁰ access to information²⁰¹ and the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret, as well as the right to participate in politics and to stand for office.²⁰² Secondly, it is submitted that Parliament must take cognisance of the nature of the democracy, which in South Africa has a constitutional foundation and importance.²⁰³

As mentioned above, sections 59 and 72 of the Constitution impose an obligation on Parliament to conduct its proceedings in an open and transparent manner. Similarly, in the context of the broadcasting of parliamentary proceedings, Parliament must provide access to the institution in the form of a live feed and television broadcast.²⁰⁴ It is submitted that this is vital for any healthy democracy. The case of *Doctors For Life International* underscored this point in the context of the

¹⁹⁸ As stated in *Doctors For Life International*, para 37 at 20, the Court stated that the principle of separation of powers requires arm of state to refrain from interfering in other arms of state. Note also *EFF No. 1*, para 90-93 at 44-46 and *Certification case*, para 109 at 67-68.

¹⁹⁹ See s 7 of the Constitution.

“(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

“(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

²⁰⁰ See s 16 of the Constitution.

²⁰¹ See s 32 of the Constitution.

²⁰² See s 19(3)(a)-(b) of the Constitution.

²⁰³ Note again section 1 of the Constitution.

²⁰⁴ Note para 2 at 3 of *Primedia Broadcasting 1*.



right of citizens to participate in the law-making of the country and stated that the democratic government envisaged by the Constitution is one that must make provision for parliamentary access for citizens.²⁰⁵ Similarly, it is submitted that perhaps all democratic governments have to make a provision for broadcasting of parliamentary proceedings to give effect to their foundational values.

Section 16 of the SA Constitution affirms an individual's autonomy and the ability to make a political choice and to participate in social issues. The media is an effective instrument in ensuring that the right to freedom of speech is meaningful. The ability of citizens to be politically active and to participate in social issues is contingent on the scope within which the media exercises its right. In the modern age of technology, Parliament will arguably not fully be in compliance with this obligation in terms of sections 59 and 72 of the Constitution, without broadcasting of its proceedings.²⁰⁶ It is therefore submitted that the broadcasting policy and rules must correctly capture the meaning of sections 59 and 72 of the Constitution and, furthermore, that if the broadcasting policy and rules are restrictive, it renders the democratic values upon which South Africa's Constitution is founded meaningless, as the right of the people to see and hear their representatives in Parliament could be limited.

As mentioned above, the people's right to hear and see what happens in Parliament cannot be discussed without dealing with the right to freedom of speech.²⁰⁷ Freedom of speech protects all forms of expression (except those excluded by section 16(2)), and political speech is at the very heart of this right. It is submitted that it is difficult to think of any content that more directly affects the right to receive and

²⁰⁵ See para 116 at 65 of *Doctors For Life International*.

²⁰⁶ *Khumalo v Holomisa* case, paras 21-22 at 18-19.

²⁰⁷ See again s 16 of the Constitution.



impart ideas than what actually occurs in Parliament. This right lies at the heart of a constitutional democracy, as it affirms individual liberty and the ability of people to make, form and express opinions on the issues of the day. For this reason, the Constitution recognises the individuals' right to see and hear what happens in Parliament.²⁰⁸

Section 19(1) of the Constitution also guarantees the right to be “*free to make political choices*”. That includes the right “*to participate in the activities of ... a political party*”. Furthermore, all citizens have a right to vote.²⁰⁹ Similarly, this right can only be exercised meaningfully with the knowledge of what the members of Parliament are doing in Parliament. In order to decide whether to join a political party, and which party to vote for, a person could wish to investigate the record of the party in Parliament, including their speeches, behaviour and conduct on the floor of the house. In this era of technology, many people will rely on television, live-feed platforms and social media in order to see the proceedings of Parliament. If this right is curtailed by the broadcasting rules and policy of Parliament, it will deny individuals their right to hold their public representatives accountable.

These operational constitutional provisions are supported by several other constitutional values, which are summarised as follows: the promise of a democratic and open society in which government is based on the will of the people; the values of openness and accountability;²¹⁰ the limits on Parliament in terms of its rule-making powers;²¹¹ and the basic governing values of public participation, accountability and

²⁰⁸ *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), para 7 at 7.

²⁰⁹ See s 19(3) of the Constitution.

²¹⁰ See s 1 of the Constitution.

²¹¹ See again ss 57(1)(b) and 70(1)(b) of the Constitution.

transparency in section 195 of the Constitution.²¹² These provisions all point to a society that embraces openness over secrecy and transparency or concealment. Where there is any doubt about whether a dispute will be resolved in favour of secrets and openness, the Constitution will lean towards transparency. In the South African legal system, it is not only the Constitution that protects this right to transparency, other laws, such as Promotion to Access to Information Act, 2 of 2000, also regulates the issue further.

4.3 THE POWERS AND PRIVILEGES ACT

This act was introduced to give effect to the provisions of the Constitution which affords both Parliament and provincial legislature powers to prescribe certain powers and privileges which their respective member can enjoy.²¹³ The act also protects the authority, independence and dignity of Parliament and provincial legislatures and their respective members. Furthermore, it enables them to perform their constitutional mandate.²¹⁴ The Powers and Privileges Act also provides that security personnel may enter the precinct of Parliament in the event of any danger to the lives or the safety of a person, or damage to any property.²¹⁵ Section 21(1) and (2) prohibit any person from televising or

²¹² See s 195(1)(f) and (g) of the Constitution.

“(f) Public administration must be accountable.

“(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”

²¹³ See ss 58(2), 71(2) and 117(2) of the Constitution.

²¹⁴ See the preamble of the Powers and Privileges Act.

²¹⁵ See s 4 of the Powers Act, which provides:

“(1) Members of the security services may-

(a) enter upon, or remain in, the precincts for the purpose of performing any policing function; or

transmitting by electronic means the proceedings of Parliament without the authority of the speaker. Furthermore, that any person who televises such proceedings, with the authority of the speaker, will not be liable to criminal or civil proceedings.²¹⁶ It is unfortunate that both *Primedia Broadcasting 1* and *2* did not deal with the constitutionality of section 21(1) of the Powers and Privileges Act.²¹⁷ It is submitted that section 21(1) regards broadcasting of parliamentary proceedings as an exception rather than a default position contrary to the foundational values of transparency, openness and accountability.

4.4 CONCLUSION

Taking all the above into consideration, it is arguably clear that the constitutional provisions relating to the broadcasting of parliamentary proceedings require Parliament to consider openness and transparency as a default position rather than as an exception. As stated, it is important that Parliament interpret these constitutional provisions correctly in order

(b) perform any policing function in the precincts, policing function; or only with the permission and under the authority of the Speaker or the Chairperson.

- (2) When there is immediate danger to the life or safety of any person or damage to any property, members of the security services may without obtaining such permission enter upon and take action in the precincts in so far as it is necessary to avert that danger.

Any such action must as soon as possible be reported to the Speaker and the Chairperson.”

²¹⁶ Section 21(1) and (2) of the Powers Act provides:

- “(1) No person may broadcast or televise or otherwise transmit by electronic means the proceedings of Parliament or of a House or committee, or any part of those proceedings, except by order or under the authority of the Houses or the House concerned, and in accordance with the conditions, if any, determined by the Speaker or Chairperson in terms of the standing rules.
- (2) No person is liable to civil or criminal proceedings in respect of the broadcasting, televising or electronic transmission of proceedings of Parliament or a House or committee if it has been authorized under subsection (1) and complies with the conditions, if any, determined under that subsection.”

²¹⁷ Note para 15 at 7 of the *Primedia Broadcasting No.1 case*. The Court perhaps have had an opportunity to evaluate the constitutionality of section 21(1) of the Powers and Privileges Act.



to devise broadcasting policy which complies with constitutional standards.

CHAPTER 5: SUMMARY AND CONCLUSION

South Africa's constitutional democracy is designed such that the marginalised or voiceless people of the country have a mechanism to be heard.²¹⁸ In order to give voice to these marginalised people, Parliament must endeavour to reach as many people as possible. In the modern age of technology, this will include broadcasting of its own proceedings to enable people who do not live or work close to Parliament, to watch the proceedings on television or through other media platforms. As stated, this is in line with the nature of South Africa's democracy and its parliamentary system, which obliges that state institutions must be open and transparent.

This research has explained and highlighted the legal obligations that Parliament has in terms of sections 59 and 72 of the Constitution to conduct its affairs in an open and transparent manner.²¹⁹ These obligations must be read together with an obligation to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.²²⁰ It is submitted that Parliament must take all reasonable steps to ensure that its proceedings are easily and freely available to all who are interested in them, including broadcasting of any disruption by the members of Parliament. It is therefore submitted that Parliament cannot prevent or unreasonably limit media access for the purpose of broadcasting its own proceeding as it could well be in contravention of the founding principles of SA's constitutional democracy.²²¹ As stated and motivated above, it could well be that section 21 of the Powers and Privileges Act is itself

²¹⁸ See *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC) para 14 at 9.

²¹⁹ This obligation means that transparency and openness must be a default position rather than an exception in relation to the question of broadcasting of parliamentary proceedings.

²²⁰ See s 7(2) of the Constitution.

²²¹ The preamble of the Constitution is quoted in page 1 of Chapter 1.



against the foundational values of openness and transparency, which require state institutions to conduct their affairs in an open and transparent manner. The latter section should perhaps require that the broadcasting of parliamentary proceedings is allowed subject to reasonable limitations by the speaker, which limitations comply with the law. This is what sections 59 and 72 of the Constitution envisage. The position that section 21 of the Powers and Privileges Act elevates the power of the speaker, ostensibly to protect the dignity of the house, over the constitutional obligations in the Constitution, could well foul of SA highest law. It is therefore submitted that section 21 should be amended in order for it to be in line with the constitutional obligation of openness and transparency.

As indicated, the case of *Primedia Broadcasting No. 1* confirmed that the disruption provisions in the broadcasting policy of SA Parliament were drawn from the United Kingdom's rules of Parliament.²²² There was perhaps an oversight on the part of the law makers in this respect, as they failed to draw a distinction between a Parliament in a constitutional democracy and one in a Westminster parliamentary system. In a constitutional democracy like South Africa, the powers of Parliament are subject to the Constitution.²²³ On the other hand, the Westminster system affords Parliament more power to govern its own affairs. In such a system, the laws that are passed by Parliament are presumed to be legitimate as Parliament is seen as supreme and also the elected body by the people, and its laws can only be set aside if the procedure was not followed.²²⁴

²²² *Primedia Broadcasting No. 1*, para 51 at 19.

²²³ See again s 1 of the Constitution.

²²⁴ It is also referred to as the parliamentary sovereignty system. See also De Vos and Freedman, at 42.



Contrary to the Westminster system and notwithstanding the autonomy Parliament has to formulate its own rules; such rules must comply with the SA law in general and sections 59 and 72 of the Constitution in particular. It is therefore of constitutional importance and significance, that Parliament interprets this obligation in terms of sections 59 and 72 correctly in order to formulate broadcasting policy which meets constitutional standards.



BIBLIOGRAPHY

PRIMARY SOURCES

ACTS AND REGULATIONS

Constitution of the Republic of South Africa, 1996

Interim Constitution, Act 200 of 1993

Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004

Public Protector Act No. 23 of 1994

Promotion of Access to Information Act No. 2 of 2000

CASE LAW

Primedia Broadcasting (A division of Primedia (Pty) Ltd) v Speaker of National Assembly 2016 4 All SA 793 (SCA)

Economic Freedom Fighters v Speaker of the National Assembly and Democratic Alliance v Speaker of National Assembly 2016 (3) SA 580 (CC)

Primedia Broadcasting v Speaker of National Assembly 2015 (4) SA 525 (WCC)

Doctors for Life International v The Speaker of the National Assembly 2006 (6) SA 416 (CC)

Harris v Minister of the Interior 1952 (2) SA 428 (A)

Khumalo v Holomisa 2002 (8) BCLR 771 CC

Independent Newspaper v Minister of Intelligence Services: in re Masetla v President of the Republic of South Africa 2005 ZA CC 14; 2006 (2) SA 311 (CC)

Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) 2005 (3) SA 280 (CC)

Certification of the Constitution of the RSA 1996 (4) SA 744 (CC)

Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)



Minister of Health v New Clicks South Africa 2006 (2) SA 311 (CC)
Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)
South African Association of Personal Injury Lawyers v Health 2001 1 SA 883 (CC)
S v Dodo 2001 3 SA 382 (CC)
International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC)
Glenister v President of the RSA 2009 1 SA 287 (CC)
NSPCA v Minister of Agriculture, Forestry and Fisheries 2013 5 SA 571 (CC)
Economic Freedom Fighters v Speaker of the National Assembly 2018 2 SA 571 (CC)
Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)
Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC)
De Beer NO v North – Central Local Council ETC 2002 (1) SA 429 (CC)
United Democratic Front v Speaker of National Assembly 2017 (5) SA 300 (CC)
Cape Town City v Southern National Roads Authority 2015 (3) SA 386 (SCA)
Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 487 (CC)

SECONDARY AND OTHER SOURCES

Constitution of Kenya, 2010
Brown, C. (n.d.). Media Protocols
Ian Currie and Johann De Waal “The Bill of Rights Handbook” (2013)
Parliament’s Policy on Broadcasting
Parliament’s Television Broadcasting Rules of Coverage
W A Joubert and J A Faris “The Law of South Africa” (2004)



Pierre De Vos and Warren Freedman *et al* “South African Constitutional Law *in Context*” (2018)

B Bekink “Principles of South African Constitutional Law” (2015)

Cora Hoexter “Administrative Law in South Africa” (2013)

Rautenbach and Venter “Constitutional Law” (2018)