

FACTSHEET

06



PARLIAMENT OF KENYA
THE NATIONAL ASSEMBLY

Powers, Privileges and Immunities of Parliament

2nd Edition

Factsheet No. 6

**POWERS, PRIVILEGES AND
IMMUNITIES OF PARLIAMENT**

Published by:

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First Published 2017
Second Edition; August 2022

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on Factsheets, Speaker's Rulings and
Guidelines

Printed by:

Design & Layout:
Gitonga Ruchiami



Purpose and Acknowledgment

This Factsheet is part of the Kenya National Assembly Factsheets Series that has been developed to enhance public understanding and awareness, and to build knowledge on the work of the Assembly, and its operations. It is intended to serve as a guide for ready reference by Members of Parliament, staff and the public. The information contained here is not exhaustive and readers are advised to refer to the original sources for further information.

This work is a product of the concerted effort of all the Directorates and Departments of the National Assembly and the Parliamentary Joint Services. Special thanks go to the members of the *National Assembly Taskforce on Factsheets, Speaker's Rulings and Guidelines*, namely, Mr. Kipkemoi arap Kirui (Team Leader), Mr. Rana Tiampati, Mr. Kennedy Malinda, Ms. Anna Musandu, Mr. Samuel Kalama, Mr. Salem Lorot, Ms. Fiona Musili, Mr. Benson Inzofu, Ms. Laureen Wesonga, Ms. Anne Shibuko, Mr. James Maina Macharia, Mr. Morrice Shilungu, Mr. Finlay Muriuki, Ms. Rabeca Munyao and Mr. Stephen Omunzi.

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Powers, Privileges and Immunities of Parliament



1. Introduction

Legislative bodies world over enjoy parliamentary privilege, simply defined as *‘the sum of the peculiar rights enjoyed by each House of Parliament collectively and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals’*¹. Thus privilege, though part of the law of the land, is to a certain extent, an exemption from the general law. Privilege is designed to remove any impediments or restraints to the legislature going about its work, and to enable it to deal with challenges to its authority. Privileges are necessary for the proper exercise of the functions entrusted to Parliament by the Constitution and the law.

2. Concept of parliamentary privileges and immunities

A legislature ought to be free from control by the Executive and the courts. It must possess powers to facilitate the carrying out of its functions. Its members and others participating in its proceedings must enjoy certain immunities for the legislature to discharge its functions effectively. All these form part of a constitutional expression of parliamentary autonomy and are a means to achieving an end— that of an effectively functioning legislature able to operate in the public interest.

In modern times, parliamentary privilege has to be viewed from a different angle than in the

¹ *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 25th Edition, 2019 (The Treatise is so extensively referred to in this Factsheet)*

earlier days of the struggle of Parliament against the executive authority. Privilege at that time was regarded as a protection of the Members of Parliament against an executive authority not responsible to Parliament. The entire background in which privileges of Parliament are now viewed has changed because the Executive is now, largely, responsible to Parliament. The foundation upon which they rest is the maintenance of the dignity and independence of the House, its committees and of its members.

Parliamentary privilege may override other generally accepted legal rights in certain circumstances, which can at times lead to tensions. However, Parliament's exception to the general application of the law has, over time, become a fundamental constitutional principle, which is itself part of the general law. Kenyan courts have upheld and continue to protect this principle.

1.1 Individual Rights

Traditionally, the rights and immunities related to Members of Parliament individually may be grouped under the following headings:

- Freedom of Speech (*Only within the Plenary and during Committee sittings whether within the precincts or when sittings/proceedings are held away from the precincts*);
- Freedom from arrest in civil actions;
- Exemption from being summoned to attend court.

1.2 Collective Rights

The two most important collective privileges or powers of a House of Parliament are its disciplinary powers and its exclusive right to regulate its own internal affairs.

These include:

- The power to punish for contempt, inherent in the sovereign authority of the House
- The exclusive right to regulate its own internal affairs - for the protection of its members and the vindication of its own authority and dignity

There is a long-held 1689 Bill of Rights rule in the United Kingdom that courts have an obligation not to *'impeach or question'* proceedings in Parliament.

1.3 Sources of Parliamentary Privilege in Kenya

Parliament derives its privileges, powers and immunities from –

- a) The Constitution Kenya;
- b) The Parliamentary Powers and Privileges Act, 2017;
- c) The Standing Orders;
- d) Precedents set by Speakers' rulings and orders.

1.3.1 Privileges Specified in the Constitution

Each House of Parliament collectively, its committees and its members individually enjoy certain powers, privileges and immunities which are considered essential for them to discharge their functions and duties effectively without any let or hindrance. While the more important of these privileges, namely, freedom of speech in Parliament and immunity of Members from

any proceedings in courts in respect of *anything said* or *any vote given* by them in Parliament are specified in the Constitution, and some are specified in certain statutes and the Standing Orders, others are at present based on the precedents and conventions. These precedents and conventions, which have developed in terms of the provisions of the Constitution, may remain until defined by Parliament by law.

The powers, privileges and immunities (simply known as privilege) specified in the Constitution are due to the Houses of Parliament, Members (in our case including leadership), committees, staff and witnesses.

When any individual or authority disregards or attacks any of the privileges, rights and immunities, either of the Members individually or of the House in its collective capacity or of its committees, the offence is termed a *breach of privilege*, and is punishable by the House. Besides, actions in the nature of offences against the authority or dignity of the House, such as disobedience to its legitimate orders or libels upon itself, its Members or officers are also punishable, although these actions are not breaches of any specific privilege. Such actions, though often called 'breaches of privilege', are more properly distinguished as 'contempts'.

Each House is the guardian of its own privileges: it is not only the sole judge of any matter that may arise which in any way infringes upon those privileges but can, if it deems it advisable, punish, either by warning or reprimand, any person whom it considers to be guilty of contempt. The penal jurisdiction of the House is not confined to its own Members nor to offences committed in its immediate presence, but extends to all contempts of the House, whether committed by Members or by persons who are not Members, irrespective of whether the offence is committed within the House or beyond its walls.

Members of Parliament *may not be sought, prosecuted, judged or imprisoned* for actions that they have accomplished within their duties as parliamentarians. In particular, they are immune from prosecution for actual defamation committed in the exercise of their functions. This includes their **speeches** and **votes** in public sittings of the Assembly, legislative proposals, amendments, as well as reports and other actions commissioned by parliamentary instances. In the French jurisdiction, this privilege is called *irresponsibility*.



Members of Parliament may not be sought, prosecuted, judged or imprisoned for actions that they have accomplished within their duties

The power of the House to punish any person who commits a contempt of the House or a breach of any of its privileges is the most important privilege. It is this power that gives reality to the privileges of Parliament and emphasizes its sovereign character so far as the protection of its rights and the maintenance of its dignity are concerned. It is important to note that in Kenya this area of *Parliamentary Law* is still developing. Some of these powers include the freedom of speech and debate, freedom from arrest in civil actions, exemption from being summoned to attend court as witness, the power to exclude and remove strangers, making own rules and regulating own procedures, and the power of a High Court to summon persons to give evidence, enforce attendance of witnesses, compel production of documents and to issue a commission, as explained below.

1.3.2 Freedom of Speech and Debate

Article 117 of the Constitution provides for **freedom of speech and debate** in Parliament. The Members have therefore the freedom of speech and debate in the House. The overarching essence of this provision is that the Members' *freedom of speech and debate, or proceedings* in the House ought not be curtailed or questioned. This is a long-held principle in the United Kingdom dating back to 1689 under Article 9 of the Bill of Rights 1689. A primary function of Parliament is to debate and pass resolutions freely *on subjects of its own choosing*. This is a cornerstone of parliamentary democracy. The performance of this function is secured by the Members of each House having the right to say what they will (*freedom of speech*) and discuss what they will (*freedom of debate*). These freedoms, the single most important parliamentary privilege, are protected under Article 117 of the Constitution of Kenya.

In modern English, Article 9 of the Bill of Rights 1689 provided '*That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*' In this Article, many treaties explain that the possible meanings of 'impeach' include *hinder, challenge* and *censure*. The principal purpose was to affirm the House's right to initiate business of its own and to protect Members from being brought before the courts and accused of seditious libel. Article 9 also reasserted the long-established claim not to be answerable before any court for words spoken in Parliament. The modern interpretation is now well established: that Article 9 and the constitutional principle it encapsulates protect Members of both Houses from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of *proceedings* in Parliament.



This immunity is wide. Statements made in Parliament may not even be used to support a cause of action arising out of Parliament. The immunity is also absolute: it is not excluded by the presence of malice or fraudulent purpose. This is important. Article 9 protects the Members who know what they are saying is untrue as much as the Members who act honestly and responsibly. The protection is not only confined to Members. It also applies to officers of Parliament and non-Members who participate in proceedings in Parliament, such as witnesses giving evidence to a committee of any of the Houses. In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

The public interest in the freedom of speech in the proceedings *is of a high order*. It is not to be imperiled by the prospect of subsequent inquiry into the state of mind of those who participate in the proceedings even though the price is that a person may be defamed unjustly and left without a remedy. Members should not be exposed to the risk of being brought before the courts to defend what they said in Parliament. Abuse of parliamentary freedom of speech is a matter for internal self-regulation by Parliament, not a matter for investigation and regulation by the courts.

The legal immunity principle is as important today as ever. The courts have a duty not to erode this essential constitutional principle. While the speech and action in Parliament may be said to be unquestioned and free, the freedom from external influence or interference does not involve any unrestrained license of speech within the walls of the House.

The right to freedom of speech in the House is circumscribed by the National Assembly Standing Order 81 and Senate Standing Order 96. The Standing Orders provide that the personal conduct of the following persons shall not be referred to adversely, except upon a specific substantive Motion of which at least three days' notice has been given:

- 1) the President
- 2) the Speaker
- 3) any judge, or the judicial conduct of any other person performing judicial functions,
- 4) the Head of State or Government or the representative in Kenya of any friendly country
- 5) the holder of an office whose removal from such office is dependent upon a decision of the House.

Proceedings

The broad description in *Erskine May* of proceedings is a useful starting place:

'The primary meaning of proceedings, as a technical parliamentary term, . . . is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.'

In many commonwealth jurisdictions, **'proceedings in Parliament'** ordinarily carries the meaning of words spoken and acts done in the course of, or for the purposes of, or necessarily incidental to, transacting the business of either House of Parliament or of a committee.

Proceedings in Parliament include:

- 1) the giving of evidence before a House or a committee or an officer appointed by a House to receive such evidence;
- 2) the presentation or submission of a document to a House or a committee or an officer appointed by a House to receive it, once the document is accepted;
- 3) the preparation of a document for the purposes of transacting the business of a House or a committee, provided any drafts, notes, advice or the like are not circulated more widely than is reasonable for the purposes of preparation;
- 4) the formulation, making or publication of a document by a House or a committee, and
- 5) the maintenance of any register of the interests of the Members of a House and any other register of interests prescribed by resolution of a House.

A document includes any disc, tape or device in which data are embodied so as to be capable of being reproduced therefrom.



1.3.3 Power to exclude and remove strangers

Article 118 of the Constitution gives Parliament power to exclude and remove strangers from the Chamber and its precincts to the extent that such presence of strangers may impede deliberations of the House or its Committees. This is applied in exceptional circumstances that are determined by the Speaker.

Section 5 of the Parliamentary Powers and Privileges Act, 2017 provides that *“A member of the public may, subject to the Parliamentary Powers and Privileges Act 2017, the Standing Orders and such orders and directions as may be issued by the Speaker, access such places*

within the precincts of Parliament as may be specified ... The right of access to Parliament under Article 118 shall be limited as specified under this section for the purposes of facilitating the orderly conduct of the business and the affairs of Parliament”.

Section 8 of the Act also provides that *“a person who assembles, demonstrates or pickets contrary to the law may be removed from the precincts of Parliament on the direction of a Speaker, a duly authorized member of staff or a police officer”.*

The core rule here is that public access and participation in legislative processes is always *guaranteed*. Parliament is expected to conduct its business in an open manner, and its sittings and those of its committees must be open to the public. Parliament must also *facilitate* public participation and involvement in the legislative and other business of Parliament and its committees.

However, to exclude the public, or any representation of media, from any sitting, the relevant Speaker must determine that there are *exceptional circumstances* and *justifiable reasons* for the exclusion.

1.3.4 Making own rules and regulating own procedures

Article 124 of the Constitution gives each House of Parliament the power to establish Committees and make Standing Orders for the orderly conduct of business and to regulate its own procedures. The exclusive right to control its own operation is one of the House’s privileges. Like many legislatures around the world, the House regulates its own proceedings without intervention by any other authority. Together with the associated privilege of free speech, it is fundamental to parliamentary independence and the continuous balancing of constitutional arrangements.

The House exists within a constitutional framework where the legislature’s autonomous law-making capability and scrutiny powers sit alongside the principle of judicial independence. The two institutions involved (the legislature and the judiciary) endeavour to avoid intrusion into each other’s sphere, and maintain a relationship of mutual respect so as not to upset the balance. This respectful relationship avoids conflict between the institutions and promotes due regard for existing conventions, while allowing continuing constitutional evolution.

In commonwealth jurisdictions, Houses of Parliament generally avoid setting out the detail of its procedures in legislation. On the other hand, the courts exercise restraint from venturing into the House’s internal workings, even in respect of powers or duties conferred or imposed by a statute. However, despite the House’s freedom from outside interference, it is expected that the rules made by the House are in conformity with the provisions of the Constitution.

1.3.5 Power to call for evidence

Article 125 of the Constitution gives Parliament and its Committees the power to summon any person to appear before it for the purpose of giving evidence or providing information. In so doing, the House of Parliament or Committee has the same power as that of the High Court to:

- 1) enforce attendance of witnesses and examine them on oath, affirmation or otherwise;
- 2) compel production of documents, and
- 3) issue a commission or request to examine witnesses abroad.

This is fundamental in ensuring that Parliament executes its mandate including in some instances to exercise quasi-judicial functions assigned to it under the Constitution, whether directly or through its committees. To effectively perform their functions such as scrutiny of government policies and expenditures, it is important for parliamentary committees to have the cooperation of witnesses and to secure all relevant information. Select committees have the *powers to send for persons, papers and records* that are conferred on them under the law.

1.4 The Parliamentary Powers and Privileges Act 2017

The Parliamentary Powers and Privileges Act 2017 sets out the nature, scope and extent of the privileges enjoyed by each of the Houses of Parliament, *independently*. It does so by reference to the privileges exercised by both Houses of Parliament as at August 16, 2017. This is when a new privilege law was enacted, repealing the National Assembly (Powers and Privileges) Act of 1952 (Cap 6 of the Laws of Kenya). However, the new law does not provide a comprehensive codification of the parliamentary privilege law in Kenya.

The Act seeks to give effect to Article 117 of the Constitution. These powers, privileges and immunities are granted to the House and to Members as follows –

1.4.1 Freedom from arrest in civil actions

Section 6 of the Parliamentary Powers and Privileges Act 2017 provides that *“A Member shall not be liable to arrest for any civil debt except a debt the contraction of which constitutes a criminal offence, whilst going to, attending at or returning from a sitting of a House of Parliament or any committee ... The right of access to justice under Article 48 of the Constitution shall be limited as specified under this section for the purposes of facilitating the conduct of business and the affairs of Parliament”*.

Traditionally, the second most important of the Speaker’s customary petitions on behalf of the House at the beginning of a Parliament is *freedom from arrest*. A House of Parliament did make this claim as of right. The principle that the King’s servants doing their duty in a superior court should not be impeded by litigation in a lower tribunal was clearly established at a relatively early date. The first known assertion of freedom from arrest seems to date from 1340, when the King released a Member from prison during the Parliament following that in which he had been prevented, by his detention, from taking his seat. In 1404, the Commons claimed that it was privileged from arrest for debt, contract, or trespass of any kind, according to the custom of the realm. Though the principle may have been deeply engrained, its implementation was patchy and often beyond the power of the Commons alone to enforce.

Subsequent developments, however, were to establish relatively clearly, if slowly, the basis and the limitations of the privilege. In the first place, it had always been recognised that privilege could not be pleaded against criminal offences, then adequately summed up as treason, felony, and breach of the peace. However, across the Commonwealth, the Houses of Parliament seem to have voluntarily narrowed the scope of the privilege of *freedom from arrest*. Though, the freedom of a Member from arrest in civil debt (save for debts contracted illegally) while going to, attending at or coming from a sitting in Chamber or in a committee in Kenya has been put on a statutory footing, the modality of its enforcement still remains unclear.

1.4.2 Immunity from legal proceedings

Section 12 of the Act provides that *“No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament”*.

Additionally, *“No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office”*. The Clerk or other members of staff are also not liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.



1.4.3 Exemption from being summoned to attend Court as a Witness

The *right of the House to the attendance and service of its Members* exempts a Member, when the House is in session, from the normal obligation of a citizen to comply with a summons to attend court as a witness. In many Commonwealth jurisdictions, this exemption applies in civil, criminal and military matters before the courts. However, this claim is not intended to be used to impede the course of justice and, therefore, is regularly waived, particularly for criminal cases. When the House is in session, should a summons or other legal process be served on a Member, the Member may wish to appear in court if the Member feels that absence from court might affect the course of justice. However, the Member still has a right to claim the privilege of exemption from appearing as a witness. A Member may give evidence voluntarily without any formality, even on a day when the House is sitting or scheduled to meet, but if he or she does so, the Member surrenders the protection this privilege provides.

In Canada, Members are exempt from appearing as witnesses in any court when the House is in session, 40 days before and after a session, and 40 days following a dissolution of Parliament. This includes periods when Parliament is prorogued. Speaker Fraser reinforced this claim in

a May 1989 ruling: “... *the right of a Member of Parliament to refuse to attend court as a witness during a parliamentary session and during the 40 days preceding and following a parliamentary session is an undoubted and inalienable right supported by a host of precedents*”. No jurisprudence on the claim of this privilege by a Member has yet developed in Kenya.

1.4.4 Other immunities and powers granted to Members

The Act provides for the following immunities and privileges of the Members of Parliament -

- Where any Member has been sentenced to an imprisonment for a period of at least six months, adjudged to be of unsound mind, adjudged bankrupt, or is found in accordance with any law to have misused or abused a State office or a public office or in any way to have contravened Chapter Six of the Constitution, the decision shall not have effect for the purposes of Article 103(1)(g) of the Constitution until all possibility of appeal or review of the relevant decision or sentence has been exhausted.
- No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.
- No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.
- No process issued by any court in Kenya in the exercise of its civil jurisdiction shall be served on a Member within the precincts of Parliament while either one or both Houses are sitting. (See section 2.4.5 below)
- A Member who has been sentenced to an imprisonment for a period of at least six months, adjudged to be of unsound mind, adjudged bankrupt, or is found in accordance with any law to have misused or abused a State office or a public office or in any way to have contravened Chapter Six of the Constitution shall not be disqualified from being elected as a Member of Parliament until all possibility of appeal or review of the relevant decision or sentence has been exhausted.

1.4.5 House Privilege

The Parliamentary Powers and Privileges Act, 2017 provides for the following immunities and privileges of Parliament -

- That no proceedings or decisions of the House or the Committee of Powers and Privileges shall be questioned in any court. (See Note below)
- The House or its committees may invite or summon any person to appear before it for the purpose of giving evidence or providing any information, paper, book, record or document in the possession or under the control of that person and, in this respect, the House and its committees shall have the same powers as the High Court as specified under Article 125 of the Constitution.
- Where a witness summoned does not appear, or appears but fails to satisfy the House or any of its committees, the House or committee has power to impose upon the witness such fine, not exceeding five hundred thousand shillings.
- The House may order the arrest of a person who fails to honour the summons of a Committee or the House.
- Either House of Parliament has power to investigate breach of privilege by a Member of Parliament and prescribe appropriate punishment, including recommendation for prosecution by the Director of Public Prosecution.

It is however important to note that on 21st May 2018 the High Court issued a decree that **sections 7 and 11** of the **Parliamentary Powers and Privileges Act (No. 29 of 2017)** are inconsistent with and contravene Articles **1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2), 94 (4), 159, and 258** of the Constitution of Kenya, 2010 and further issued a declaration that **sections 7 and 11** of the **Parliamentary Powers and Privileges Act (No. 29 of 2017)** are **unconstitutional and therefore null and void**. The matter is under appeal as at September 28, 2020.

1.5 The Standing Orders



National Assembly Standing Order 191 and Senate Standing Order 205 provide for the powers and privileges of committees. Committees enjoy and exercise all the powers and privileges bestowed on Parliament by the Constitution and statute, including the power to summon any person to appear before it for the purposes of giving evidence or providing information; enforce the attendance of witnesses and examine them under oath, affirmation or otherwise; compel the production of documents; request for and receive papers and documents from the Government and the public; and, to issue a commission or request to examine witnesses abroad.

National Assembly Standing Order 258 and Senate Standing Order 248 entitle the House to attendance by its members and failure to attend sittings comes with sanctions. If, during any Session, a Member is absent from eight sittings of the House without permission, in writing from the Speaker, the Speaker reports the matter to the House and the matter shall stand referred to the Committee of Privileges for hearing and determination. The Committee of Privileges shall inquire into the matter within fourteen days from the date the matter is referred to it and submit a report to the House. If the report of the Committee finds that the Member has not offered a satisfactory explanation for the Member’s absence from eight sittings, it results in a declaration, pursuant to Article 103 (1) (b) of the Constitution, that the office of the Member concerned has become vacant.

3. Origin of Parliamentary Privilege

The scope and application of parliamentary powers, privileges and immunities in most Commonwealth jurisdictions, including Kenya, largely mirror the Westminster model of the United Kingdom.

Parliamentary privileges can be traced to the monarchical United Kingdom. Then, state power and authority was heavily vested in the Monarchy and even though the institution of Parliament existed, it used to perform parliamentary functions in subservience to, if not under the influence of the Monarchy.

In 1387, King Richard II sought approval to exercise absolute control over Parliament. The judges approved the claim, which became popularly known as '*regimen Parliament.*' Consequently, the Monarchy enjoyed prerogative rights on practical business of Parliament, and would greatly leverage on or veto decisions of Parliament².

The need for Parliament to be granted powers and privileges was pursued so as to enable Parliament to effectively perform its functions without influence of the Monarchy. Parliamentary powers, immunities and privileges are granted to Parliament, collectively as an institution and to Members of Parliament in their individual capacity.



A painting of King Richard II

2 *Ibid*

While parliamentary privilege gives Members of Parliament privileges and immunities which exceed those possessed by other bodies or individuals, it is never intended to set them above the ordinary law. Members are subject to criminal and civil law, except in relation to freedom of speech and debates in the context of parliamentary proceedings.

The United Kingdom House of Commons had evolved its privileges over some six centuries. Its pre-eminent privilege of freedom of speech was designed to permit members to speak freely in the House without fear of legal consequences or other repercussions. Under its privilege of freedom from arrest, the House laid claim to the service and attendance of its members over the legal rights of creditors or others to have members arrested or detained in civil (but not criminal) cases. A further privilege was the power of the House to punish for contempt anyone who committed a breach of any of its privileges or interfered with it or its members in the execution of their duties. This privilege was analogous to the power of a court of record summarily to punish persons who commit a contempt in the face of the court (for example, through insulting behaviour or improper interference with the court's proceedings). The House

of Commons claimed justification for the contempt power on the ground that the House was a constituent part of a court of law, namely the High Court of Parliament. The power ensured the independence of the Commons from the courts, as the Commons could itself punish for contempt, without need to refer cases to the courts to be dealt with (where the ultimate right of appeal was to the other Chamber of the legislature—the House of Lords). The House could take action of its own volition to protect its dignity and authority.

Unlike the House of Commons, legislatures stemming from colonial legislatures created by United Kingdom legislation have never claimed the trappings of a court. As a legislative body, in common with other legislatures, the common law vested in the Houses of Parliament such privileges as were reasonably necessary to its existence and the proper exercise of the functions it was called upon to perform. The original primary privilege was the power to punish for contempt.

Application of the usages, forms, precedence, customs, procedures and traditions of other jurisdictions

Section 14 of the Parliamentary Powers and Privileges Act provides that determination of questions on the following matters shall be done in accordance with the usages, forms, precedence, customs, procedures and traditions of the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya:

- 1) the right or power of Parliament or a committee to hear, admit or receive oral evidence;
- 2) the right or power of Parliament or a committee to peruse or examine any paper, book, record or document or to summon, direct or call upon any person to produce any paper, book, record or document before Parliament or committee;
- 3) the right or privilege of any person (including a Member of the Parliament or committee) to refuse to produce any paper, book, record or document or to lay any paper, book, record or document before Parliament or committee.

4. Rationale for Parliamentary Privilege

Parliamentary privilege is designed to remove any impediments or restraints to the legislature going about its work, and to enable it to deal with challenges to its authority. Parliamentary privilege has been justified in law on the grounds that a legislature must enjoy freedom from control by the Executive and the courts (an aspect of the constitutional separation of powers); that it must possess certain powers to facilitate the carrying out of its functions; and that Parliament, its Members and others participating in its proceedings must enjoy certain immunities for the legislature to discharge its functions effectively. The privileges that a legislature enjoys are not an end in themselves; they form part of a constitutional expression of parliamentary autonomy and are a means to achieving an end—an effectively functioning legislature able to operate in the public interest. Parliamentary privilege may override other generally accepted legal rights in certain circumstances, which can at times lead to tensions. However, Parliament's exception to the general application of the law has, over time, become a fundamental constitutional principle, which is itself part of the general law.

5. Application of Privilege

(a) Disciplinary and Penal Powers of the House

The House is governed by rules and procedures that are intended to enable it execute its

mandate and maintain order. In order to ensure compliance, the House invokes its powers from time to time by punishing those who are in breach of its rules.

Article 117(2) of the Constitution provides that Parliament may, for the purpose of the orderly and effective discharge of its business, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and Members. It is from this constitutional provision that the House is empowered to enact legislation and provide for its rules to govern its procedures, including sanctions.

The terminology “disciplinary and penal powers of the House” has been used to refer to the sum-total of the rules, procedures and provisions relating to the House aimed at being observed by both the public and the Members and which attract the sanctions of the House when they are not adhered to.

These disciplinary and penal powers of the House may be grouped into two as explained below:

- (i) Disciplinary and penal powers of the House pertaining to Members, and
- (ii) Disciplinary and penal powers of the House pertaining to non-members (strangers)

(i) Disciplinary and Penal Powers of the House pertaining to Members

Members of the House are required to adhere to the provisions of the Constitution on ethics, leadership and integrity, the law pertaining to parliamentary powers and privileges, the Standing Orders, Speaker’s Rules, Rulings, Guidelines and Orders, among others. Parliamentary Law and House Rules prescribe sanctions against members who act in breach of the law, Standing Orders and codes governing conduct of members.

1. The Practice in the House of Commons



The House of Commons (UK Parliament)

The House of Commons metes various forms of punishments to its Members. These are reprimand or admonition, suspension, and expulsion.

The custom of reprimand or admonition traces its history to the Commons where an offender, if he or she is in attendance, is brought to the Bar of the House by the Serjeant-at-Arms, and is reprimanded by the Speaker in the name and by the authority of the House. If the offender is not in attendance, he or she may be ordered either to be taken into the custody of the Serjeant and brought to the Bar the following day or some later day, to be reprimanded and discharged, or to attend the House on a future day to be reprimanded.

Standing Order No. 44 of the House of Commons provides for the suspension of a Member of the House of Commons who has disregarded the authority of the Chair or abused the rules of the House. Suspension of a Member is mostly occasioned by reports by select committees, particularly the Committee on Standards and Privileges in respect of allegations made against the Member and for conduct falling below the standards of the House, among other things.

Also, a Member of the House of Commons may be expelled from the House and this has been treated as one of the methods of punishing a Member.

2. The Practice in the Parliament of Kenya

The Constitution of Kenya, specific legislations and the Standing Orders prescribe punishments for Members who breach the rules that govern their conduct. These legislations include the Public Officer Ethics Act, the Leadership and Integrity Act, the Parliamentary Powers and Privileges Act., which contain Codes of Conduct.

2.1 The Constitution of Kenya

Chapter 6 of the Constitution of Kenya prescribes the conduct expected of state officers, inclusive of Members of Parliament. For instance, Article 75(1) provides as follows:

(1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(a) any conflict between personal interests and public or official duties;

(b) compromising any public or official interest in favour of a personal interest; or

(c) demeaning the office the officer holds.

2.2 Parliamentary Powers and Privileges Act

The House Committees of Powers and Privileges draw their mandate from the Constitution, Parliamentary Powers and Privileges Act, 2017, the Public Officer Ethics Act, 2003, the Leadership and Integrity Act, 2012, and the Standing Orders which assign to the Committees various functions, which include the following:

1.1.1 Inquiring into the conduct of a Member alleged to constitute breach of privilege

Section 15(4)(a) of the Parliamentary Powers and Privileges Act, 2017 mandates the Committee to inquire into the conduct of a Member whose conduct is alleged to constitute breach of privilege in terms of section 16 of the Act. The breaches contemplated under section 16 are –

- (i) the unauthorized publication of any journal, if the publication of the journal is prohibited by or in terms of the Standing Orders or an order or resolution of

Parliament, any journal purporting that it has been published under the authority of Parliament or a committee or the Speaker while it has not been published under such authority, or any journal purporting that it is a verbatim account of the proceedings of Parliament or a committee while it is not such account;

- (ii) assaulting, obstructing, molesting or insulting, ...improper influence, etc (*in contravention of sections 25, 26 or 28*);
- (iii) willfully failing or refusing to obey any rule, order or resolution of Parliament;
- (iv) contravening any provision of the Speaker's Orders³; or
- (v) conducting himself or herself in a manner which, in the opinion of the Committee, is intended, or is likely to reflect adversely on the dignity or integrity of Parliament, or of the Members or to be contrary to the best interests of Parliament or its Members.

The Committee may inquire into the conduct of a Member whose conduct is alleged to constitute breach of privilege either of its own motion (*suo moto*) or as a result of a complaint made by any person. Upon conclusion of the inquiry, the Committee may recommend any or all the sanctions under Section 17 of the Act. Where the relevant House finds that a Member has committed a breach of privilege, the relevant House may, in addition to any other penalty to which the Member may be liable under a specific law, impose:

- a) a formal warning;
- b) a reprimand;
- c) an order to apologize to the House or a person in a manner to be recommended by the Committee of Powers and Privileges;
- d) the withholding, for a specific period of time, of the member's right to the use or enjoyment of any specified facility provided to Members by Parliament;
- e) the removal or suspension for a specified period of time of the Member from any parliamentary position occupied by the Member;
- f) such fine in terms of the Member's monthly salary and allowances as the House may determine;
- g) the suspension of the Member for such period as the House may decide, whether or not Parliament or any of its committees is scheduled to meet during that period or
- h) vacation of seat pursuant to Articles 75(2)(b) and 103(1)(c) of the Constitution.

In the case of an inquiry arising from a complaint, the Parliamentary Powers and Privileges Act envisages such inquiry to be concluded within **fourteen days** of receipt of complaint. Moreover, the Committee is expected to table its findings in the House, together with such recommendations, as it considers appropriate for consideration, within **fourteen days of the conclusion of an enquiry**. However, section 36 of the Act permits the Committee **to seek an extension of time for inquiring into a complaint**.

³ Section 37, Parliamentary Powers and Privileges Act, 2017

These forms of punishment applicable in the Parliament of Kenya are nearly similar to those in comparable jurisdictions. For instance, in jurisdictions such as New Zealand and Canada, sanctions for breach of privilege and/or the code of conduct include—

- (a) demand for an apology to be issued at the Bar;
- (b) censure or rebuke by the House;
- (c) suspension or expulsion from Committees;
- (d) suspension from the House;
- (e) expulsion from the House;
- (f) resolution for the prosecution at law of errant Members;
- (g) exclusion from the precincts of the House (mostly invoked on “strangers” or to members when the House and Committees are on recess);
- (h) order for recovery of expenses related to restoration of any damaged property of the House;
- (i) imposition of a fine; and
- (j) committal to imprisonment by order of the House.

It should be noted that some of the sanctions are carried out by the House whereas the more severe ones are not. Some of the sanctions that have been meted out by the House are demand for an apology to be issued at the Bar, censure or rebuke by the House, suspension or expulsion from Committees and suspension from the House. The sanctions which are yet to be tested by the House include orders for recovery of expenses related to restoration of any damaged property of the House, imposition of a fine, expulsion from the House, resolution for the prosecution at law of errant Members and committal to imprisonment by order of the House. These sanctions imposed are based on usages, precedents, customs, and traditions of the Parliament of Kenya and other jurisdictions to the extent of their applicability to Kenya. Therefore, the forms of sanctions may change from time to time whereas some may not be resorted to. Also, some of the disciplinary measures are of ancient usage in other jurisdictions and caution should be exercised before applying them.

1.1.2 Inquiring into the conduct of a witness alleged to constitute breach of privilege

Breaches of privilege by witnesses include⁴, -

- failing to attend at the time and place specified in a summons, without sufficient cause, having been duly summoned;
- failing to remain in attendance until excused from further attendance by the person presiding at the inquiry;
- refusing to be sworn in or to make an affirmation as a witness;
- failing or disobeying, without sufficient cause, to answer fully and satisfactorily all questions lawfully put to the person;
- failing or disobeying to produce any document, paper, book or record in the person’s possession, custody or control which the person has been required to produce.

⁴ Section 27(1)(a), (b) or (2) and (3)(d), (e), (f) or (g), Parliamentary Powers and Privileges Act, 2017

On conviction, these offences attract a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

Other serious offences in relation to witnesses⁵ include -

- threatening, obstructing, assaulting or insulting a member of staff or police officer carrying out service of summons issued under this Act;
- using abusive language directed at a Member, a committee or a House of Parliament;
- threatening or obstructing another person in respect of evidence to be given before Parliament or a committee;
- inducing another person to refrain from giving evidence to or to produce a document before Parliament or a committee; or
- inducing another person to give false evidence before Parliament or a committee;
- assaulting or penalising or threatening another person or depriving the person of any benefit on account of the giving or proposed giving of evidence before Parliament or a committee;
- producing a false, untrue, fabricated or falsified document with intent to deceive or mislead Parliament or a committee;
- wilfully furnishing Parliament or a committee with information which is false or misleading or making a statement before Parliament or committee that is false or misleading.

On conviction, such offences attract a fine not exceeding five hundred thousand or a term of imprisonment not exceeding one year or to both such fine and imprisonment.

2.2.3 Absences

Article 103(1)(b) of the Constitution as read together with Standing Order 258 of the Standing Orders assigns to the Committee of Powers and Privileges the function of determining claims of absence of a Member from the House without the permission of the Speaker or where, upon a complaint, a satisfactory explanation for the absence is tenable to the Committee. National Assembly Standing Order 258 and Senate Standing Order 248 provide that if, during any Session, a Member is absent from eight sittings of the House without the Speaker's written permission, the Speaker reports the matter to the House and the matter stands referred to the Committee of Powers and Privileges for hearing and determination.

The Committee inquires into the matter within fourteen days from the date the matter is referred to it and thereafter submits a report to the House. If the report of the Committee finds that the Member has offered a satisfactory explanation for the Member's absence, the matter ends.

If the report of the Committee finds that the Member has not offered a satisfactory explanation for the Member's absence, the Chairperson or a Member of the Committee designated by the Committee for that purpose, upon submitting the report, must give a three days' notice of a Motion that, **"This House notes the Report of the Committee of Privileges laid on the Table of the House on ... regarding..."**.

The Motion is debated in the usual manner, except that –

- (a) no amendment to the Motion is permitted;
- (b) the debate of the Motion cannot be anticipated by a Motion for the adjournment of the House, and no dilatory Motion is allowed in relation to the business, and the business cannot be interrupted; and
- (c) at the conclusion of the debate, the Speaker does not put a question but declares that,

⁵ *Ibid*

pursuant to Article 103 (1) (b) of the Constitution, the office of the Member concerned has become vacant.

It is however important to note that Article 105 of the Constitution provides that the High Court shall hear and determine any question whether a person has been validly elected as a Member of Parliament or the seat of a member has become vacant. The question must however be heard and determined within six months of the date of lodging the petition.

1.1.4 Enforcement of the Rules Governing Conduct of Members of Parliament

Chapter Six of the Constitution of Kenya prescribes leadership and integrity benchmarks for holders of State and public offices. Article 75 of the Constitution assigns the Committee the role to exercise penal authority over contravention of the Leadership and Integrity Code.

Article 75(2) states –

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2) –

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and

(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

A State Officer (including a Member) who does not behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties, or behaves in a manner compromising any public or official interest in favour of a personal interest, or demeans the office the Member holds (*and thus contravening Articles 75(1), 76, 77 or 78 (2)*) shall be subject to the applicable disciplinary procedure for the relevant office; and may, in accordance with the disciplinary procedure, be dismissed or otherwise removed from office⁶.

The Public Officer Ethics Act, 2012 also assigns to the Committee the function of investigating and enforcing compliance with the Code of Conduct. Section 35(1) of the Act provides that the responsible Commission for a public officer may investigate to determine whether the public officer has contravened the Code of Conduct and Ethics.

The General Leadership and Integrity Code contained in the Leadership and Integrity Act, 2012 is also within the ambit of the Committee of Powers and Privileges with respect to misconduct by Members of Parliament.

Section 37(3) of the Parliamentary Powers and Privileges Act provides for a Code of Conduct for Members of Parliament, provided in the Fourth Schedule to the Act. Rule 12 of the Code specifically obligates the Committee of Powers and Privileges to enforce the Code and recommend penalties in case of any breach.

2.2.5 Contempt

Contempt are acts or omissions which obstruct or impede either House of Parliament or their respective committees in the performance of their functions, or which obstruct or impede any Member or officer of such House in the discharge of their duty or which have a tendency, directly or indirectly, to produce such results. Any disorderly, contemptuous or disrespectful conduct in the presence of either House or a committee constitutes a contempt, which may be committed by members of the public, parties, witnesses or by Members of either House. It is

⁶ Article 75(2)(b) of the Constitution

therefore impossible to list every act which might be considered to amount to a contempt, as Parliamentary privilege is a 'living concept'.

Determination of what constitutes contempt is as the House would determine upon occurrence of an incident. It is upon the House to punish for contempt. It is notable that although the Act does not define what acts or omissions can be termed as being contemptuous, such matters can arguably be determined following the dictates of usages, forms, customs, precedence, procedures and traditions of Parliament as envisaged in section 14 of the Parliamentary Powers and Privileges Act. Although certain broad principles may be deduced from a review of the kinds of misconduct which in the past commonwealth Parliaments have punished as contempt, most of them exercise penal jurisdiction very sparingly and only do so when satisfied that it was essential to do so. Thus, many acts which might be considered to be contempts are either overlooked or resolved informally.

1.1.6 Declaration of Income, Assets and Liabilities

The Committee of Powers and Privileges is also the responsible commission in matters pertaining to declaration of wealth by state officers and holders of independent Commissions. Custody of the wealth declaration forms tendered by state officers is vested in a 'responsible Commission'. Section 3 the Public Officer Ethics Act (No. 4 of 2003) assigns the role of responsible Commission for the purposes of members and other designated officers to the Committee of Powers and Privileges.

1.1.7 Registration of Members' Interests

Registration of Members' Interests is regulated by Section 16 of the Leadership and Integrity Act, 2012, the Second Schedule to the Act, and Rule 6 of the Code of Conduct for Members of Parliament contained in the Fourth Schedule to the Parliamentary Powers and Privileges Act, 2017.

Rule 6 of the Code of Conduct for Members of Parliament provides that Members shall register with the relevant Speaker all financial and non-financial interests that may reasonably influence their parliamentary actions; declare any relevant interest in the context of parliamentary debate or the matter under discussion before contributing to debate in the House or its Committees, or communicating with state officers or other public servants; and observe any rules set by the House in respect of financial support for Members or the facilities of the House.

Whereas Rule 6 envisages Members' registering their personal interests with the relevant Speaker, the Committee of Powers and Privileges handles questions of Members' registrable interests on behalf of the Speaker.

3. The Standing Orders

The Standing Orders impose various modes of punishment upon a Member for breach of the rules. The Standing Orders provide for instances when a Member commits certain offences. These include creating actual disorder, knowingly raising a false point of order, unnecessarily interrupting proceedings or consulting in a disruptive manner, failing to record abstention in a division, failing to declare personal interest in a matter before the House or a Committee, deliberately giving false information to the House, making allegations without, in the Speaker's opinion, adequate substantiation, threatening to use violence against a Member or other person in the House or Committee, voting more than once in breach of the Standing Orders, failing to record abstention in a division or committing any other breach of the Standing Orders, that in the opinion of the Speaker, constitutes disorderly conduct. When any of these happens, the Speaker may call the Member to order and **caution the Member** or order the Member to

withdraw from the precincts of the Assembly for a maximum of **four days**.

A Member commits an **act of gross disorderly conduct** if the Member defies a ruling or direction of the Speaker or Chairperson of Committees; declines to explain or retract use of *unparliamentary* words or declines to offer apologies, despite having been ordered to do so by the Speaker; demonstrates or makes disruptive utterances against the suspension of a Member; attempts to or causes disorder of whatever nature during an address by a visiting dignitary; uses violence against a Member or other person in the House or Committee; attempts to or disrupts the Speaker's Procession when the Procession is entering or leaving the Chamber; attempts to or removes the mace from its place in the Chamber; acts in any other way to the serious detriment of the dignity or orderly procedure of the House; or commits any other breach of these Standing Orders, that in the opinion of the Speaker, constitutes gross disorderly conduct.

Unparliamentary language means the use of words which, in the opinion of the Presiding Officer, are deemed to be impolite, rude, abusive or inconsistent with parliamentary procedure or practice.

The Speaker may call a Member whose conduct is grossly disorderly to order, and order the Member to withdraw immediately from the precincts of the Assembly for a minimum of five days and a maximum of twenty-eight days, including the day of suspension.

Any member may at any time on a point of order, invite the Speaker or the Chairperson of Committees to *name* another member for grossly disorderly conduct. However, the decision whether to do so remains with the Speaker or Chairperson.

Whenever a Member is named by the Speaker or the Chairperson, and if the breach is committed by such Member in the House, the Speaker may order the Member to withdraw from the Chamber and the precincts of the Assembly.

It is noteworthy that a Member who has been ordered to withdraw from the precincts of Assembly or has been suspended forfeits the right of access to the precincts of the Assembly except for instances when the suspended Member is to appear before a Committee of the House for the consideration of a Bill sponsored by the Member. Also, the Member forfeits his or her salary and allowances payable during the period.

The Standing Orders provide for the right of a Member to appeal in writing to the Committee of Privileges within three days of the suspension.

(ii) Disciplinary and penal powers of the House pertaining to members of the public

The House as a public institution relates with the public at various levels including admitting members of the public to the precincts of Parliament and to participate in proceedings of the House and committees.

While at the Public Gallery, Diplomatic Boxes or the Press Gallery, the provisions of the Constitution, the Standing Orders, the Parliamentary Powers and Privileges Act, the Speaker's Rules, relevant laws, codes, customs and usages apply.

In relation to the public, the House and committees exercise several powers, including:

- (a) *Power to call for evidence*
- (b) *Power to order withdrawal of the public*
- (c) *Penal Provisions under the Parliamentary Powers and Privileges Act*

6. Limitations of Parliamentary Powers, Privileges and Immunities

Disciplinary and Penal Powers

Although Standing Order 1(2) gives the Speaker discretionary powers to rely on usages, forms, precedents, customs and procedures of the Parliament of Kenya and other jurisdictions in cases where there are no express provisions in the Standing Orders on an issue that has arisen, the challenge arises on the applicability of these customs and usages. It is worth noting that some of the disciplinary and penal powers that the Houses exercise have been borrowed but are of ancient practice in other jurisdictions with no direct application under the current Constitution, parliamentary law and practice.

7. Challenges and emerging issues in parliamentary powers, privileges and immunities

Constitutionality of Section 7 and 11 of the Parliamentary Powers and Privileges Act

- *Apollo Mboya vs Attorney General, National Assembly and the Senate*

In this case, the Petitioner had challenged the constitutionality of Sections 3, 7 and 11 of the Parliamentary Powers and Privileges Act on grounds that the said provisions were inconsistent with and/or contravene the Constitution. The Petitioner claimed that Section 7 of the Act was premised on the ground that the section insulates legal officers and staff of Parliament from service of process from the Courts in Kenya exercising civil jurisdiction and that the section attempts to permit service of foreign court process within the precincts of Parliament to the exclusion of process of Courts in Kenya.

The Petitioner also challenged Section 11 of the Act on grounds that the section limits the right to fair administrative action and access to justice guaranteed under Article 47 and 48 of the Constitution; and that the section limits a right and fundamental freedom in the Bill of Rights contrary to Article 24 of the Constitution. He further averred that the section attempts to confer non-existent privileges and immunities on all staff of Parliament from Court process thereby elevating them above the law. He also claimed that the section insulates the proceedings or decisions of Parliament including the enactment of laws and appointment of public officers from scrutiny by the Courts in Kenya and that the section elevates Parliament beyond scrutiny by the Courts in Kenya even when there is a violation of the Constitution or infringement, denial or violation of rights guaranteed by the Constitution and the law contrary to Article 23 of the Constitution to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights in accordance with Article 165 of the Constitution.

He sought, among other prayers that a declaration be made that Section 3, 7 and 11 of Parliamentary Powers and Privileges Act (No. 29 of 2017) are inconsistent with and contravene the Constitution of Kenya, invalid, null and void.

Section 7 of the Act provided that *“No process issued by any Court in Kenya in the exercise of its civil jurisdiction shall be served or executed-(a) within the precincts of Parliament while either one or both Houses are sitting; or (b) through the Speaker or any officer of Parliament-(i) unless it relates to a person employed within the precincts of Parliament or attachment of a member’s salary; or (ii) if the subject matter relates to a member or members exercising their personal duties. Sub-section (2) provides that “The right of access to justice under Article 48 of the Constitution shall be limited as specified under this section for the purposes of facilitating the conduct of business and the affairs of Parliament.”*

Section 11 of the Act provided that *“No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.”* The Act defines proceedings as:- (a) *all things said, done or written by a Member or by any officer of either House of Parliament or by any person ordered or authorized to attend before such House or its committees, in or in the presence of such House or its committees and in the course of a sitting for the purpose of transacting the business of the House or its committees; and (b) all things said, done or written between Members or between Members and officers of either House of Parliament for the purpose of enabling any Member or any such officer to carry out his or her functions.*

Parliamentary immunity is designed to ensure the proper operation of Parliament. It confers specific rights and privileges to Members of Parliament, most importantly the privilege of freedom of speech. Indeed, freedom of expression is the working tool of Members of Parliament which enables them to do their job as representatives of the people, legislating, adopting the budget and overseeing the activities of the government. If they cannot speak out, criticize the government and investigate and denounce abuses because they fear reprisals by the executive branch or other powerful actors, they cannot live up to their role. Freedom of speech enables them to raise questions affecting the public good which might be difficult to voice elsewhere owing to the possibility of court action. They require immunity to freely express themselves without obstruction and without fear of prosecution or harassment of any kind.

An individual Member takes part in proceedings usually by speech, but also by various recognized kinds of formal action, such as voting, giving notice of a motion, etc; or presenting a petition or a report from a Committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers can also take part in the proceedings of the House, e.g. by giving evidence before one of its committees, or by presenting petitions for or against private bills. While taking part in the proceedings of the House, Members, officers and strangers are protected by the same provisions as that by which freedom of speech is protected, namely, that they cannot be called to account for their actions by any authority other than the House itself.

... Parliamentary immunity is not an individual privilege granted to Members of Parliament for their personal benefit,



Parliamentary immunity is not an individual privilege granted to Members of Parliament for their personal benefit, but rather a privilege for the benefit of the people and the institution which represents them, namely, Parliament. Parliamentary immunity ensures that Parliament can fulfill its tasks and function without obstruction from any quarter. Obviously, a Parliament can only work insofar as its Members are free to carry out their mandate. Immunity is therefore a prerequisite for ensuring that a Parliament can indeed function as an independent institution and vindicate its own authority and dignity.

The core of the privilege of freedom of speech is indisputably constituted by statements made from the floor of the House or in committees, bills or proposed resolutions and motions, written and oral questions, interpellations, reports made at the request of Parliament, and votes cast. These are protected by the absolute privilege of freedom of speech, as are generally documents which are ancillary to those matters, such as drafts of questions or notes. As stated earlier, absolute privilege means that such statements or acts cannot be challenged in court. Members of Parliament cannot therefore be sued for defamatory statements they make nor for statements that would otherwise constitute a criminal offence.

The Judge found that a reading of Section 11 leaves no doubt that it covers more than the immunity intended. It bars any person from challenging, in Court, decisions made by Parliament or its committees. The provision does not specify the nature of the decisions. It does not refer to immunity in the performance of Parliamentary duties. It seeks to shield Members' decisions from court scrutiny. It is an ouster or finality clause which restricts or eliminates Judicial Review. He added that in Kenya's constitutional dispensation, it is not Parliament, the Executive or the Judiciary that are Supreme, but the Constitution.

Traditionally, the courts have interpreted provisions ousting the jurisdiction of Courts narrowly, that is to mean that, the decision is still subject to judicial review. In other words, the decision under attack may be final on the facts but it is not to be regarded as final on the law.

Legislation can be nullified for being unconstitutional or on grounds that the process leading to its enactment was unconstitutional. A decision rendered by a Parliamentary Committee in the exercise of its quasi-judicial functions can be quashed for being *ultra vires*, *an error of law*, *unreasonable*, *illegal*, *arbitrary* or *for violating the Bill of Rights*. That is the mandate and sacred duty of the Court.

Parliament should be cautious about upsetting that balance by undercutting the constitutional power of the High Court to review constitutionality of legislations and decisions rendered by Parliamentary Committees. The High Court is entrusted under Article **165(2)(d)** with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the questions whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

The High Court cited the decision of the Supreme Court of India, which, on the question of ouster clauses in cases involving fundamental rights, stated that an ouster clause, no matter where placed, is wholly ineffective against the infringement of constitutional or natural justice rights. The High Court concluded that Section 7 of the said Act contravened Articles 165(2)(d), 48, 22, 24, 258, 1, 2, 3, 10, 19 of the Constitution.

While the Judge found that Section 3 of the Act left no doubt that it merely defined the precincts of Parliament and that there was nothing unconstitutional in the section, he ruled that Sections 7 and 11 did not pass the constitutional muster and were inconsistent with Articles 1, 2, 3, 10, 19, 20, 21(1), 22, 23, 24, 48, 50, 93 (2), 94 (4), 159, and 258 of the Constitution. He added that in the Kenyan constitutional dispensation, Judicial Review is part of the *basic structure* of the Constitution that cannot be excluded.

The court is mandated to assess the constitutionality of legislation, Executive actions and governmental policy. Therefore, part of the role of the Judiciary is to ensure that public authorities act lawfully and to serve as a check and balance on the Government's power. In the Kenyan constitutional dispensation, it is not Parliament, the Executive or the Judiciary that are supreme, but the Constitution. The court ruled that ouster clauses offend the constitutional principle of the rule of law because an aggrieved citizen is denied the possibility of access to the courts to challenge the decision affecting him or her.

CONCLUSION

Parliamentary powers, privileges and immunities are important for an effective legislature. The nature, scope and extent of the privileges enjoyed by each of the Houses of Parliament, are enjoyed *independently*. The Parliamentary Powers and Privileges Act provides for the powers, privileges and immunities of Members, committees, leadership, the Houses, parliamentary staff and witnesses, albeit with not so comprehensive a codification of the parliamentary privilege law in Kenya. However, the courts continue to develop jurisprudence in this area. The Houses of Parliament continue to develop mechanisms for ensuring parliamentary rights and privileges are safeguarded and protected.

REFERENCES

Erskine May (2019), Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 25th Edition

Marc Bosc and Andre Gagnon (2017), House of Commons Procedure and Practice, 3rd Edition

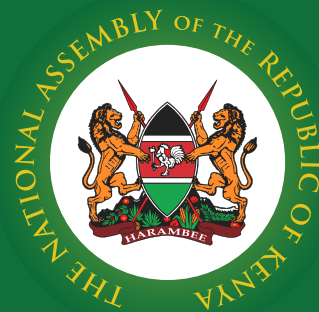
Republic of Kenya (2018), National Assembly Factsheets, National Assembly of Kenya

Republic of Kenya, (2010), The Constitution of Kenya, 2010, Government Printer, Nairobi, Kenya

Republic of Kenya, (2017), The Parliamentary Powers and Privileges Act, 2017, Government Printer, Nairobi, Kenya

Republic of Kenya, (2020), The National Assembly Standing Orders, 2020 (5th Edition), Government Printer, Nairobi, Kenya

Republic of Kenya, (2020), The Senate Standing Orders, 2020, Government Printer, Nairobi, Kenya



Published by:

The Clerk of The National Assembly
Parliament Buildings,
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Nairobi, Kenya.

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