PARLIAMENT OF THE REPUBLIC OF FIJI

PRIVILEGES COMMITTEE

TERMS OF REFERENCE

1. AUTHORITY

The Privileges Committee is a Select Committee of the Parliament of the Republic of Fiji automatically convened pursuant to Standing Order 123(1).

2. MEMBERSHIP

The membership is as set out in Standing Order 127 and announced in the Speaker's Communications on Friday 15 May 2015, with one substitution [Hon. Tupou Draunidalo substituting Hon. Salote Radrodro].

3. MATTER FOR CONSIDERATION

A referral of a matter of privilege by Madam Speaker.

4. COMMITTEE WORK PLAN

To be endorsed at the first meeting taking into consideration the Committee must report back to Parliament no later than Thursday, 21 May 2015.

5. **PROCESS**

The Committee to call evidence as may be necessary.

The Committee to call the member accused of breach of privilege to provide an explanation.

The Committee to call other relevant persons to provide clarification.

The Committee to finalise and table its Report in Parliament.

6. **MOTION TO BE MOVED IN PARLIAMENT**

APPENDIX II

Parliament of the Republic of Fiji

Privileges Committee Work plan

Referral of Matter by Madam Speaker on Monday 18 May 2015

Tuesday 19th May – Subject to Time of Adjournment		
2.00pm	Committee to listen to recordings and discuss	
3.00pm	Committee to Call Hon. Ratu Naiqama Lalabalavu	
3.30pm	Committee to Call other persons	To Be confirmed
4.00pm	Committee to Deliberate on Question of Breach	
	Close	
Wednesday 20th May – Subject to Time of Adjournment		
2.00pm	Committee to Consider Severity of Breach, if any	
3.00pm	Committee to Consider Sanctions, if any	
4.00pm	Committee to finalise Recommendations and Committee Report	
	Close	
Thursday 21st May		
9.30am	**Parliament to Sit**	
	Committee Report to be tabled subject to Order Paper	
	Tea Break	
	Motion on Committee Report to be Moved subject to Order Paper	
	Parliament Adjourns for the Day	

To be decided by Committee		
	Persons to be called in addition to Hon. Member, if any	

*All times are subject to adjournment of Parliament and other amendments made by the Honourable Members of the Committee.

APPENDIX III

Witnesses Called

1. Mr Vijay Narayan
2. Mr Semi Turaga
3. Hon. Ratu Naiqama Lalabalavu

APPENDIX IV

ELIGIBILITY OF ATTORNEY-GENERAL TO SIT ON PRIVILEGES COMMITTEE INQUIRY

I now wish to rule on a point of order raised by the Hon. Bulitavu regarding the eligibility of the Attorney-General to sit on the Privileges Committee inquiry as he was the mover of the motion referring the allegation of breach of privilege to the committee.

A member may not sit on a committee if he or she has a direct pecuniary interest or a personal interest in a matter under inquiry by the committee. In my opinion, personal interest should be interpreted in the very narrow sense of an interest peculiar to a particular person.

In this instance, the eligibility of the Attorney-General to sit on the committee is acceptable because firstly, there is no claim of him having a direct pecuniary interest in the inquiry, and secondly, in my opinion the Attorney-General does not have a personal interest to the extent where he might derive a personal benefit from the outcome.

In my view, the Attorney-General simply moved the motion on behalf of the Government and may well have not moved it himself had the Prime Minster been in attendance.

I therefore rule that there is no impediment to the Attorney-General participating in the inquiry.

Finally, I take this opportunity to also advise Members that it would assist the Committee's process if Members refrained from further discussing the matters under consideration in the House until the report is presented. There will be ample opportunity to debate the issues after that time.

Privilege Ruling

Last week the Hon. Roko Tupou Draunidalo raised a matter of privilege in the House. I will now make my ruling.

The essence of the matter raised was that the requirements of the Public Order Act requiring members to get a permit for holding public meetings with constituents is an infringement of the rights of the Member.

In ruling on this matter, regard must be had to the principle of the protection of the proceedings in Parliament. Members will be aware that freedom of speech and debates on proceedings in Parliament enjoy absolute protection. As well as debates in the Chamber, this protection extends to proceedings in committees. It may be that a meeting with constituents is related to the proceedings of Parliament—for example, perhaps a meeting is to give a member information for them to use for a speech in the House.

However, while members' work with constituents is a very important and a large part of their job as a Member of Parliament, it does not fall within the definition of proceedings in Parliament and therefore protected by Parliamentary Privilege.

The Public Order Act makes clear the requirement to obtain a permit and all members are required to comply with, and are bound by, the provisions of the law.

I therefore rule that there has been no breach of privilege in this matter.

APPENDIX V

Robati v Privileges Standing Committee - Judgment 1 [1994] CKCA 2; CA 156.1993 (7 February 1994)

IN THE COURT OF APPEAL OF THE COOK ISLANDS
CA No. 156/93

BETWEEN

PUPUKE ROBATI
of Rarotonga, Member of Parliament
Plaintiff

AND

THE PRIVILEGES STANDING COMMITTEE
of the Parliament of the Cook Islands
First Defendant

AND

THE SPEAKER
of the Parliament of the Cook Islands
Second Defendant

Coram: Quilliam J.A. (Presiding)
Barker J.A.
Dillon J.A.

Counsel: Mr McFadzien, Solicitor General and
Dr G.P. Barton Q.C. for Defendants
Mr B.H. Giles, Mr M.C. Mitchell and Mrs S.R.A. Anderson for Plaintiff

Hearing: 17 December 1993
Date of Judgment: 7 February 1994

JUDGMENT OF QUILLIAM J.A.

A motion by the Defendants to strike out an action commenced by the Plaintiff in the High Court has been removed into this Court. It concerns an important constitutional question which requires determination as to the jurisdiction of the Courts to review the proceedings of Parliament.

It is necessary first to set out the facts alleged in the Plaintiff's Statement of Claim and it needs to be noted that, for the purposes of an application to strike out, it must be assumed that the facts alleged will be capable of proof.

The Facts

The Plaintiff is a member of the Cook Islands Parliament. The first Defendant is a Standing Committee established by Parliament pursuant to its Standing Orders. The second Defendant is the Speaker of the Parliament.

On 13 July 1993 the First Defendant ("the Committee") considered and made recommendations to Parliament in Parliamentary Paper No. 9 ("Paper No. 9") in respect of disciplinary offences in relation to Parliamentary conduct.

On 23 August 1993 the Plaintiff spoke in Parliament in a debate on what was known as Parliament Paper No. 6 concerning a report on an audit of the country's financial statements. On 24 August the Speaker permitted Paper 9 to be tabled in the House. On 27 August Parliament resolved to accept and adopt Paper 9 to be effective as and from the date on which it was tabled, namely 24 August.

On 29 September 1993, in accordance with a resolution of Parliament, the Speaker issued a summons to the Plaintiff requiring him to attend before the Committee to answer a charge expressed in these terms:

"That the Honourable Member Dr Pupuke Robati, Member for Rakahanga be referred to the Privileges Standing Committee pursuant to the recommendations of the Privileges Standing Committee following its meeting on 13 July 1993 and tabled in this House on Tuesday 24 August 1993 on the grounds that the Honourable Member Pupuke Robati made a wilfully misleading statement in this House on Monday 23rd August 1993 when he alleged inter alia that the Honourable Vincent Ingram, Member for Mikao/Panama-

(a) is being paid above his Member of Parliament salary in an amount exceeding $200,000;

(b) that this sum is being deducted from $7 million appropriated for ECIL;

(c) and that the ECIL car in Auckland was not being utilised for the work of the Sheraton and ECIL but family purposes."

The Plaintiff appeared before the Committee in answer to the summons. He requested the right to be represented by counsel, but this was declined. The Committee then considered the charge and in due course made a finding that the actions of the Plaintiff did not amount to a deliberate act to mislead the House and the public.

The Committee then submitted a report to Parliament on the hearing of the charge and, notwithstanding its findings, recommended that the Plaintiff be ordered to make himself available in Parliament to:

"10.1 (a) Apologise fully to the Honourable Member Vincent Ingram for the misleading and damaging allegations he made against the Honourable Vincent Ingram on 23 August 1993.

(b) Apologise fully to the members of the family of the Honourable Member Vincent Ingram for the disparaging remarks Dr Robati made against that family on 23 August 1993.

(c) Fully and completely retract all those misleading, erroneous, and damaging allegations against the Honourable Member Vincent Ingram and his family.

10.2 That the apology and retraction by the Honourable Member Dr Pupuke Robati are to be acknowledged by the Chairman of the Privileges Committee.

10.3 That an approved copy of the set of apologies and retractions be broadcasted and publicized over the National Radio, the Cook Islands Television and the Cook Islands News."

The Speaker then gave the Plaintiff notice to make the apologies referred to. On 19 October 1993 the Plaintiff was suspended from Parliament until such time as he tendered the apology referred to.

It needs to be observed that the terms of Paper 9 have not been pleaded and so this Court is not aware whether it created the offence with which the plaintiff was charged, nor whether it created some lesser offence of misleading Parliament although without having done so wilfully. For present purposes, however, the Court must assume that Paper 9 did at least create the offence of wilfully misleading Parliament. It must also be noted that, in terms of the Speaker's summons to the Plaintiff, it was pursuant to Paper 9 that the Committee was required to consider the charge against the Plaintiff.

The Plaintiff's Claim

On the basis of these allegations of fact the Plaintiff's claim is:

1. That, in accordance with the principles of natural justice, he was entitled to be represented by counsel at the hearing conducted by the Committee.

2. That, in accordance with Standing Orders, he could not in any event have been suspended from Parliament for a period exceeding 7 days.

3. That as the resolution of Parliament adopting Paper 9 was made retrospective only to 24 August, it could not have given the Committee or Parliament power to deal with a charge in respect of a matter occurring prior to that date. The Plaintiff has accordingly claimed that the proceedings and decisions of the Defendants in respect of what occurred were ultra vires, in excess of jurisdiction and/or without jurisdiction and/or were unreasonable or unfair and has sought declarations to that effect.

The Motion to Strike Out

By way of a preliminary response to the Statement of Claim the Defendants had moved to strike out the Plaintiff's action on the ground that, in accordance with the Constitution, the High Court does not possess jurisdiction to hear and determine the action or grant the declarations sought.

This motion raises the important constitutional question of the extent to which, if at all, the Courts have the jurisdiction to review and pronounce upon the proceedings of Parliament, and it will have been for this reason that the motion was removed into this Court.

The Statutory Provisions

The Plaintiff relies upon Articles 64 and 65 of the Cook Islands Constitution Act 1964, namely:

"64. Fundamental human rights and freedoms - (1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms:

(a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;

(b) The right of the individual to equality before the law and to the protection of the law;

(c) The right of the individual to own property and the right not to be deprived thereof except in accordance with the law:

Provided that nothing in this paragraph or in Article 40 of this Constitution shall be construed as limiting the power of Parliament to prohibit or restrict by Act the alienation of Native land, (as defined in section 2(1) of, the Cook Islands Act 1915 of the Parliament of New Zealand);

(d) Freedom of thought, conscience, and religion;

(e) Freedom of speech and expression;

(f) Freedom of peaceful assembly and association.

(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands."

"65. Construction of law - (1) Subject to subclause (2) of this Article and to subclause (2) of Article 64 hereof, every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof, and in particular no enactment shall be construed or applied so as to-

.....

(d) Deprive any person of the right to a fair hearing, in accordance with the principals of fundamental justice, for the determination of his rights and obligations before any tribunal or authority having a duty to act judicially; or

(e) Deprive any person charged with an offence of the right to be presumed innocent until he is proved guilty according to law in a fair and public hearing by an independent and impartial tribunal; or

.....

(g) Authorise the conviction of any person or any offence except for the breach of a law in force at the time of the act or omission;"

"(2) Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal attainment [[of the object]] of the enactment or provision thereof according to its true intent, meaning and spirit."

"(3) In this Article the term "enactment" includes any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom, being an Act in force in the Cook Islands, and any regulation, rule, order, or other instrument made thereunder."

The Defendants place reliance on:

"34. Procedure

(5) Subject to the provisions of this Constitution, Parliament may from time to time make, amend, and repeal Standing Orders for the regulation and orderly conduct of its proceedings and the dispatch of business."

"36. Privileges of Parliament and of its members - (1) the validity of any proceedings in Parliament or in any committee thereof shall not be questioned in any Court.

(2) No officer or member or Speaker of Parliament in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any Court.

(3) No member or Speaker of Parliament and no person entitled to speak therein shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament or in any committee thereof.

(4) No person shall be liable to any proceedings in any Court in respect of the publication by or under the authority of Parliament of any report, paper, vote or proceeding.

(5) Subject to the provisions of this Article, the privileges of Parliament and of the committees thereof, and the privileges of members and the Speaker of Parliament and of the persons entitled to speak therein may be determined by Act:

Provided that no such privilege of Parliament or of any committee thereof may extend to the imposition of a fine or to committal to prison for contempt or otherwise, unless provision is made by enactment for the trial and punishment of the person concerned by the High Court."

Reference also needs to be made to s.4A of the Legislative Assembly Powers and Privileges Act 1967:

"4A Privileges of Assembly Subject to the provisions of the Constitution, the Assembly and the Committees and Members thereof shall have, hold, enjoy and exercise the like privileges, immunities and powers as are held, enjoyed and exercised by the House of Commons of the Parliament of Great Britain and Northern Ireland and by the Committees and Members thereof whether such privileges, immunities and powers are held, possessed or enjoyed by custom, statute or otherwise, and the Leader of the House may at any time give such instructions an may be necessary to ensure the orderly progress of parliamentary business and which are authorised or notified by the Assembly."

The jurisdiction of the High Court is contained in Article 47 of the Constitution and, in particular, Article 47 (2):

"47(2) Except as provided in this Constitution or by law, the High Court shall have all such jurisdiction, including jurisdiction (both civil jurisdiction, including jurisdiction in relation to land, and criminal jurisdiction) as may be necessary to administer the law in force in the Cook Islands."

Finally in respect of the principal statutory provisions, reference was made to Article 9 of the Bill of Rights 1688 (Eng.):

"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court of place out of Parliament."

The Constitutional Principles

In a full and careful submission Dr Barton on behalf of the Defendants placed great reliance upon the words of Article 36(1) set out above, and upon the cases in England in particular which have, in effect, upheld the principle of the freedom of proceedings in Parliament from the scrutiny of the Courts. I do not refer in detail to those cases because the general principle appearing from them is well recognised and has not been contested in this case. The real question, however, concerns what truly are the "proceedings" of Parliament and whether the principle is absolute or permitting of exceptions.

I have derived considerable assistance from some decisions of Courts in countries which, like the Cook Islands, have a written constitution. In particular, a decision, of the Supreme Court of Zimbabwe is one with marked similarities to the present case. This was the case of *Smith v Mutasa & Another* (1990) 1 LRC (Const.) 87. It concerned the former Prime Minister of Zimbabwe (previously Southern Rhodesia) who was a member of the House of Assembly of the new country. He had, while visiting the United Kingdom, made remarks derogatory of the black people and their representatives in Zimbabwe. He was found guilty of a contempt of Parliament. He subsequently made further remarks of a similar kind and was then suspended by the House of Assembly for a year and deprived of his salary and allowances. He applied to the High Court for an order restoring his salary and allowances. The Speaker gave a certificate that the matter was one of privilege and the High Court held that the proceedings should thereupon be stayed on the basis that they had been finally determined. On appeal from the decision the Supreme Court

allowed the appeal on the ground that there was no legal authority for the suspension of the remuneration.

While the Supreme Court was prepared to uphold the right of Parliament to deal with matters of privilege without scrutiny by the courts, and upheld also the principle of the supremacy of Parliament, it drew a distinction in the case of Parliament having acted unlawfully and contrary to its Constitution. In that case Parliament had the power to deal with Smith in respect of his remarks as a matter of privilege, but none of the prescribed penalties for such a matter included the power to suspend salary. Parliament had accordingly purported to act beyond its legal powers, and the Supreme Court was prepared to accept jurisdiction to deal with the matter.

That decision is one of compelling persuasion in the present case. If it is the case that the Committee purported to deal with the Plaintiff on 23 August for an offence which did not come into existence until the following day (and for present purposes we must accept that it did so) then the Committee was acting contrary to the provisions of Article 65(1)(g) and so in a manner which was unconstitutional. In such circumstances it must be proper for the Court to intervene.

In *Smith v Mutasa* the Court summarised the position at p 94 in this way:

"The Constitution of Zimbabwe is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds of the authority prescribed it by the Constitution."

This comment has obvious application to the present case.

To similar effect are the observations of Barwick CJ in *Cormack v Cope* [1974] HCA 28; (1974) 131 CLR 432 at p.453:

"Whilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law making is not properly carried out."

And later, at p.464:

"Second, it is not the case in Australia, as it is in the United Kingdom, that the Judiciary will restrain itself from interference in any part of the law-making process of the Parliament. Whilst the Court will not interfere in what I have called the intra-mural deliberative activities of the House, including what Isaacs called 'intermediate procedure' and the 'order of events between the House', there is no ⇦ **Parliamentary privilege** ⇨ which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law making are observed."

While there may be considerable doubt as to the Plaintiff's claim that he had the right to representation by counsel before the Committee, there seems little doubt that, accepting the facts as pleaded, there was never any constitutional right for Parliament to have dealt with the Plaintiff for an offence which did not exist at the time it was alleged to have been committed, nor to have

imposed an indefinite suspension in the absence of any provision in the Constitution permitting such a course.

Notwithstanding the characteristically thorough argument presented on behalf of the Defendants, I am satisfied that this Court has both the jurisdiction and the duty to allow the Plaintiff' s action to proceed. Perhaps I should add that, if the facts are indeed as pleaded, then appropriate steps could well be taken for the Defendants to correct what has happened without the need for the action to proceed further.

The members of the Court being agreed on the result, the Defendants' application to strike out is declined, with costs to the Plaintiff.

QUILLIAM J.A.

Butadroka v Attorney-General of Fiji [1993] FJHC 55; Hbc0208j.1993s (18 June 1993)

IN THE HIGH COURT OF FIJI
[AT SUVA]
CIVIL JURISDICTION

CIVIL ACTION NO. HBC0208 OF 1993

BETWEEN:

SAKEASI BUTADROKA
of Queens Road, Naboro, Fiji.
PLAINTIFF

AND

ATTORNEY-GENERAL OF THE SOVEREIGN DEMOCRATIC REPUBLIC OF FIJI
DEFENDANT

Mr. S. Stanton (Of the New South Wales Bar)with
Mr V. Parmanandam for the Plaintiff
Mr. A. Cope with Mr. W. Rigamoto for the Defendant

Date of Hearing: 7th, 8th, 9th and 15th of June, 1993
Date of Delivery of Judgment: 18th day of June, 1993

JUDGMENT

In the case before the court the Plaintiff, by way of Originating Summons seeks the following Declarations:-

1. A Declaration that in the events that have occurred the suspension of the Plaintiff purported to be pursuant to Standing Orders of the House of Representatives of Fiji (hereafter S.O.) and in particular SO 66(4)(a) and/or SO 30(4) and 30(5) was:

(a) null and void and of no effect in that it was contrary to the manner and form of the SO; and

(b) was in excess of the jurisdiction conferred; and

(c) did not represent in fact or otherwise a proper exercise of a privilege or the adjudication into the question of whether there had been a breach of the S.O. or any such privilege; and

(d) was null void and of no effect on account of the fact that the Plaintiff was denied natural justice in all the circumstances.

2. A Declaration that in the circumstances the suspension of the Plaintiff from attending the House of Representative of Fiji was contrary to the Standing Orders in that there was:

(a) no ground available and/or applicable in respect of SO 30 in the circumstances;

(b) no certificate was sought nor produced in compliance with SO 30(3) in respect of the alleged conduct of the Plaintiff amounting to a breach of privilege;

(c) there was a total failure to comply with and/or implement the due observance of the manner and form of the procedure of SO 30 and 31.

3. A Declaration that in the circumstances that have occurred the SO of the House of Representatives of Fiji are or have the tendency to infringe the fundamental freedoms of the Constitution of Fiji in that:

(a) they fail to ensure secure protection of law contrary to s.ll of the Constitution;

(b) they fail to provide and/or ensure freedom of expression contrary to s.13 of the Constitution;

(c) they fail to allow and/or protect freedom of assembly and association and conscience contra to ss.15 and 12 of the Constitution.

4. A Declaration that the suspension of the Plaintiff on the Report of the Select Committee of a Privilege was null void and of no effect on account of the fact that the Plaintiff was denied natural justice.

5. A Declaration that in the events that had occurred the Plaintiff having been dealt with and suspended from attending the House of Representatives for 3 (THREE) days such suspension to occur on and from 20th April, 1993 the matter was of at an end and all parties were functus officio."

The facts are as follows. The Plaintiff is the elected member for the Constituency of Rewa Province in the House of Representatives in the Parliament of Fiji. During the April 1993 sittings of the Parliament the Plaintiff took part in the debates of the House of Representatives. On Monday the 19th of April members of the House spoke against the Plaintiff because of alleged opinions he held in relation to a prominent member of Fijian society. After the morning tea adjournment the Plaintiff was accused in the House by some members of creating instability within Fiji, and damaging national unity. Reference again was made to the Plaintiff's opinion concerning the respected member of Fijian society.

During the course of debate the Plaintiff took offence at the accusations made against him, and when he replied he spoke in equally strong terms in defence of himself. During the course of the Plaintiff's reply, the Speaker began to interrupt him and called him to order. The interruptions by the Speaker increased and eventually the Plaintiff and the Speaker began to raise their voices and shouted at each other. The House then adjourned.

On Wednesday the 21st of April the House of Representatives reconvened and the Plaintiff resumed his speech. Shortly after resuming, another member of the House interjected with a point of order which the Speaker began to adjudicate upon. The Plaintiff began to repeat the matter raised by the interjecting member and was ordered by the Speaker to withdraw certain remarks made by him. The Plaintiff questioned the Speaker in this regard and then became involved in another heated exchange with yet another member of the House. The Speaker again reprimanded the Plaintiff and indicated that he would be stopped from speaking further if he did not behave. The Plaintiff continued speaking and was interrupted by a member who sought a ruling from the Speaker on a point of order. Debate then took place on the point of order which had been raised. When the Plaintiff resumed his speech another member raised a further point of order for the Speaker to rule on. The Speaker discontinued the Plaintiff's speech and the Plaintiff again remonstrated with the Speaker over being discontinued. The Speaker then ordered the Plaintiff to leave the House which he did.

After the luncheon adjournment on that day the Plaintiff was advised in writing that he had been suspended from the House of Representatives for three sitting days and that he could resume his seat on Monday the 26th of April.

When the Plaintiff resumed his seat on the morning of Monday the 26th of April he was served with a copy of a report of the Select Committee of the House of Representatives on Privileges concerning his alleged breach of privilege in the House on Wednesday the 21st of April.

The report recommended that the Plaintiff be suspended from the House of Representatives for the June/July sittings of the Parliament. The House then resolved in accordance with the recommendation and the Plaintiff is now so suspended.

The issues to be determined in this case are as follows:-

1. ***To what extent, if at all, are the actions of the Speaker, committees and members of the House of Representatives within the internal proceedings of the House, subject to the scrutiny and control of the High Court?***

2. ***Do all the general provisions of the Constitution of Fiji apply to the internal proceedings and privileges of the Parliament, in particular Sections 11, 12, 13, 14 and 15 set out in Chapter 2 therein?***

3. ***Did the manner in which the Speaker applied the Standing Orders of the House of Representatives against the Plaintiff, and his ultimate suspension from the House of Representatives amount to a violation of his guaranteed constitutional rights set out in Ss. 11, 12, 13, 14 and 15 of the Constitution, and thus render the Plaintiff's suspension void?***

4. ***Are the Standing Orders of the House of Representatives unconstitutional?***

The Standing Orders of the House of Representatives could fairly be described as occupying the

position of the statute law of the House relating to its internal proceedings. They are to all intents and purposes rules for regulating the procedure of the House of Representatives, their chief characteristic being to make provision for the efficient and effective progress of the business of the House by checking and limiting the opportunities for debate.

The Standing Orders are concerned to see that all the members of the House of Representatives are given an opportunity to participate in the debates of the House. The position and role of the Speaker in this scheme is to act as a neutral referee whose duty is to ensure fair play in this regard. As one of the principal features of Parliament is debate, the position and powers of the neutral Speaker are of paramount importance with regard to the limiting of debate.

The power to limit and control debate is set out in Standing Order 39. Under that Standing Order the Speaker is vested with a wide discretion in order to ensure equal opportunity and fair play during the debates of the House. An adjunct to this is the power of the Speaker to enforce his decisions and maintain the order of the House. The ultimate authority on the matter of order etc. is the House itself, however, the Speaker occupies the position of Chief Executive Officer of the House by whom the rules set out in the Standing Orders are enforced. Standing Order 42 invests the Speaker with wide powers and discretion in dealing with breaches of order. This ranges from reprimanding a member and discontinuing his speech, to suspending him from the House. Standing Order 42(8) empowers the House of Representatives to deal with any breach of order of the House in any way it thinks fit.

Closely associated with the application of Standing Orders with regard to the maintenance and control of the order of the House of Representatives is the application of the privileges enjoyed by the members. I can do no better than quote from the 21st edition of "PARLIAMENTARY PRACTICE" by Mr. Erskine May at page 69 in this regard. At that page the learned author states:-

"⇦ Parliamentary privilege ⇨ is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, 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. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members. When any of these rights and immunities is disregarded or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament."

If a member breaches the privileges of the House he is then liable to be punished under Standing Orders.

One of the privileges of Parliament is the right to the exclusive cognizance of its own internal proceedings. Such principle was clearly established in England in 1689 with the enactment of Article 9 of the Bill of Rights. Article 9 states:-

"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."

This had the effect of making the House of Commons in England the sole Judge of its own proceedings and empowering it to settle its own code of procedure. The House of Commons thus became the sole Judge of the lawfulness of its own proceedings and was able to depart from its own procedure without having such departure questioned in a court of law. This was the case even where the procedure of the House, or the right of the member to take part in the proceedings of the House was ensured under statute.

In BRADLAUGH v GOSSETT (1883-4) 12 QBD 271 the court gave unqualified recognition to the principle obtaining under the Bill of Rights by authoritatively pronouncing on its own incompetence to inquire into the internal proceedings of the Houses of Parliament.

With regard to the House of Commons procedures, COLERIDGE C.J. at 274 said that the House:-

".....as for certain purposes and in relation to certain persons it certainly is, and is on all hands admitted to be, - the absolute judge of its own privileges, it is obvious that it can, at least for those purposes and in relation to those persons, practically change or practically supersede the law."

His Lordship Mr. Justice Stephen expressed the view that even if the House of Commons prohibited a member of the House from doing what a statute required him to do, and in order to enforce the prohibition, excluded the member from the House, the Court had no power to interfere. In this regard, he said at p.278:-

"I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable.....The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."

Further, at p.280 he said:-

"It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly."

The proceedings of the Houses of Parliament relate to the formal actions such as the business of the House of which a principal aspect is debate. A member takes part in the proceedings of the House by debating, and voting etc. The House of Commons Select Committee on the Officials Secret Act in l938-39, when reporting on the meaning of the term "proceeding" described it as covering:-

".....both the asking of a question and the giving of written notice of such question, and includes everything said or done by a Member in the exercise of his functions as a Member in a committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. .....While taking part in the proceedings of a House, Members, officers and strangers are protected by the same sanction 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."

See "PARLIAMENTARY PRACTICE" by E May 21st Ed. at p.92.

The question of jurisdiction between the Court and the Houses of Parliament in relation to their privileges and proceedings is not new, but has been litigated at various times over the past 500 years.

From the mid 1400s attempts were made by litigants to have the High Court intervene in questions concerning the privileges and proceedings of Parliament. These attempts were always unsuccessful, the court holding that there was a body of law known as the Law of Parliament which was not part of the general law and was therefore not known to the common law of the realm and was thus not justiciable nor reviewable by the courts of judicature.

In the 19th century the court continued to hold that the proceedings and privileges of the Houses of Parliament were part of the Law of Parliament and not part of the general law, and thus not reviewable in the High Court.

In 1836 in STOCKDALE v HANSARD 3 state TR NS 748, the court accepted that the House of Commons had exclusive jurisdiction over its own internal proceedings and privileges, and that the court could only determine whether a particular claim fell within that category and inquire no further.

As mentioned previously the case of BRADLAUGH V GOSSETT (1883-4) 12 QBD 271, established that in matters relating to its own internal management, procedure and privileges the House of Commons had an exclusive jurisdiction which was not reviewable by the High Court even if the House wrongly interpreted a statute prescribing rights within the House itself. This

would also apply to Standing Orders.

In recent times in the United Kingdom the courts have continued to recognise the need for an exclusive jurisdiction of the Parliament in this area as being necessary for the maintenance of the dignity of the Houses of Parliament. The courts have held that when a matter is a proceeding of the House of Commons commencing and terminating within the House itself it is outside the jurisdiction of the court. However the view has been expressed that if a proceeding of the House affected the rights of persons exercisable outside the House, the jurisdiction of the court might be invoked so as to inquire whether the act complained of was duly covered by the privilege of the House.

In BRITISH RAILWAYS BOARD v PICKIN (1973) QBD 231, Lord Denning said at p.231:-

"In my opinion it is the function of the Court to see that the procedure of Parliament itself is not abused, and that undue advantage is not taken of it. In so doing the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament, and, I might add in aid of justice."

As powerful a statement as that is in going against the established principle of the inviolability of the internal proceedings of Parliament by the courts, and by as eminent a jurist as Lord Denning, the House of Lords (See (1974) WLR 208) in overruling the decision in that case took an equally strong opposing view re-affirming the traditional position based on the 19th century authorities that a court could not inquire into the internal proceedings of Parliament. Lord Reid held that the authorities for the past century supported that conclusion. Lord Simon of Glaisdale held that any other conclusion would impeach the proceedings of Parliament contrary to Article 9 of the Bill of Rights.

In R v THE SECRETARY OF STATE FOR TRADE AND OTHERS, Exp. ANDERSON (1983) 2 ALL ER 233 Dunn LJ held that for a court to inquire into what had been said or done within the walls of Parliament during its proceedings for the purposes of Judicial Review of those proceedings, would be contrary to Article 9 of the Bill of Rights.

The Development of the case law in the United Kingdom over the last 500 years is clear. The High Court will not, in fact considers that it cannot, inquire into the internal proceedings and privileges of the Houses of Parliament even where the House, or an officer of the House has misinterpreted or misapplied the statute law, or, I might add, the rules of The House itself under Standing Orders.

POSITION IN FIJI

I now turn to consider firstly the relevant statute law as applies in Fiji.

Section 2 of the 1990 Constitution states:-

"This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void. "

Section 6l of the Constitution recognises the supremacy of the Constitution within the realm of law making for Fiji. Section 61 states:-

"Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Fiji."

These sections make clear that a law enacted by Parliament which breached the provisions of the Constitution would be void and of no effect. Parliament in its legislative role is thus clearly subordinate to the provisions of the Constitution with respect to law making for Fiji in general. While Section 6l addresses itself to the legislative power of the Parliament for Fiji as a whole, Section 63 focuses on regulating the internal procedures of each of the Houses of Parliament. Section 63(1) states:-

"S.63(1) Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may make rules for that purpose, including, in particular, the orderly conduct of its own proceedings."

This subsection gives the mandate to each House of Parliament to regulate its own procedure and make rules relating thereto, subject to the provisions of the Constitution. This would appear to be the subsection under which the Standing Orders of the House of Representatives are made, as these orders deal with matters such as the transaction of the business of the House, order of business, debating and passing of bills, committees etc. Standing Orders along with Parliamentary Practice and Rulings of the Speaker from the Chair form the rules of procedure for regulating the smooth flow of the business of the House. The House can make, amend and alter any of its rules or orders in this regard provided that such rules or orders do not offend or violate the provisions of the Constitution applicable under that subsection.

Thus, it would appear that under that Section 63(l) the same principles apply to each of the Houses of Parliament internally as apply to the Parliament externally under Section 6l, to the extent that any Standing Order or Rules of Procedure which are inconsistent with, or violate an applicable provision of the Constitution, would be void and of no effect.

Under Section 63 (3) Parliament is empowered by the Constitution to provide for the Powers, Privileges and Immunities of each House, its Members and Committees. Section 63 (3) states:-

"Parliament may, for the purpose of the orderly and effective discharge of the business of each House, make provision for the powers, privileges and immunities of each House and the committees and members thereof."

This subsection would appear to be that which confers on the Parliament the power to grant to each House, its committees and members their privileges and immunities in addition to the powers to apply and enforce their own Standing Orders and regulations made under Section 63(l). For example, the power of the Speaker under Standing Orders to limit debate, keep order and suspend a member from the House etc. It is interesting to note that this subsection is not made subject to the provisions of the Constitution.

How have the courts in Fiji interpreted the application of Section 63 of the Constitution to the internal proceedings of Parliament? In l973 in the case of JAMES MADHAVAN v JOHN NIEL FALVEY AND OTHERS 19 FLR l40, the Fiji Court of Appeal was called upon to consider this question. While dealing with the provisions of the l970 Constitution, those provisions are in identical terms to their counterparts in the l990 Constitution. For the sake of ease I will refer to the sections considered in that case by their Section numbers in the l990 Constitution. In that case the manner in which the position of the Speaker of Parliament was occupied during a sittings of the House of Representatives was challenged in the High Court. The Defendants were successful in having the Plaintiffs application struck out as disclosing no reasonable cause of action on the grounds that the matter related to the internal proceedings of the House of Representatives which were not cognizable in the High Court. The Plaintiff appealed to the Court of Appeal.

The facts of the case were that the Appellant was a member of the House of Representatives. At the end of a duly convened sittings the Speaker adjourned the House under Standing Orders. The Respondents objected to the adjournment and physically took over the House and the fifth Respondent purported to sit as Deputy Speaker. The Appellant sought amongst other things a Declaration from the High Court that the actions of the fifth Respondent in physically taking over the chair of the Speaker, and sitting as Deputy Speaker when the Speaker was still present was a breach of Section 67(1) of the Constitution. Section 67(1) states:-

"The Speaker or in his absence the Deputy Speaker or in their absence a member of the House of Representatives (not being a Minister or Assistant Minister) elected by the House for the sitting or sittings shall preside at any sitting of the House."

The Court of Appeal held inter-alia that:-

1. The privilege of the House of Representatives to control its own proceedings had become part of the Law of Fiji unless the Constitution otherwise required, and,

2. The House of Representatives had exclusive control over its own internal proceedings under Section 63 (1) of the Constitution, and,

3. The decision as to whom should preside as Speaker of the House was exclusively one of internal procedure and not reviewable in the Court.

Their Lordships took the view that by Section 2 of the Constitution it was the supreme law of Fiji and that to the extent that the privilege of the House of Representatives having control over its own proceedings, was inconsistent with the Constitution then, to the extent of the inconsistency the privilege would be void. However, their Lordships held that the internal proceedings of the House of Representatives could not be inquired into by the court. In relation to the alleged breach of Section 67(1) of the Constitution by the Respondents, their Lordships stated that the court could only ascertain whether the requirements of Section 67(1) had been met in so far as the Speaker, Deputy Speaker or an elected member had in fact presided at the sittings. Such a view would be in accordance with the requirements of the Constitution in relation to its application to the privilege of Parliament to control its own proceedings. The application of that principle did not however extend to reviewing the internal proceedings by which one of the persons mentioned in Section 67(1) came to so preside, or the manner in which they came to so preside. That was a matter for the House of Representatives itself to determine free from the interference of the court.

In this regard their Lordships said at p. 148 lines D-G and following:-

"With respect we agree entirely with what the Chief Justice has said there about the purpose of Article 57(l) [S.67(1)] being to ensure that there will be someone to preside over the sittings of the House. At least in part, it is procedural but, unlike most procedural matters, it has been made a part of the Constitution. That being so, it must be a provision of the Constitution within the wording of Article 97 [S.113] and contravention of its terms may, provided the other requirements of Article 97 [S.113] are fulfilled, be the subject of an application to the Supreme Court under that Article. The Court would have jurisdiction to ascertain whether there had been a contravention. The Constitution is, by Article 2 thereof, the supreme law, and to any extent that the ⇦ Parliamentary privilege ⇨ was inconsistent with it, but only to that extent, the privilege would be void.

It is to be noticed that in an example given by Stephen J. in <u>BRADLAUGH V GOSSETT (supra) at p.278, he says -</u>

"The legal question which this statement of the case appears to me to raise for our decision is this:- Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable."

It is one of the functions of a Court so to construe the law as to avoid conflict, if that can properly be done. The passage just quoted from the judgment of Stephen J. indicates that even the statute law will not be examined by the Courts if it relates to the internal proceedings of the House. We think it both permissible and proper to apply that approach to Article 57(l)[S.67(1)] and to hold that the basic requirements that the Speaker, Deputy Speaker or elected Member shall preside are constitutional, and if material business is transacted at a

sitting of the House not so presided over it may be a contravention of the Constitution challengeable (by a person qualified) under Article 97[S.113]. But the decision which of the persons mentioned shall preside is essentially one of internal procedure, which must necessarily be resorted to by the House in deciding the question. In that sphere the privilege mentioned continues to operate and the Courts may not inquire whether the House has interpreted the law correctly or not."

Thus, as I understand it, the decision in Madhavan's case established that the privilege of the House of Representatives of Fiji to control its own internal proceedings was part of the law of Fiji. Also, the House of Representatives has exclusive control over its own internal proceedings. As such, the internal proceedings of the House of Representatives are not subject to the jurisdiction of the Court. The High Court can only inquire into the internal proceedings of the House where it can do so in its capacity as guardian of the Constitution, and that will only be where the internal proceedings of the House are specifically provided for in the Constitution, such as found in Section 67(1) where the Constitution specifically sets out the requirement that someone must preside at a sittings of the House of Representatives and defines whom it is that should preside. The jurisdiction of the court to inquire in such an instance being based on the fact that a part of the internal procedure of the House of Representatives has been specifically incorporated as a provision of the Constitution.

It follows from this, that where a procedure of the House of Representatives is not specifically incorporated into the Constitution then the High Court has no jurisdiction to inquire into the internal proceedings of the House. From this it would further follow that the manner of the application of Standing Orders by the Speaker, and the activities of the privileges committee, in matters concerning the internal proceedings of the House of Representatives, unless specifically provided for in the Constitution, are not cognizable in the court.

Other relevant legislation which should be considered as supportive of this view is Article 9 of the Bill of Rights of 1689. By virtue of Section 22(1) and Section 24 of the Supreme Court Act Cap 13, Article 9 of the Bill of Rights is part of the Law of Fiji. That Article clearly established the supremacy of Parliament with regard to the control of its own proceedings, and not having them called into question in the courts of law.

Also the Parliamentary Powers and Privileges Act Cap.5 is relevant. Section 28 of that Act states:-

"Neither the Speaker, Deputy Speaker, President or Vice President nor any other officer of Parliament shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in such officer by or under this Act."

Clearly, the intention of Section 28 is that the activities of the named officers with regard to the internal proceedings of the House of Representatives are not subject to the jurisdiction of the Court.

Mr. Stanton, on behalf of the Plaintiff made a number of submissions which can be categorised conveniently as follows:-

1. That the Plaintiff's suspension from the House of Representatives under the Standing Orders was void in that the procedure as set out in the Standing Orders had not been properly followed by the Speaker and the Privileges Committee.

2. That the actions of the Privileges Committee in inquiring into and recommending the Plaintiff's further suspension from the House of Representatives for the June/July sittings amounted to a breach of one of his fundamental rights guaranteed under Section 4 of the Constitution and set out in Section 11(8).

3. That the Standing Orders of the House of Representatives in themself were unconstitutional in that they breached the Fundamental Freedoms set out in Sections 11, 12, 13 and 15.

4. That the suspension of the Plaintiff from the Parliament amounted to a breach of the Fundamental Freedoms guaranteed to him under Sections 12, 13, 14 and 15 of the Constitution.

Mr. Stanton filed written submissions in this case. I have read them and find that the questions raised therein for determination can best be answered on the grounds of general principle.

Central to the determination of the questions before the Court is a consideration of Section 63(1) and (3) of the Constitution. Of crucial importance is the decision in Madhavan's case. The Fiji Court of Appeal authoritatively pronounced on matters similar to those raised in this case. The court there construed and applied Section 63(1) of the Constitution.

The decision in that case being a decision of the Court of Appeal is binding on this Court.

As I have mentioned previously, Madhavan's case decided that the Privilege of the Houses of Parliament having exclusive control over their own internal proceedings was part of the law of Fiji, and, that under Section 63(1) of the Constitution the House of Representatives had exclusive control over its own internal proceedings. As also has been noted, Section 63(1) is expressed as being, ***"Subject to the provisions of this Constitution....."***. How did the Court of Appeal approach the application of those words to the matter before it? This would seem to be set out at p.148 of the decision which I have referred to at pp. 21 and 22 herein. The words "...***even the statute law***...." have significant meaning in relation to the questions to be answered in this case. Mr. Stanton submitted that Madhavan's case clearly decided that while the House of Representatives had exclusive control over its own internal proceedings, Section 63(1) also clearly established that those internal proceedings were subject to all the provisions of the Constitution, and that when an internal proceeding of the House breached any of the provisions of the Constitution, and in particular the Chapter 2 provisions (which set out the Fundamental Freedoms in Sections 11, 12 13, 14 and 15), then those proceedings would be void. He submitted that clearly the Chapter 2 provisions applied to the internal proceedings of the House of Representatives and that if any of those provisions were breached during the course of the proceedings of the House then the High Court could rightfully and properly intervene and

adjudicate on the correctness or otherwise of those proceedings. He submitted that Madhavan's case at p. 148 line D where their Lordships said:-

"The Constitution is, by Article 2 thereof, the supreme law, and to any extent that the ⇦ Parliamentary privilege ⇨ was inconsistent with it, but only to that extent the privilege would be void."

was ample authority for that proposition.

Mr. Cope on the other hand, submitted that what might be called the narrow construction to Section 63(1) applied. He submitted that because the decision in Madhavan's case affirmed that the House of Representatives had exclusive control over its own internal proceedings, such proceedings were subject only to the Constitution where the Constitution specifically referred to, and provided for the proceedings of the Parliament, such as found in Section 67(1). He said that in that Section the Constitution clearly referred to the office of the Speaker and who should occupy that position, and that it was only where specific provision was made, such as in that section, that the Constitution applied to the internal proceedings of the House of Representatives. He emphasised that Madhavan's case was not an authority for the proposition that all the provisions of the Constitution such as found in Chapter 2, applied to the internal proceedings of Parliament. In support of his submission he referred the court to page 148 of their Lordship's judgment where the court said:-

".....even the statute law will not be examined by the Courts if it relates to the internal proceedings of the House. We think it both permissible and proper to apply that approach to Article 57(l)[S.67(1)] and to hold that the basic requirements that the Speaker, Deputy Speaker or elected Member shall preside are constitutional, and if material business is transacted at a sitting of the House not so presided over it may be a contravention of the Constitution challengeable (by a person qualified) under Article 97[S.113]. But the decision which of the persons mentioned shall preside is essentially one of internal procedure, which must necessarily be resorted to by the House in deciding the question. In that sphere the privilege mentioned continues to operate and the Courts may not inquire whether the House has interpreted the law correctly or not. It has often been said that this particular privilege is one of necessity and it would lead to a chaotic situation if any member could rush to the Courts for a declaration that the election of a member to preside was in some way defective."

I believe that it is this question, i.e. the degree or extent of the application of the Constitution to the internal proceedings of the House of Representatives, as per the construction of Section 63(1) that is the nub of the case now before the court. It is the application of what I might call the Madhavan principle that will be decisive to the matters raised for consideration here.

After reading Madhavan's case a number of times I am satisfied that the narrow application to the construction of Section 63(1) as submitted by Mr. Cope is the only way to give effective legal sense to the decision.

Sections 63(3) gives Parliament power, for the purpose of the orderly and effective discharge of the business of each House to make provision for the powers, privileges, and immunities of each House and the committees and members thereof. This section I believe arms and enforces the procedures set out under Standing Orders. The powers and privileges created under this subsection do not appear to be subject to the Constitution. Madhavan's decision in relation to the House of Representatives maintaining exclusive control over its own proceedings would appear to reflect this. I might also add that this subsection would appear to reflect the sentiments of 500 years of the common law, Article 9 of the Bill of Rights, and Section 28 of the Parliamentary Powers and Privileges Act.

Section 63(1) ensures that Standing Orders as drawn do not violate the Constitution with regard to the procedural aspects of Parliament which are specifically set down in the Constitution. If the Standing Orders do offend in this regard they may be challenged under Section 113. In such an instance the court would have jurisdiction, to intervene, and, to the extent that the Standing Orders were inconsistent with any specific procedural provisions of the Constitution, could strike down the offending Standing Orders. However, where the Standing Orders do not offend the Constitution in this regard the question of how the privileges of Parliament under Standing Orders are applied, I believe, is purely an internal procedure of the House and in the light of Madhavan's case, is clearly not subject to the jurisdiction of this Court.

I refer again to the judgment of Stephen J. in BRADLAUGH V GOSSETT 1883-4 12 QBD 271 at pp. 285-6 where His Lordship said:-

"The assertion that the resolution of the House goes beyond matter of procedure, and that it does in effect deprive both Mr. Bradlaugh himself and his constituents of legal rights of great value, is undoubtedly true if the word "procedure" is construed in the sense in which we speak of civil procedure and criminal procedure, by way of opposition to the substantive law which systems of procedure apply to particular cases. No doubt, the right of the burgesses of Northampton to be represented in parliament, and the right of their duly-elected representative to sit and vote in parliament and to enjoy the other rights incidental to his position upon the terms provided by law are in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words. Some of these rights are to be exercised out of parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will, in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologise for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment no appeal from their

decision. The law of the land gives no such appeal; no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses. This is enough to justify the conclusion at which I arrive.

We ought not to try to make new laws, under the pretence of declaring the existing law. But I must add that this is not a case in which I at least feel tempted to do so. It seems to me that, if we were to attempt to erect ourselves into a Court of Appeal from the House of Commons, we should consult neither the public interest, nor the interests of parliament and the constitution, nor our own dignity. We should provoke a conflict between the House of Commons and this Court, which in itself would be a great evil;....."

I am of the opinion that provided the privileges set out in the Standing Orders do not breach a specific Constitutional provision with regard to the procedure of the House of Representatives, the court will go no further. The court will not examine the internal proceedings of the House of Representatives to see if the application of the Standing Orders by either the Speaker or the Privileges Committee was either incorrect in terms of its own procedure, or led to a breach of the Chapter 2 provisions of the Constitution. As the Parliament under S. 63(3) is not subject to the provisions of the Constitution in providing for its own powers and privileges etc, for the orderly conduct of its business, I am of the opinion that the Chapter 2 provisions of the Constitution do not apply to the internal proceedings of the House of Representatives as no specific constitutional provision is made for the application of that Chapter to the proceedings of Parliament. In my view the proper construction of Section 63 (l) of the Constitution is that the High Court is concerned to see that the Standing Orders and their application conform to the provisions of the Constitution where the Constitution specifically provides for the procedure of the House. That is where the jurisdiction of the High Court ends. That being so, once the House acts under Standing Orders then the jurisdiction of the court is satisfied. The manner of the application of Standing Orders, whether in accordance with the procedures set out therein or not is an internal matter within the walls of Parliament relating to the powers and procedure of the House, and, in accordance with the decision in Madhavan's case is clearly not cognizable in this court.

I think that Mr. Cope's submission that Madhavan's case has established that the general provisions of the Constitution, including the provisions of Chapter 2, do not apply to the internal proceedings of the House of Representatives, and that those proceedings are only subject to the Constitution where it specifically provides for the internal proceedings of the House, is a sound analysis. Such an analysis makes sense of, and reinforces the reasoning and decision in Madhavan's case. To come to the conclusion as submitted by Mr. Stanton on behalf of the Plaintiff would mean that the court would have to scrutinise the internal proceedings of the House of Representatives to see if a breach of the Chapter 2 provisions had occurred. This would lead to precisely what the decision in Madhavan's case said that the court could not do. If the provisions of Chapter 2 applied to the internal proceedings of the House those proceedings would be open to investigation by the High Court every time a member alleged that the authority of the House, its Committees or its Officers had violated those provisions either in the manner of the application of Standing Orders themselves, or in any ultimate sanction imposed under them.

This could lead to every aggrieved member of the House who had been silenced, suspended or otherwise dealt with under Standing Orders, alleging a breach of his Fundamental Freedoms under Chapter 2 and seeking to have the High Court adjudicate on the internal proceedings of the House that gave rise to the complaint. Clearly such an occurrence would be neither desirable nor in the best interests of the Parliament. For this court to inquire into, and adjudicate on the activities of the Speaker and the Privileges Committee in the application of the powers and privileges set out under the Standing Orders, without a specific mandate to do so from the Constitution, would involve in my opinion an unlawful invasion by the court into the Constitutionally guaranteed right of the House of Representatives to regulate its own proceedings, and, to provide for its own powers, privileges and immunities free from the interference of the Court. I return to the dicta of their Lordships in Madhavan's case where at page l48 they said:-

"It is one of the functions of the court so to construe the law as to avoid conflict if that can properly be done."

I believe that to apply the authority of the decision in the Madhavan's case in the manner as submitted by Mr. Cope fulfils their Lordships exhortation.

I am further fortified in this view by the dicta of Lord Morris of Borth-y-Gest in PICKIN v BRITISH RAILWAYS BOARD (1974)WLR 208, where at page 220 His Lordship said:-

"The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which I think should be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. .....It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed."

Mr. Stanton submitted that the Plaintiff's suspension from Parliament was void because the Speaker and the Privileges Committee of the House did not follow, and did not apply correctly the procedure for suspending a member as set out in the Standing Orders. He submitted that the court had the jurisdiction to inquire into those allegations and if found to be true to declare the resolution of the House void. Again, I think the decision of BRADLAUGH V GOSSETT (1883-4) 12 QBD 271 is helpful to consider, remembering that in that case a similar question as here arose, but one relating to the House of Commons not complying with an act of Parliament as opposed to Standing Orders. The Court there nevertheless held that it could not interfere with the

internal proceedings of the House of Commons. I am satisfied that the same applies in Fiji. The court does not have either the power or jurisdiction as contended for it by Mr. Stanton. The manner of the application of Standing Orders by the Speaker, and the activity of the Privileges Committee are purely matters of internal procedure over which the House has exclusive jurisdiction and control. Standing Orders set out the rules of procedure of the House and the powers vested in the House and its Officers to enforce those rules. I am satisfied that under Section 63(1) of the Constitution those rules are only subject to the Constitution where it specifically provides for the proceedings of Parliament. The powers contained in the Standing Orders derive from Section 63(3) of the Constitution. Those powers are not subject to any provisions of the Constitution. The Court is thus only able to adjudicate upon the question as to whether the Standing Orders as such are in conformity with any specific provision of the Constitution which relates to the proceedings of the Parliament. Once so satisfied the jurisdiction of the court ends there. The manner, method and degree of application of Standing Orders by the Speaker etc. are not subject to review in this court.

With regard to the submission as to the general applicability of all the provisions of the Constitution to the internal proceedings of the House of Representatives under Section 63(1), Mr. Stanton emphasised the paramountcy of the Plaintiff's fundamental rights as set out in Chapter 2 in Sections 11(8), 12, 13, 14 and 15. He submitted that such was the importance of those rights in Fiji that the internal proceedings of the House could not but be subject to them. Such a submission I believe treats those fundamental rights as absolutes. I think it is also important to bear in mind that those rights are in fact not absolute but subject to proviso's. Those proviso's need to be weighed against the position, role and function of the Houses of Parliament in Fiji. The proviso's themselves place limits upon the particular Fundamental Freedoms in the interests of those freedoms being respected in others, or in the interests of the public generally and public order. A helpful statement in this regard was made by GAUDRON J. of the High Court of Australia when discussing powers conferred by Section 51 of the Australian Constitution which were made "Subject to the Constitution". In NATIONWIDE NEWS PROPRIETARY LTD. V WILLS (1992) CLR 658, at page 689 Gaudron J. said:-

".....powers conferred by s 51 of the Constitution, because they are conferred "subject to the Constitution".....do not authorise laws which impair or curtail freedom of political discourse, albeit that that freedom is not absolute. Because that freedom is not absolute and for the reasons which I state in AUSTRALIAN CAPITAL TELEVISION PTY. LTD. v THE COMMONWEALTH [NO.2]. freedom to discuss matters pertaining to government institutions and agencies may be curtailed by a law under s 51, but only if its purpose is not to impair freedom, but to secure some end within power in a manner which, having regard to the general law as it has developed in relation to the written and spoken word, is reasonably and appropriately adapted to that end."

In R. V. JACKSON (1987) 8 NSW LR 116 Hunt J. when reviewing the standing of the privileges of Parliament said at p.121:-

"The English and American authorities stress the immense historical importance of art 9 [of the Bill of Rights]. They also stress that the privileges and rights of Parliament go beyond the

interests of an individual member of Parliament and are necessary to represent the interests of Parliament as a whole. "

These dicta, in conjunction with an examination of the proviso's themselves set out in Sections 11, 12, 13, l4 and l5 of the Constitution assist me in reaching the conclusion that the Fundamental Freedoms set out in those sections are not absolute, but are tempered generally by the need to place their operation in the context of the competing interest of others in the setting to which they are to be applied.

The limitation upon the natural operation of those sections in Chapter 2 of the Constitution when applied side by side with the authoritative decision in Madhavan's case, which would require the Constitution to do that which it has not done, i.e. to make specific provision for the application of the Chapter 2 provisions to the internal proceedings of Parliament, further reinforces me in the view that an alleged breach of any of the Chapter 2 provisions of the Constitution arising from internal proceedings of the House of Representatives is neither cognizable nor reviewable in the High Court. Thus, the words ***"Subject to the provisions of this Constitution"*** as set out in Section 63(1) do not have the effect of applying the Chapter 2 provisions to the internal proceedings of the House of Representatives and making such proceedings subject to those provisions.

The compelling authority of the common law and the law as applies in Fiji I believe forcefully and logically can only lead to the conclusion that Parliament in its internal proceedings should not be, and is not subject to the scrutiny or jurisdiction of the High Court unless specifically provided for in that capacity in the Constitution.

Parliament must be free to control and regulate its own internal proceedings free from the interference of the court. In a society where the rule of law is paramount, Parliament is presumed to, and can be relied upon to act properly and to lawfully regulate itself. Given the unique and onerous responsibility of the Parliament as being in effect, and fact, the people of Fiji acting through their elected representatives as the supreme law making body of the land, it must be free to order its own affairs without interference from the court. It must be unfettered in controlling its own proceedings, empowering itself to give force and effect to those proceedings and applying those powers in a manner and with the discretion of its own choosing.

The court can only inquire into, and adjudicate on those proceedings where the mandate to do so is clearly established. I am of the opinion that the law in Fiji is clear in this regard.

In the management of its own internal proceedings, powers and privileges The House of Representatives has the exclusive control of those proceedings subject only to the Constitution, where it specifically provides for the regulation of those proceedings.

The matters of which the Plaintiff complains arose out of the internal proceedings of the House of Representatives which are not specifically provided for in the Constitution, and as such, fall within the category of being wholly internal proceedings of the House into which this court cannot inquire.

The remedy that the Plaintiff seeks is not to be found in a court of law, but within the walls of Parliament by appealing to the conscience and charity of the members themselves. In this regard I echo the sentiments of COLERIDGE C. J. in BRADLAUGH V GOSSETT (1883-4) 12 QBD 271, at page 277 where His Lordship said:-

"The history of England, and the resolutions of the House of Commons itself, shew that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy it be, lies, not in actions in the courts of law (see on this subject the observations of Lord Ellenborough and Bayley,J, in BURDETT v ABBOTT, 14 East, 150,15l, and l60, 161), but by an appeal to the constituencies whom the House of Commons represents."

While the court is sympathetic to the position that the Plaintiff finds himself in with regard to his suspension from the House of Representatives, it cannot interfere with the proceedings of the House which led to that result.

From the foregoing I believe that the questions raised under issues 1 and 2 can be answered in the following. The internal proceedings in the House of Representatives of Fiji are not subject to the jurisdiction of the High Court. The regulation of procedure, and the manner of the application and enforcement of the powers, privileges and immunities of the House by the Speaker and Committees under Standing Orders, are part of the internal proceedings of the House of Representatives and as such remain within the exclusive jurisdiction, control and discretion of the House itself and are not subject to the jurisdiction of the High Court.

I am also satisfied that all the provisions of the Constitution generally do not apply to the internal proceedings of the House of Representatives, and that those proceedings are only subject to the Constitution where provision is specifically made with regard to the operation, function and procedures of the Houses of Parliament.

Accordingly I am satisfied that the declarations sought by the Plaintiff in paragraphs 1, 2, 4 and 5, of the Originating Summons relate to matters of privilege and procedure which are purely internal proceedings of the House of Representatives, and are not subject to the jurisdiction of this court. I decline to grant the declarations sought in those paragraphs.

With regard to the submission that the Standing Orders of the House of Representatives are unconstitutional, Mr. Stanton said that the Standing Orders as drawn infringed or at least had the tendency to infringe the provisions of Chapter 2 of the Constitution in that they were in breach of the Fundamental Freedoms set out in Sections 11, 12, 13 and 15 therein. Those sections provide for the protection of law, freedom of conscience, freedom of expression and freedom of movement. This submission is reflected in paragraph 3 of the Originating Summons. I am satisfied that the authority of Madhavan's case establishes that under Section 63(1) of the Constitution the internal proceedings of the House of Representatives including Standing Orders are only subject to specific Constitutional provisions dealing with the procedure of each House of Parliament. They are not subject generally to all the provisions of the Constitution, and this includes the Fundamental Freedoms set out in Chapter 2. I am satisfied that the Standing Orders

of the House of Representatives as published refer to, and make provision for the regulating of procedure, privileges, powers and immunities of the House of Representatives in accordance with the requirements of Section 63(1) and (3) of the Constitution. They are not subject to the provisions of Chapter 2 and as such do not infringe the Constitution in this regard. Accordingly, I decline to grant the declaration sought in paragraph 3 of the Plaintiff's Originating Summons.

That addresses matters raised in the Plaintiff's pleadings.

I now turn to consider further submissions made by Mr. Stanton on behalf of the Plaintiff that also raised grounds for relief, but were not pleaded in the Plaintiff's Originating Summons.

Those submissions were based on the allegation that the manner in which the Speaker applied the Standing Orders against the Plaintiff also violated his Fundamental Freedoms set out in Section 11(2) and (8) of the Constitution, and that his suspension from the Parliament was in itself a violation of Sections 12, 13, 14 and 15 of the Constitution, therefore unconstitutional and void.

Although those matters were not specifically pleaded in the Originating Summons, Mr. Stanton sought to raise them before me pursuant to Section l9 of the Constitution which gives the court power to hear complaints by persons who allege that any of their constitutional freedoms set out in Chapter 2 have been breached.

Mr. Cope on behalf of the Defendant objected to the court hearing submissions on those matters as they had not been specifically pleaded by the Plaintiff. I decided to hear the further submissions of Mr. Stanton as the allegations raised questions which were of constitutional significance and did not raise any new matters or take the Defendant by surprise.

In relation to the submission that the manner in which the Standing Orders were applied against the Plaintiff breached his constitutional rights under Section 11(2) and (8). The manner of the application of the Standing Orders by the Speaker within the House of Representatives being exclusively an internal proceeding of the House of Representatives is not subject to the jurisdiction of the Court. Also, given that I am satisfied that the internal proceedings of the House of Representatives are not subject to the provisions of Chapter 2 of the Constitution then clearly Section 11(2) and (8) have no application in this regard and thus fall from consideration. I might add however, that even if this section did raise itself for determination it is difficult to see how Section 11(2) could apply to the Plaintiff's suspension. That subsection specifically relates to the rights of a person who has been charged with a criminal offence. The Plaintiff's suspension from the House of Representatives did not arise as a result of any criminal act on his part, nor was he charged with any such offence. In relation to Section 11(8). That subsection sets out the obligation incumbent upon any court or authority, which is required or empowered by law to determine the existence or extent of any civil right or obligation, to be both independent and impartial, and to afford a person a fair hearing within a reasonable time. Neither the Speaker, nor the Privileges Committee in dealing with the Plaintiff under Standing Orders were an authority called upon to determine the existence or extent of a civil right or obligation of the Plaintiff. They were simply dealing with proceedings internal to the House of Representatives. Mr. Stanton submitted that the Plaintiff had a civil right to be heard before the Privileges Committee

before it reached the decision to recommend his further suspension from the House. I am not satisfied that such a right exists. The Plaintiff in his affidavit acknowledged the existence of the privilege of the House of Representatives to have exclusive control over its internal proceedings. He thus did not challenge the existence of the privilege. Neither did he challenge the extent of the privilege. He challenged the manner of its application. I would further add that I am not satisfied that the Privileges Committee is in fact an authority within the meaning of the subsection. Under Standing Order 66(4) the Privileges Committee is a committee whose duty is to:

"4.

(a) To bring to the attention of the House any breach of the privilege of the House committed by any person or persons and recommended to the House what action should be taken;

(b) To consider and report upon such questions of privilege as may be referred to it by the House;

(c) To conduct enquiry into any complaint that may be referred to it by the House concerning any breach of privilege on the part of any person or persons from time to time; and for such purposes to have and exercise the powers available to the House in respect of any matter for consideration by the House or any committee thereof."

Those matters relate to the privileges of the House of Representatives. The Privileges Committee is not empowered by any law to determine the existence or extent of the civil rights or obligations of the members of the House of Representatives. The Privileges Committee when acting under Standing Order 66 is not a court or authority that carries out any of the responsibilities set out in Section 11(8) and thus is not a body to which Section 11(8) is addressed or applies. That subsection I believe, would apply to bodies such as courts of law or administrative tribunals, e.g. immigration tribunals etc.

I turn now to consider the submission by Mr. Stanton that the Plaintiff's suspension itself breached Sections 12, 13, 14 and 15 in that the suspension violated the Plaintiff's freedom of conscience, expression, assembly and association and movement.

I am satisfied that the Plaintiff's suspension from Parliament was not in any way unconstitutional. The suspension does not breach any of the Fundamental Freedoms set out in Sections 12, 13, 14 and 15. All those freedoms are still available to the Plaintiff, unhindered outside the walls of Parliament. As I have mentioned earlier, those freedoms are not absolute but limited by the considerations of public order, and respect for those same rights in others. To fail to place such limitations upon those Fundamental Freedoms would, I believe, given the nature of man as it is, have a tendency to lead to anarchy. In other words those rights are limited for the orderly conduct of society. The Houses of Parliament are also mandated by the Constitution to regulate themselves to provide for the orderly conduct of their own business and proceedings.

I might further add that those sections anticipate that the Fundamental Freedoms set out therein may also be limited by the consent of the individual himself. The fact that the Plaintiff took his

seat in the House of Representatives implies consent on his part to be bound by the rules of the House and to accept the limitations imposed on members for the orderly conduct of its business and proceedings. The suspension of the Plaintiff from the House of Representatives was pursuant to its own internal rules. As I have said earlier the suspension does not affect those Fundamental Freedoms in the Plaintiff outside the Parliament and in society in general, it is just that he cannot exercise them within the walls of Parliament for two months. I cannot see that any rights in the Plaintiff have been infringed, for his rights in relation to the taking of his seat in the House of Representatives is the right to take that seat in accordance and compliance with the rules and regulations of the House of Representatives.

Finally, Mr. Stanton submitted that the suspension of the Plaintiff was void because the rights of all the constituents of Rewa to be represented by the Plaintiff in the Parliament had been breached. I am not persuaded by this submission. Under Section 19 of the Constitution it is for a constituent of Rewa himself who alleges a grievance to apply to the court. The Plaintiff cannot apply on his behalf. There has been no such application, and if there was would such constituent be able to point to any breach of his Fundamental Freedoms by the Plaintiff's suspension from the House of Representatives? Those Fundamental Freedoms exercisable by him individually are in no way violated by the Plaintiff's suspension.

Also, it is important to note that the constituents of Rewa are still represented in the House of Representatives by their second member who may continue to take his seat during the Plaintiff's suspension. The right of the constituents of Rewa if any, with regard to the Plaintiff taking his seat in the House of Representatives is surely the right to be represented by their elected member, taking his seat in accordance, and in compliance with the rules of the House of Representatives and not otherwise.

Thus, the questions raised under issues 3 and 4 are answered in the negative. I therefore decline to grant the declarations sought and dismiss the Plaintiff's Originating Summons.

I make no order as to costs.

David E. Ashton-Lewis
Judge

In re ⇦ Mahendra Pal ⇨ Chaudhary [1998] FJHC 44; Hbm0003j.1998s (7 April 1998)

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

MISCELLANEOUS ACTION NO. 0003 OF 1998

IN THE MATTER
of an application by the Attorney General of Fiji
for leave to apply for an order of committal

AND:

IN THE MATTER of ⇦ MAHENDRA PAL ⇨ CHAUDHARY

Mr. S. Banuve and Mr. S. Kumar for the Applicant
Mr. R. Naidu for the Respondent

JUDGMENT

The **Fiji Labour Party** is one of the four political parties represented in **Parliament**. Last year on **Friday** the **11th** of **July** the **12th Annual Delegates Conference** of the **Party** was held at the **Tokatoka Resort Hotel** in **Nadi**.

⇦ Mahendra Pal ⇨ Chaudhary ('the respondent') is and was the **Secretary-General** of the **Fiji Labour Party ('FLP')** at all material times. He prepared for presentation to the **FLP Annual Delegates Conference**, a comprehensive **30-page** report dated the **8th July 1997** and entitled: **FIJI LABOUR PARTY 1997 Activities Report ('The report')**.

Chapter 6 of **'the report'** is entitled: **LAW AND ORDER** and contains ten **(10)** paragraphs of which it is only necessary, for present purposes, to refer to two **(2)** which reads:

"Allegations of corrupt practices in the Police, DPP's Office and the judiciary have received wide publicity in the media. A recent disclosure on corrupt practices in the judiciary resulted in an inquiry being appointed by the Attorney General but its report has not been made public.

There has been public suspicion since the coups that many in our judicial system are corrupt. In several cases well known lawyers have been identified as receiving agents for magistrates and judges. A number of lawyers are known to arrange for them to appear before their preferred magistrates or judges."

(my underlining)

On the **14th of July 1997** edition of the **Daily Post** newspaper under a front page article carrying a large bold headline: **"JUDICIARY CORRUPT"** the above latter paragraph was extensively quoted in speech marks and attributed to the **Secretary General** of the **Fiji Labour Party**.

Six **(6)** months later on the **22nd of January 1998** the **Attorney-General** sought leave under **Order 52** of the **High Court Rules**: ***'... to apply for an order of committal against Mahendra Chaudhary'*** on the following basis as set out in **paras. 2 & 3** of the accompanying **Statement** which reads:

"2. 'THE relief sought herein is an Order that the Applicant be at liberty to apply, for an order of committal in respect of Unionist and Member of Parliament ⇦ Mahendra Pal ⇨ Chaudhary of Suva, for his contempt of this Court on the 12th day of July, 1997 in a pamphlet duly signed by the said ⇦ Mahendra Pal ⇨ Chaudhary and delivered at the Labour Party Convention at Sabeto, Nadi, which was published in the Daily Post on the 14th July, 1997.

3. 'THE grounds upon which the said order is sought are the words used in the said pamphlet in particular the fourth paragraph of page 22 of the said pamphlet. In particular the words 'in several cases well known lawyers have been identified as receiving agents for magistrates and judges', which scandalise this Honourable Court in that they are a scurrilous attack on the Judges and Magistrates thereby lowering the authority of this Honourable Court."

On **5th February 1998** leave was granted to the **Attorney-General** to issue contempt proceedings and on the **10th of February 1998** a **Notice of Motion** was issued against ⇦ **Mahendra Pal** ⇨ **Chaudhary** seeking his committal to prison for ***"... his contempt of this Honourable Court in publishing pamphlets and causing it (sic) published in the issue of 'The Daily post dated the 14th July, 1997, under the Heading 'JUDICIARY CORRUPT'"***.

It is convenient at this stage to deal with the respondent's first **'head'** of defence which seeks to attack the form and contents of the proceedings undertaken by the **Attorney-General**.

To begin with, counsel for the respondent writes in his written submissions: ***'... there is no proof of service*** (of the motion)*'*. It is not entirely clear what is meant by the sentence in the absence of an affidavit denying service, but if it means that counsel should be served with the papers or a copy of an **Affidavit of Service** or that he be advised of the same, then I entirely disagree.

Order 52 r.3(3) of the **High Court Rules 1988** merely requires ***'personal service on the person sought to be committed'*** of the **Notice of Motion**, together with a copy of the **Statement** and affidavit in support of the application for leave under **Rule 2**.

Suffice it to say that there is an ***'Affidavit of Service'*** in the court file dated the **17th day of February 1998** deposed by an employee of the **Attorney-General's Chambers** which fully complies with the requirements of the above **Order**. There is no merit in this submission.

Secondly, counsel writes: ***'No grounds of the alleged contempt are contained in the motion.'*** This, it is submitted, is a fatal non-compliance with the requirements of the rules and Counsel refers to several cases in support, chief amongst which, are the judgments of the **English Court of Appeal** in ***Harmsworth v. Harmsworth*** (1987) 3 All E.R. 816 and ***Chiltern D.C. v. Keane*** (1985) 2 ALL E.R. 118. Both were decisions dealing with contempts for disobedience of court orders.

Both cases refer to prescribed **Forms** and court **Rules** that requires the **Notice of Motion** to set out particulars sufficient to let the person alleged to have been guilty of contempt know the subject matter of the breach(es) alleged against him.

In particular the relevant **County Court Form in Harmsworth's** case provides for there to be set out in the ***'notice to show cause'*** the particular breach(es) of the order alleged, and, in **Chiltern's** case, the relevant court **Rule** expressly required the **Notice of Motion** to commit to '(state) ***the grounds of the application'***.

There is no such requirement in respect of the **Notice of Motion** to commit in **Order 52** of our **High Court Rules** which only requires the **Statement** under **Order 52 r.2(2)** to set out ***'the grounds on which ... committal is sought'***.

I accept however that:

"... no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him ..." [In re Pollard *(1886) L.R. 2 P.C. 106, 120.*]

But as was said by **Woolf L.J.** in ***Harmsworth's*** case (ibid. at **p.823**):

"What is not required by the relevant rules is that the notice of motion should be drafted as though it was an indictment in criminal proceedings."

The ***'test'*** as propounded by **Sir John Donaldson M.R.** in **Chiltern's** case (ibid. at **p.119**) is:

"... that what is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of court."

and later the learned **Master of Rolls** said at **p.120**:

"Every notice of application to commit must be looked at against its own background. The test as I have said, is: 'Does it give the person alleged to be in contempt enough information to enable him to meet the charge?"

Clearly with those principles in mind the framers of our **High Court Rules** determined that it would be sufficient for a copy of the **Statement** to accompany the **'Notice of Motion'** when service is effected upon the person sought to be committed.

It is undisputed in this case that a copy of the **Attorney-General's Statement** together with the affidavits in support of the application for leave were personally served on the respondent along with the **'Notice of Motion'**. That is all that is required under our **High Court Rules**.

Turning then to, counsels highly pedantic analysis of the **Notice of Motion**, having considered all four **(4)** documents served together with the annexures, I am more than satisfied that the information supplied to the respondent not only strictly complied with the **High Court Rules**, but also contained sufficient particulars to enable the respondent to defend himself against the contempt alleged against him.

It must be remembered that the simple ***'background'*** to the present application is the publication in a local newspaper of the offending paragraph attributed to the respondent. We are not here dealing with several court orders or injunctions *or* even with numerous alleged breaches occurring over an extended period of time.

Viewed against that ***'background'*** the **Notice of Motion** read with **paragraphs 2 & 3** of the **Attorney-General's Statement** (earlier set out at **pp. 2 & 3**) and the **Daily Post** newspaper article, gives more than sufficient information both as to the nature and details of the particular contempt alleged, as well as, the manner and occasion when it is alleged to have been committed. I accordingly reject this submission.

The **Attorney-General's** motion is supported by two **(2)** very brief affidavits, one deposed by **Mesake Koroi** of the **Fiji Daily Post Co. Ltd.** and, the other, by **Kamal Iyer**, a senior journalist in the employ of **Fiji Broadcasting Commission**. Both affidavits annexed a copy of **'the report'** and described how the respective deponents came to be in possession of the same.

In particular, **Mesake Koroi** deposed that:

"ON 12th of July, 1997, I was at the Parliament Complex at Veiuto, Nasese, Suva where I picked up a copy of a pamphlet which was disseminated for public consumption."

Kamal Iyer for his part, deposed:

"THAT I was given a pamphlet at the Fiji Labour Party's annual delegates conference held at the Tokatoka Hotel on Friday July 11th, 1997."

Neither identified the supplier or source of the ***'pamphlet'*** nor, in **Mesake Koroi's** case, the exact place from where it was picked up.

The **Attorney-General's** motion was fixed to be heard on the **26th of February 1998**.

The relevant papers were duly served on the respondent on the **13th of February, 1998**. On the hearing date the respondent appeared by counsel who sought a short adjournment to enable answering affidavits to be filed on his behalf. This was granted and on the **4th of March 1998**, three **(3)** affidavits were filed. They are deposed by **Rajendra Pal Chaudhary** Administrative/Research Officer in the **Fiji Labour Party Office** at the **Parliamentary Complex** at **Veiuto** (the **'FLP Office'**); by **Dipika Patel**, Secretary in the same office and by **Rakesh Chandra** the Office Messenger/Clerk. There was no affidavit from the respondent.

The latter two affiants merely deposed that on the **12th of July 1997**, a **Saturday**, neither was present at the **'FLP Office'** and neither was ***'aware of any reason why the FLP Parliamentary Office would be open on that day'***.

Rajendra Chaudhary for his part whilst confirming the closure of the **'FLP Office'** on the **12th of July 1997;** and the holding of the **FLP Annual Delegates Conference** at the **Tokatoka Resort Hotel** on **Friday, 11 July 1997**; and the presentation of **'the report'** thereat, deposed *inter alia* that: *'*(The delegates conference) ***was a private meeting, attended by approximately 60 delegates from the FLP's various branches around Fiji'*** and ***'Neither the media nor the general public was invited to attend the delegates Conference.'***

He further deposed that the **'the report'** was ***'not intended for circulation to the general public'*** but there is no suggestion that the copies of **'the report'** in the possession of **Mesake Koroi** and **Kamal Iyer** were either unauthorised copies or unlawfully obtained.

It is plain from the answering affidavits that issue was being taken on the date (i.e. ***'12th July 1997'***) when **Mesake Koroi** deposed he ***'picked up'*** a copy of **'the report'**; also, **on** the source or supplier of **'the report'** to the respective reporters; and **on** who was responsible for its subsequent publication in the **Daily Post**. The authorship, intended readership and actual contents of **'the report'** are not denied however.

In this latter regard **'the report'** bears in the middle of its cover page the following wording:

"presented by the Secretary-General to the 12th Annual Delegates Conference";

and on the first page under the heading, the following attribution appears:

"Report of the Secretary-General to the 12th Delegates Conference
Tokatoka Resort NADI - 11 July, 1997."

'The report' then opens with the personal words: ***"I shall begin the report ..."*** which suggests to my mind that it was intended to be delivered orally, and the last page bears the date ***'8 July, 1997'*** and carries a hand-written signature above the words:

'Mahendra P. Chaudhary'
SECRETARY GENERAL'

On the **5th of March**, when the **Attorney-General's** motion was being heard in open court, **State Counsel** mindful of the above, orally sought from the bar table to amend the date in **Mesake Koroi's** affidavit and when this was disallowed, **Mesake Koroi** was called into Court and after identifying a copy of **'the report'**, testified, over defence counsel's objections, that on the afternoon of the **11th July 1997** he was called into the **'FLP Office'** at the parliamentary complex and was given a copy of **'the report'** by **Mr. Rajendra Chaudhary** who was packing at the time.

It is convenient at this stage to deal with the second **'head'** of defence advanced by counsel for the respondent entitled: **'LACK OF PROOF TO ANY STANDARD'**, which as the name suggests, seeks to challenge the quality of the evidence adduced in support of the **Notice of Motion**.

The allegation against the respondent may be conveniently summarised as follows - that he published *(and I would here emphasise the disjunctive nature of the charge)* or caused to be published in the **14th of July 1997** issue of the **Daily Post**, words which constitute a contempt of Court in that they are a scurrilous attack on the Judges and Magistrates thereby lowering the authority of the Courts.

In the absence of any affidavit evidence from the respondent, Counsel submits that the respondent neither published **'the report'** or caused it to be published in the **Daily Post**.

In this latter regard the evidence of **Mesake Koroi** is that he personally wrote the article in the **Daily Post** which was based on a copy of **'the report'** that he had obtained from the **'FLP Office'**. There is no evidence however that the respondent either supplied **'the report' or** authorised or knew of the article **or** indeed, that he in any way caused the article to be written or published in the **Daily Post** newspaper. I am accordingly not sufficiently satisfied that the respondent ***'caused'*** the offending words to be published in the **Daily Post** *albeit* that they were undoubtedly extracted from **'the report'** presented by him.

Did he then in any way publish **'the report'** containing the allegedly contemptuous passage? Counsel for the respondent although accepting that ***'on the face of*** (the report) ***it was circulated to 60 political party delegates'*** nevertheless submits, that that is not a sufficient **'publication'**. I cannot agree.

I cannot accept that **'publication'** for the purpose of contempt arising out of written matter is in any way dependant on the number of persons for whom and to whom the matter is circulated. Were this so then a letter written personally to the **Chief Justice** and containing scurrilous abuse of the **Chief Justice** would not amount to contempt and ***Martins case*** (1747) 34 R.R. 1771 where an intending suitor had written to the **Lord Chancellor** referring to his proposed action and enclosing a 20 note plainly disproves this proposition albeit that that was a blatant if somewhat, hopeless case of attempted bribery.

Nor in my view, does the limited partisan nature of the readership or intended audience of **'the report'** have any bearing on the question. In ***Attorney-General v. Butler*** (1953) N.Z.L.R. 944 which concerned a circular letter dictated by a **Union Secretary** and sent by post to ten branches

of the **Union** and which *inter alia* described an **Arbitration Court's** award as ***'a travesty of justice'***, the **New Zealand Supreme Court** on a **Motion** to commit the Union Secretary ***"for the contempt of Court in publishing a circular letter to the members of the*** (named branches) ***..."*** found him guilty of contempt and ordered him to pay the costs of the proceedings.

Clearly in that case the **Supreme Court** did not consider itself constrained by the necessarily restricted circulation of the secretary's letter **or** by the essentially private internal nature of the correspondence.

Bearing in mind counsel's concession, the clear purpose and intended readership of **'the report'**, and **Rajendra Chaudhary's** sworn affidavit to the effect that **'the report'** was ***'presented to*** (the **FLP** annual delegates) ***Conference'***, I am satisfied beyond a reasonable doubt that the respondent did ***'publish'*** the offending words *albeit* to a limited audience.

Counsel for the respondent also criticised the use of the word ***'pamphlet'*** in the papers filed by the **Attorney-General**. Suffice it to say that in my view, nothing turns on that description.

This limb of the second **'head'** of defence is accordingly dismissed.

The respondent for his part entered a ***'not guilty'*** plea through his counsel and upon the Court's intimation elected through his counsel to rely solely upon the affidavits filed on his behalf.

So much then for the evidence in this case.

I turn next to consider the law. In ***R. v. Gray*** *(1900) 2 Q.B. 36* **Lord Russell** of **Killowen C.J.** in holding that the contents of the newspaper article in that case constituted a contempt of court said at **p.40**:

"Any act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower its authority, is a contempt of Court ... (which) ***... belongs to the category which Lord Harwicke L.C. characterised as 'scandalising a Court or a judge' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court."***

More recently **Lord Diplock** in delivering the opinion of the **Privy Council** in ***Chokolingo v. Attorney General of Trinidad*** (1981) 1 All E.R. 244 described the contempt of ***'scandalising the court'***, at **p.248**:

"(as) ***a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice."***

Quite plainly in my view, and with this there can be little disagreement, the nature of the contempt *(if any)* committed by the respondent in this case is that of ***'scandalising the Court'***. Certainly that is the terminology adopted by the **Attorney-General** in his **Statement** in support of the application for leave and uniformly addressed in counsels submissions to the Court.

As for the ***'purpose'*** of this jurisdiction to summarily punish contempt of Court, **Rich J.** in the **High Court of Australia** said, in ***R. v. Dunbabin*** *ex-parte* ***Williams*** [1935] HCA 34; (1935) 53 CLR 434, at **442**:

"This jurisdiction ... exists for the purpose of preventing interferences with the course of justice ... such interferences may ... arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgment because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."

then in similar vein to the ***'qualification'*** earlier referred to in **Lord Russell's** judgment in ***R. v. Gray*** *(ibid.)*, his honour continues:

"The jurisdiction is not given for the purpose of protecting the Judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the court performs its functions. The law permits in respect of courts, as of other institutions, the fullest discussions of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose."

In this country too, the **Court of Appeal** had occasion to deal with this ***'rare'*** form of contempt of court in the case of ***Vijaya Parmanandam v. Attorney-General*** [1972] 18 FLR 90 and, in upholding the **Supreme Court's** finding of contempt, said at **p.95**:

"The power to punish for contempt (of scandalising the Court itself) ***is not for the personal vindication of the judges; the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for the public good alone."***

As to the ***'standard of proof'*** required of such a contempt, **Lord Russell** said in ***R. v. Gray*** (ibid.) at **p.41**:

"It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt;"

In similar vein it was held in ***Attorney-General (N.S.W.) v. Munday*** (1972) 2 NSWLR 887 that:

"Scandalising the court is a form of criminal contempt triable on indictment except in exceptional circumstances, for instance where the contempt is established clearly and beyond reasonable doubt ..."

(*See also*: *per* **Lord Denning M.R.** in ***In re Bramblevale Ltd.*** (1970) 1 Ch.D. 128 at **137**.)

Quite plainly in this instance this Court did not consider it necessary to deal with the respondent either summarily or in ***'brevi manu'***. The **Attorney-General** however, in his wisdom and upon his independent and impartial assessment of the public interest in maintaining the due administration of justice in all its integrity, has decided to bring this matter to the Court's attention and consideration by way of a **Notice of Motion** to commit the respondent for his contempt of Court, and for that, this Court makes no criticism.

Having said that however, I am firmly of the view that not every unwarranted or discourteous criticism of the **Judiciary** amounts to the contempt of ***'scandalising the Court'***. Before such criticism may constitute scandalising contempt it must, viewed objectively, amount to what has been termed ***'scurrilous personal abuse of a judge'*** or, be of such a nature as to be ***'calculated to excite misgivings as to the integrity, propriety and impartiality'*** of the Courts.

What's more, in both instances, the Court must be satisfied that there is ***'a real risk as opposed to a remote possibility of interference with the due administration of justice'***.

I disagree however with counsel's attempt to link this ***'requirement'*** with the question of publication. In my view it is not so much the audience to which the offending words is addressed that determines the question but, whether or not the offending words themselves are, viewed objectively, calculated to bring the administration of justice or the Courts into disrepute and the author's intention is irrelevant.

As was said by **Lord Reid** in ***Attorney-General v. Times Newspapers Ltd.*** (1973) 3 All E.R. 54 said at **p.63**:

"The question whether there was a serious risk of influencing ... is certainly a factor to be considered in what course to take by way of punishment, as is the intention with which the comment was made. But it is I think confusing to import this into the question whether there was any contempt at all or into the definition of contempt."

In any event bearing in mind the respondent's position within the **FLP**; the representative nature of the participants attending the **FLP** annual delegates conference drawn from throughout **Fiji**; and counsel's concession that **'the report'** was ***'circulated to 60 political party delegates'***, I am satisfied that there was a real risk of bringing the Courts into disrepute.

Needless to say I disagree with the elevation of this requirement into ***'an element of the actus reus'***, preferring to see it instead, as a factor in the exercise of the Court's ultimate discretion whether or not to impose punishment.

For the sake of completeness and in the absence of any evidence or submissions in that regard, I record my respectful agreement with the judgment of the **New Zealand Court of Appeal** where it held in ***Solicitor-General v. Radio Avon Ltd. and Anor***. (1978) 1 N.Z.L.R. 225 that:

"It is not necessary in proceedings for contempt consisting of lowering the authority of a court or judge to prove that the defendant intended his action to have that effect ... but the defendants intention is relevant to the penalty to be imposed."

So much then for the applicable law.

I turn next to consider the offending paragraph in **'the report'** (earlier set out at **p.2**) and in particular the words:

"In several cases well known lawyers have been identified as receiving agents for magistrates and judges ..."

In doing so, I have been guided by the applicable law. I have also borne in mind the necessarily limited and partisan audience for whom **'the report'** was originally intended and adopted an open even cynical mind. I have also given the words used, their plain and ordinary meanings and considered the context and content of **'the report'** in which they occur, **and** I am mindful that no denial, explanation, justification or rationalisation has been proffered, at any time, by the respondent for his deliberate choice of words.

It is immediately noticeable that no specific names or details of ***'cases'*** are mentioned in the paragraph which begins with a general allegation that ***'many in our judicial system are corrupt'*** to be immediately followed by what can only be described as an instance of a highly corrupt practice namely, the soliciting or acceptance of bribes by judicial officers using lawyers as ***'receiving agents'***.

Learned counsel for the **Attorney-General** submits that the above paragraph is a:

"scurrilous attack upon the judiciary as a whole ... without specificity and its whole tenor questions their integrity i.e. personal financial gain is a factor which sways the decision of a magistrate or judge in a particular litigated matter."

and further (at **p.4**):

"... the said words ... by its very lack of specificity and the inflammatory words utilised constitutes a scurrilous attack on the Judiciary or Magistracy of this country as a whole with no other intent (by the choice of the words used) ***but to undermine public confidence in it."***

and finally:

"(the) ***words utilised are a scurrilous abuse of the Courts of this country, and the passage ... constitute contempt, in imputing that judges and magistrates as a whole are on the take. The gravamen of the offence is that determinations by magistrates and judges of this country in their official capacities are often swayed by personal financial gains solicited through well-known lawyers as agents, rather*** (than) ***on argument based on legal issues governing the cases before them."***

In his defence on this aspect, learned counsel for the respondent sought ***'protection under the constitutional right to free speech'*** conferred under **Section 13(1)** of the **1990 Constitution**.

I would point out however, that there is an important difference between a ***'right'*** and a ***'freedom'***. A ***'right'*** is conferred in positive language whereas a ***'freedom'*** may be negatively defined as what remains after all restrictions or regulations in a particular area or sphere of activity has been accounted for.

What's more the protection afforded by **Section 13** is not and has never been absolute.

In this latter regard **section 13(2)** expressly provides (so far as relevant for present purposes):

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(b) 'for the purpose of ... maintaining the authority and independence of the Courts ...;'

except so far as that provision ... is shown not to be reasonably justifiable in a democratic society."

and as for the particular ***'law'*** in question, **Section 121** of the **Constitution** specifically recognises that:

"The superior courts shall have power to punish persons for contempt in accordance with the law."

There is not the slightest doubt in my mind that the law of contempt of court is a legitimate, necessary and ***'reasonably justifiable law in a democratic society'*** and has, as its sole purpose, the maintenance of the authority and independence of the Courts. There cannot be, and it has certainly not been ***'shown'*** to this Court, that the position is otherwise.

The **Supreme Court** (now **High Court**) in dismissing a similar argument in ***Vijaya Parmanandam's*** case said at **p.2**:

"The Court has been addressed by Counsel for the respondent on the right of the respondent under the Constitution of Fiji to freedom of speech. However there is a profound difference between freedom, be it freedom of action or freedom of expression, and licence. While justice is not a cloistered virtue and it is open to all to criticise temperately and fairly the administration of same, criticism which is actuated by malice or which imputes improper motives to those taking part in the administration of justice or which is calculated to bring a Court or a judge of the Court into contempt or to lower his authority cannot shelter behind the bulwark of freedom of speech.

Abuses of the freedom of speech are the excrescences of liberty and to curtail such abuses is not to imperil liberty but to safeguard it and ensure its natural and healthy growth."

In so far as learned counsel referred to the Canadian case of ***R. v. Kopyto*** 47 DLR (4th) 213 in support of his submission, I would respectfully point out that the Canadian **Charter of Rights** does not contain any express exclusions or limitations as in **Section 13(2)** of our **Constitution** and, with all due respect to the opinions of the majority of the Court, and except as to the requirement of ***'mens rea'***, I prefer the dissenting judgment of **Dubin J.A.**

I would dismiss this ground of defence.

Without the confidence of the people and their representatives, the **Judiciary** in this country could not function and the **'rule of law'** would be gravely undermined. The respondent himself recognised this when he wrote in **'the report'** (at **p.22**): ***"It is indeed damning for Fiji that such is the public perception of our law enforcement agencies. It has shaken public confidence in our system of preserving law and order in the society."***

If I may say so the respondent's earlier contemptible remarks on that same page can only further undermine that public confidence so vital to the proper functioning of the Courts and the administration of justice.

The words deliberately chosen and used by the respondent were intemperate and inflammatory, and the context in which they occur in **'the report'** only serves to highlight their wanton and gratuitous tone and satisfies me beyond a reasonable doubt that they constitute a ***'technical contempt'*** of this Court in scandalising the Court by unfairly, improperly and indiscriminately imputing to unnamed members of the Court the commission of serious criminal offences in the performance of their judicial functions.

I accordingly find the respondent guilty of contempt of this Court and order him within seven **(7)** days to pay the costs of these proceedings which I fix at **$500.00**.

D.V. Fatiaki
JUDGE

At Suva,
7th April, 1998.

APPENDIX VI

PARLIAMENT OF THE REPUBLIC OF FIJI

PRIVILEGES COMMITTEE

READING MATERIALS FOR DELIBERATION

CONTENT

Imprisonment 669
Fine 670 – 672
Censure 672
Prosecuted at Law 672
Impeachment 672 – 673
Suspension 673
Expulsion 673 – 674
Exclusion 674 – 675

Apology 675

4. I. C. HARRIS (Ed), HOUSE OF REPRESENTATIVES PRACTICE [AUSTRALIA] (5TH Ed, 2005)

4.1	Acts Constituting Breach(es) and Contempt	(Pp 726 – 737)	TAB 8
(i)	Misconduct	Pp 728 – 734	
(ii)	Offences Against Witnesses	Pp 734 – 735	
(iii)	Exercise of Power	Pp 645 – 646	
(iv)	Reflections on Members	P 735	
(v)	Other Offences	P 737	
4.2	Penal Jurisdiction of the House	(Pp 738 – 743)	TAB 9
(i)	Power and source	Pp 738 – 739	
(ii)	Commitment	Pp 739 – 740	
(iii)	Imposition of fine	P 740	
(iv)	Reprimand or admonishment	Pp 740 – 741	
(v)	Exclusion of persons from precincts	Pp 741 – 742	
	Punishment of Members		
(vi)	Apology	Pp 742 – 743	
(vii)	Suspension	P 743	
(viii)	Former power of expulsion	P 743	

(1)

ANAND BABLA

v.

DEVAKAR PRASAD & THE ATTORNEY-GENERAL

[HIGH COURT, 1998 (Tuivaga CJ) 18 August]

Constitution- Parliament- whether subject to scrutiny by the High Court- whether internal disciplinary proceedings subject to fundamental constitutional rights and freedoms- whether suspension of a member of Parliament constitutional- whether standing orders constitutional. Constitution (1990), Chapter II, Sections 63 (1), 63 (3), 67 (1) – Parliamentary Powers and Privileges Act (Cap 5) Section 28- High Court Act (Cap 13) Section 22 (1).

The Plaintiff, who was a member of the House of Representatives, was suspended from the House after the Privileges Committee of the House found him to be in contempt of Parliament. The Plaintiff sought declarations that his suspension was unconstitutional. The High Court, relying on established precedents HELD: (1) absent specific constitutional provisions to the contrary the internal proceedings of Parliament are not subject to judicial scrutiny and (2) that neither the Plaintiffs freedom of movement nor his right to represent his constituents had been violated by his suspension.

Cases cited:

A.G. of Ceylon v. D'Oliveira [1962] 11 All E.R. 1069
Bradlaugh v. Gossett (1884) Q.B.D. 271
Sakeasi Butadroka v. Attorney-General (1993) 39 FLR 115
Church of Scientology of California v. Johnson Smith [1972] 1 All E.R. 379
Keilley v. Carson (1842) - 4 Moo PCC 63
Madhavan v. Falvey & Ors (1973) 19 FLR 140
Rost v. Edwards [1990] 2 All E.R. 641

Proceedings for declaratory Judgment in the High Court.

Sir Vijay R. Singh Counsel for the Applicant
The Solicitor-General (N. Nand) with *E. Walker* for the Respondents

Tuivaga CJ:

This originating motion is brought by Anand Babla, the Indian Member in the House of Representatives for Tavua/Ra West Constituency ("Babla" henceforth) claiming that the decision of the Deputy Speaker suspending him from the House for two consecutive meetings was unlawful and made without jurisdiction or in excess of jurisdiction.

The case arose in this way. In September 1997 Babla submitted in a letter to

the Secretary-General to Parliament several questions on which he wanted answers relating to various payments made to Ministers, Speaker, President of the Senate and Leader of the Opposition.

On November 14, 1997 the Secretary-General wrote to Babla informing him that his questions had been considered, and were disallowed. Part of the reply reads:

> "As for your question which relates to the number of official trips taken by all Government Ministers, etc. since 1994, this has also been disallowed by the Speaker, as it is felt that the time and staff resources required from different Ministries to collect the information cannot be justified"

On 21 November, 1997 Babla wrote back to the Secretary-General.

> "Firstly, it is my entitlement, as an elected representative of the people, to ask questions which pertain to public finds. This is clearly contained in Standing Order 29.
>
> ..... On the second question on that of official trips etc. again your answer that "time and staff constraints make the collection of this information unjustified," is again an obvious attempt on your part to protect the interest of the Speaker, Government Ministers, President of the Senate, Senators, Members of Parliament and yourself who is implicated in this question. Such unethical standards from you on the advice of the Speaker, sets a dangerous precedent on questions pertaining to the use of public funds.
>
> If Parliament cannot guarantee transparency and accountability of funds, how can we expect any better from others?
>
> I expect a comprehensive answer to my questions to be tabled in Parliament or I shall be compelled to take this matter up by way of a parliamentary motion."

Babla apparently not content to leave the matter there saw fit to tell the "Fiji Times" about his complaints and allegations which were given front-page publicity. The Speaker obviously considered Babla's conduct as seriously out of line and should be inquired into. The Speaker brought up the matter in the House in these terms:

> "Honourable Members, the Member for Tavua (A. Babla) is not in the House but my attention has been drawn to an article which appeared on the front page of the Fiji Times on Saturday, November 22nd titled "MP seeks answers on Ministers' trips" by Geoffrey Smith.

The published article contained part of my reply to a question raised by the Hon. Member for Tavua. For the information of the House although he is not here, I will read out the question as the Honourable Member for Tavua has already deemed it fit to advise the media". A

The Speaker then gave details of the questions Babla had raised. The Speaker explained the position as follows:

"A question shall not be asked seeking information which can be found in accessible documents or ordinary, works of reference. B

"As one who has never worked in a Government department, the honourable Member can be excused for not realising the mammoth task involved in gathering such data for the last four years from different ministries taking into account that this would have to be done manually; gathering of residential telephone bills for the last four years from different ministers, some of whom have now left Cabinet. C

..... I will leave it there for the time being because the honourable Member is not here. Instead of the honourable member coming back to me he has seen fit to give his questions to the press and I deeply regret that. If that was not enough, the honourable Member, following my decision, went further in the papers to say that the reaction to his queries was an obvious attempt to protect the interests of the Speaker, Government Ministers, President of the Senate, Senators, Members of Parliament and the Secretary-General. D E

My decision is based on Standing Order 31 which is very transparent. I want to inform the honourable Member for Tavua to substantiate his claim that "this was an obvious attempt to protect the interests of the Speaker and Members of Parliament ". I am giving him 24 hours to substantiate the accuracy of his own statement in writing and following that, I will decide what to do." " F

On Tuesday, 25 November, 1997 when the House met Babla was present. He was questioned by the Speaker about the allegations he was making. The exchange in Parliament that morning is reported in Hansard as follows: G

"MR. SPEAKER - Honourable Member, I just want to ask whether you still stand by your statement or not, after hearing my communication.

HON. A. BABLA - No.

MR. SPEAKER.- Do you still stand by it? HON. A. BABLA -

No.

MR. SPEAKER - Are you withdrawing it?

HON. A. BABLA - Yes.

MR. SPEAKER - Therefore, what you have been saying is not true, that the ruling from the Chair was to protect the interests of those whom I have already mentioned - the honourable Prime Minister, the Leader of Opposition, parliamentarians, et cetera. So that statement is not correct?

HON. A. BABLA - "Yes."

On the Fiji One news later that day Babla spoke to TV One which broadcast this statement by Babla in their evening news service:

> "I stand by my question and I was this morning deeply disturbed by the Speaker's conduct of the matter. I had replied to the Speaker under considerable duress. I asked for time to reconsider the situation, but he did not allow me to respond, to give me time. I was under pressure to withdraw my remarks."

On Wednesday, 26 November 1997 the House passed a resolution that Babla's conduct be referred to the Privileges Committee of the House to determine and report whether his conduct constituted contempt of the House.

After their deliberations on the matter the Privileges Committee concluded that Babla's conduct constituted contempt and as already noted he was suspended from the House for two sittings.

In his affidavit the Speaker deposed that the inquiry into Babla's conduct was part of the internal proceedings of the House of Representatives and therefore was not subject to the jurisdiction of the court.

In this case Babla claims that the decision of the Deputy Speaker of the House of Representatives to suspend him -

> "1. Is unlawful as being made without jurisdiction or in excess of jurisdiction;
>
> 2. contravenes sections 4 and 13(1) of the Constitution by denying the applicant his freedom of speech in the House on all matters under its consideration;
>
> 3. contravenes sections 4 and 14(1) of the Constitution by denying the applicant his freedom to assemble and associate with other members in the chamber and in the precincts of the House;

4. contravenes 4 and 15(1) of the Constitution by denying the applicant the freedom of movement in and within the precincts of the House customarily enjoyed by other members of the House;

5. contravenes the Constitution by usurping the functions of the judiciary, in particular section 11 of the Constitution, in that the first respondent has purported to adjudicate and impose a penalty upon the applicant for an alleged offence against section 20(h) of Parliamentary Powers and Privileges Act.

6. contravenes the Applicant's right conferred upon him by Chapter VI Part 2 of the Constitution to represent the electorate of Tavua/Ra West Indian constituency.

7. contravenes paragraphs (1) and (3) of section 41 of the Constitution to the disadvantage of the applicant"

and consequently Babla seeks the following relief and remedies -

"1. A Declaration that the Deputy Speaker and House of Representatives had no lawful power to suspend him from the service of the House for two consecutive meetings of the House.

2. A Declaration that the Deputy Speaker and House of Representatives had no jurisdiction or power to penalise him by suspending him as aforesaid for an alleged criminal offence against section 20(h) of the Parliamentary Powers and Privileges Act Cap 5 and in purporting so to do, infringed the protection afforded to the applicant by section 11 of the Constitution.

3. A Declaration that the Deputy Speaker had no lawful power or jurisdiction to cause him to be removed from the precincts of the House.

4. A Declaration that his fundamental freedoms conferred by sections 4, 13(1), 14(1) and 15(1) of the Constitution have been contravened by reason of his suspension.

5. A Declaration that his suspension contravened the rights conferred upon him under Chapter VI Part 2 of the Constitution to represent the electorate of Tavua/Ra West Indian Constituency."

In the judgment of the Court of Appeal in Madhavan v. Falvey & Ors (1973) 19 FLR 140 a similar issue was raised and there the court held that the House of Representatives had exclusive control over its internal proceedings and

madhavan

over the conduct of its members. It is a matter of parliamentary privilege sanctioned both by the common law and the Constitution. In that case the Court referred to relevant provisions of the Constitution and cited in support two short passages from the judgment in Bradlaugh v. Gossett (1884) Q.B.D. 271 where at page 275 Lord Coleridge C.J. said:

> "What is said or done within the walls of Parliament cannot be enquired into in a court of law."

and at page 278, Stephen J. said:

> "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings....."

Reference was also made to this statement from Dicey on the "*Law of the Constitution*" (10th Edn):

> "No court today would seriously challenge that matters concerning the proceedings within either House are to be discussed and adjudged in that House and not elsewhere."

Sir Vijay Singh, counsel for Babla, sought in his written and oral submissions to argue that the decision in Madhavan case was drawn too widely and therefore *obiter*. Sir Vijay submitted that the decision cannot be regarded as an authority on the powers of the House of Representatives to punish for contempt. This is because no such powers are given under the provisions of the Parliamentary Powers and Privileges Act (Cap. 5) and therefore clearly the House cannot arrogate to itself such powers. Sir Vijay criticised in particular the following statement at page 146 in Madhavan's case:

> "The Parliamentary Powers and Privileges Ordinance provides for some powers and privileges but does not purport to be an exclusive list and is concerned largely with procedural matters and offences by individuals. It is not in our opinion intended by implication to abolish those established privileges of the House itself, the power to punish for contempt and the exclusive right to control its own internal proceedings."

Sir Vijay submitted that an analysis of the Act shows that much more than procedural matters are dealt with there; it covers all applicable aspects of parliamentary privileges. Moreover, the Act deliberately precludes the House from the power to punish for contempt which is vested in the judiciary. Sir Vijay contended that the House of Representatives as established by the 1970 and 1990 Constitutions came into existence with no established privileges of its own. Sir Vijay said the powers and privileges of the House to control its internal proceedings are limited to those contained in section 63(1) of the 1990 Constitution and the Act. Parliament however could abridge, enlarge or

otherwise amend the privileges contained under those provisions but these can only be effected by legislative processes pursuant to the provisions of the Constitution. Sir Vijay submitted the House could have provided for itself the same regime of powers and privileges as is vested in the House of Commons of the United Kingdom under similar legislation to that of section 49 of the Australian Federal Constitution, which states:

> "The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and committees of each House, shall be such as are declared by Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the time of the establishment of the Commonwealth."

In the absence of such legislation, the powers and privileges of the House of Representatives are necessarily confined to those provided under section 63(1) of the Constitution and those contained in the Parliamentary Powers and Privileges Act (Cap.5). Section 63(1) of the Constitution reads:

> *"Regulation of procedure in each House*
>
> 63.-(1) Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may make rules for that purpose, including, in particular, the orderly conduct of its own proceedings"

But as can be seen the Constitution or the Act makes no specific provisions for conferment of any power on the House to punish any member for contempt. Thus Sir Vijay argued that in relation to the case of Babla the House was purporting to exercise a power it did not have or possess. According to Sir Vijay the House could have under the provisions of section 63(3) given itself the requisite powers to deal with any form of disorderly or contemptuous conduct by a member of the House. Section 63(3) of the Constitution states:-

> 63.-(3) Parliament may, for the purpose of the orderly and effective discharge of the business of each House, make provision for the powers, privileges and immunities of each House and the committees and members thereof."

Sir Vijay contends that the House has not enacted under section 63(3) any legislation relating to parliamentary powers and privileges but the provisions of the Act have only dealt with certain aspects of those powers and privileges. However, the House has full control over its proceedings by virtue of section 63(1) under which Standing Orders are made for the conduct of its business. The Standing Orders made by the House to regulate its proceedings embody some of the law relating to parliamentary privileges relating to the conduct of the members of the House. Sir Vijay therefore questions the correctness and soundness of the statement in the Madhavan's case earlier quoted to the effect

that established privileges of the House have been preserved and the Act has not by implication abolished the power to punish for contempt and the right to control its own internal proceedings. Sir Vijay places much reliance on the case of Keilley v. Carson (1842) - 4 Moo PCC 63 and in particular on what Baron Parke said at page 89:-

> "But the power of punishing any one for past misconduct as contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the facts may be, is of a different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not ..... It is said however, that this power belongs to the House of Commons in England; and this, it is contended, affords authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription: the *lex et consuetudo Parliamenti*, which forms part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."

Sir Vijay has made valiant attempt to circumscribe severely the powers of the House of Representatives to discipline its members for contempt in the circumstances disclosed by Babla's conduct. However, whatever the true legal merits of his submissions in this case, I must say that this Court sitting at first instance is bound as a matter of precedent to follow the law on parliamentary privileges as laid down in Madhavan's case. As was noted earlier that was a decision of the Court of Appeal which in hierarchical terms stands above this court in decisional precedence. That decision was followed by this court in the case of Sakeasi Butadroka v. Attorney-General (1993) 39 FLR 115 where Ashton-Lewis J. at page 126 observed:

> Thus, as I understand it the decision in Madhavan's case established that the privilege of the House of Representatives of Fiji to control its own internal proceedings was part of the law of Fiji. Also, the House of Representatives has exclusive control over its own internal proceedings. As such, the internal proceedings of the House of Representatives are not subject to the jurisdiction of the Court. The High Court can only inquire into the internal proceedings of the House where it can do so in its capacity as guardian of the Constitution, and that will only be where the internal proceedings of the House are specifically provided for in the Constitution, such as found in Section 67(1)

where the Constitution specifically sets out the requirement that someone must preside at a sitting of the House of Representatives and defines who it is that should preside. The jurisdiction of the Court to inquire in such an instance being based on the fact that a part of the internal procedure of the House of Representatives has been specifically incorporated as a provision of the Constitution.

It follows from this that where a procedure of the House of Representatives is not specifically incorporated into the Constitution, then the High Court has no jurisdiction to inquire into the internal proceedings of the House. From this, it would further follow that the manner of the application of Standing Orders by the Speaker, and the activities of the privileges committee, in matters concerning the internal proceedings of the House of Representatives, unless specifically provided for in the Constitution, are not cognisable in the Court."

I am satisfied that the inquiry into Babla's conduct by the Privileges Committee of the House and the findings thereof are part of the internal proceedings of the House. As such this court cannot inquire into them. The court has no jurisdiction to do so.

Sir Vijay also contended in his argument that the House of Representatives as a latter-day institution could not claim the same ancient usage and prescription; the *lex et consuetudo Parliamenti* (the law and custom of Parliament) as part of the common law as was explained in Keilley's case. It appears however that the common law of England also applies to Fiji, including ancient usage and custom of Parliament which are part of the common law of Fiji by virtue of section 22(1) of the High Court Act which states:

"22.-(1) The common law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say, on the second day of January, 1875 shall be in force within Fiji ....."

The Solicitor-General Mr. N. Nand in opposing this motion by Babla has submitted that the issues complained of in this case are all matters relating wholly to the internal proceedings of the House of Representatives. He said that the Standing Orders of the House could be described as being the statute law of the House which control the entire proceedings of the House. They regulate all proceedings on meeting and business of the House including rules on debates and privileges, motions and voting, standing committees, and select committees and the like. The members of the House enjoy as an incident of the inherent functions of the House various privileges. Breach of a privilege by a member may be dealt with under the Standing Orders or under the Parliamentary Powers and Privileges Act (Cap.5). Section 28 of the Act which contains an exclusion clause states:

> "S. 28 - Neither the Speaker, Deputy Speaker, President or Vice President or any other officer of Parliament shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in such officer by or under this Act."

Mr. Nand submitted that the courts over many years now have recognised that the internal proceedings in Parliament are not subject to control by the courts and he has quoted cases to illustrate the point. It is true that injustice may be done to a member of the House but the remedy is not with the courts. He said the explanation for this is to be found in the words of Lord Coleridge C.J. in Bradlaugh v Gossett (1884) 12 Q.B.D.27 where at page 277 he said:

> "The history of England and the resolutions of the House of Commons itself, show that now and then injustice has been done by the House to individual members of it. But the remedy, if remedy be it lies not in actions in the courts of law, but by an appeal to the constituencies whom the House of Commons represents."

Therein and as far back in legal history lies the reason why courts will not encroach on the ambit of jurisdiction of Parliament pertaining to parliamentary privileges. The privileges are part of the law and custom of Parliament. Mr. Nand has referred to quotations from several recent cases about the true relationship between the courts and Parliament. It suffices for the purpose of this case if I just mentioned two of them. In Church of Scientology of California v. Johnson Smith [1972] 1 All E.R. 379 an action was brought for libel against the defendant, a member of parliament, for defamatory remarks made by the defendant during a television interview. There the court ruled that parliamentary proceedings could not be challenged in court. In this case Browne J. at page 381 observed:

> "And I accept his (A-G's) proposition which I have already tried to quote, that is, that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a course of action even though the course of action itself arises out of something done outside the House. In my view this conclusion is supported both by principle and authority."

The other case is Rost v. Edwards [1990] 2 All E.R. 641 where at page 645 Poppelwell J. stated:

> "The Courts must always be sensitive to the rights and privileges of Parliament and the constitutional importance of Parliament retaining control over its own proceedings. Equally, as Viscount Radcliffe put it in A.G. of Ceylon v D'Oliyera [1962] 1 All ER 1069, the House will be anxious to confine its own or its

> members' privileges to the minimum infringement of the liberties of others. Mutual respect for an understanding of each others respective rights and privileges are an essential ingredient in the relationship between Parliament and the Courts."

A

I am satisfied both on principle and authority that the same legal relationship applies in Fiji between the Courts and Parliament. It is important that these two most revered institutions in the land should recognise and respect each other's jurisdiction. This is necessary to ensure the proper discharge of their respective constitutional responsibilities. It is not a mere matter of comity but one of well-established law and custom.

B

On the other contentions of Babla on which declarations are being sought from this Court, I find them to have also been adequately dealt with in the Solicitor-General's submissions. If I may say so, his approach to them is clear and perceptive and one I would also adopt.

C

One of these contentions is that Babla's suspension contravened his fundamental freedoms as conferred by Sections 4, 13(1), 14(1) and 15(1) of the Constitution. Those sections will be found under Chapter II of the Constitution which is concerned with the protection of the fundamental rights and freedom of the individual. Similar contentions had been raised in Butadroka's case and the following passage from the judgment of Ashton-Lewis J. at page 135 is apposite:

D

> "These dicta, in conjunction with an examination of the proviso's themselves set out in sections 11, 12, 13, 14 and 15 of the Constitution assist me in reaching the conclusion that the Fundamental freedoms set out in those sections are not absolute, but are tempered generally by the need to place their operation in the context of the competing interests of others in the setting to which they are to be applied.
>
> The limitation upon mutual operation of those sections in Chapter 2 of the Constitution when applied side by side with the authoritative decision in Madhavan's case, which would require the Constitution to do that which it has not done, i.e. to make specific provision for the application of Chapter 2 provisions to the internal proceedings of Parliament, further re-in forces me to the view that an alleged breach of any of Chapter 2 provisions of the Constitution arising from internal proceedings of the House of Representatives is neither cognisable nor reviewable in the High Court."

E

F

G

That conclusion by the Court in that case is unexceptional which I would also apply in relation to the circumstances of the present case. In the result I would reject as of no substance any of those contentions.

The other contention relied upon is that Babla's suspension contravened rights conferred upon him under Chapter VI Part 2 of the Constitution to represent the electorate of Tavua/Ra West Indian Constituency. A similar contention was also advanced in the Butadroka case where at page 49 of the judgment Ashton-Lewis J. explained why he rejected it:

> "Finally Mr. Stanton submitted that the suspension of the Plaintiff was void because the rights of all the constituents of Rewa to be represented by the Plaintiff in the Parliament had been breached. I am not persuaded by this submission.
>
> Under section 19 of the Constitution it is for a constituent of Rewa himself to apply to the Court. The Plaintiff cannot apply on his behalf. There has been no such application and if there was would such constituent be able to point to any breach of his Fundamental Freedom by the Plaintiff's suspension from the House of Representatives? Those Fundamental Freedoms exercisable by him individually are in no way violated by the Plaintiff's suspension."

Here too I accept the judge's finding as sound in law and would make a similar finding in this case.

In the result the motion by Babla is dismissed with costs.

(Motion dismissed.)

(Editor's Note: The 1997 Constitution of Fiji (Constitutional Amendment Act 13/1997) commenced on 27 July 1998)

of understanding between the UK Government and each of the devolved governments. The Scottish Affairs Committee reported on the nature and status of the convention as it applied to Scotland in 2006,[34] and a number of its recommendations in that report were repeated in its report on the Commission on Scottish Devolution in 2010.[35]

The 'self-denying ordinance'

Questions and adjournment debates are procedures of the House which are intended to engage Ministers on matters on which they are responsible to Parliament. After devolution, it was clear that the range of matters for which the Secretaries of State for Northern Ireland, Scotland and Wales were responsible was significantly reduced. Following a report from the Procedure Committee,[36] the House passed a resolution on 25 October 1999 as follows:

> That, subject always to the discretion of the Chair, and in addition to the established rules of order on the form and content of questions, questions may not be tabled on matters for which responsibility has been devolved by legislation to the Scottish Parliament or the National Assembly for Wales unless the question:
>
> (a) seeks information which the United Kingdom Government is empowered to require of the devolved executive, or
>
> (b) relates to matters which:
>
> (i) are included in legislative proposals introduced or to be introduced in the United Kingdom Parliament,
>
> (ii) are concerned with the operation of a concordat or other instrument of liaison between the United Kingdom Government and the devolved executive, or
>
> (iii) United Kingdom Government ministers have taken an official interest in, or
>
> (c) presses for action by United Kingdom ministers in areas in which they retain administrative powers.[37]

During those periods when the Executive and Assembly in Northern Ireland have been suspended, the restrictions imposed by this resolution have not been applied. Equally, the process of 'rolling devolution' in Northern Ireland and Wales has meant that the responsibilities of UK ministers have altered over time. The saving for matters which United Kingdom Government ministers 'have taken an official interest in' has encouraged a degree of flexibility in the interpretation of the resolution. In debate the Chair has taken a generally permissive approach to references to devolved matters.

Bill, HL Deb (1998–99) 592, c 791. For details of the method by which the government seeks the consent of the Scottish Executive, see HC Deb (2002–03) 399, c 291W, and Minutes of Proceedings of the Scottish Parliament, 17 and 31 January 2001.

[34] Scottish Affairs Committee, Fourth Report of Session 2005–06, *The Sewel Convention: a Westminster perspective*, HC 983; Second Special Report of Session 2005–06, *The Sewel Convention: the Westminster perspective: Government Response to the Committee's Fourth Report of Session 2005–06*, HC 1634.

[35] Scottish Affairs Committee, Third Report of Session 2009–10, *Commission on Scottish Devolution*, HC 155.

[36] Procedure Committee, Fourth Report of Session 1998–99, *The Procedural Consequences of Devolution*, HC 185; First Special Report of Session 1998–99, *Government Response*, HC 814.

[37] CJ (1998–99) 519; see also HC 148, 376, 185, 814 (1998–99); HC Deb (1998–99) 336, cc 606–74.

PENAL JURISDICTION OF BOTH HOUSES

The power of both Houses to punish Members and non-Members for disorderly and disrespectful acts has much in common with the authority inherent in the superior courts 'to prevent or punish conduct which tends to obstruct, prejudice or abuse them' while in the exercise of their responsibilities.[38] By this means the two Houses are enabled to safeguard and enforce their necessary authority without the compromise or delay to which recourse to the ordinary courts would give rise.[39] The act or omission which attracts the penal jurisdiction of either House may be committed in the face of the House or of a committee, within the Palace of Westminster[40] or outside it. Nor is it necessary that there should have been a breach of one of the privileges enjoyed, collectively or individually, by either House: anything done or omitted which may fall within the definition of contempt (see p 251), even if there is no precedent, may be punished. Nevertheless the House of Commons has resolved that it should exercise its jurisdiction as sparingly as possible and only when satisfied that it is essential to do so to prevent obstruction of its business (cf p 218).

Power of both Houses to secure attendance of persons on matters of privilege

The House of Commons has the power to send for persons whose conduct has been brought before the House on a matter of privilege by an order for their attendance, without specifying in the order the object or the causes for which their attendance is required;[41] and in obedience to the order Members attend in their places, and other persons at the Bar[42] (see pp 196, 197–198).

It was the ancient practice in both Houses that in appropriate cases persons were brought in custody to the Bar to answer charges of contempt[43] and in the Lords to order them to be attached and brought before the House to answer

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[38] Report of the Committee on Contempt of Court, Cmnd 5794 (1974) para 2. *Burdett v Abbot* (1811) 104 ER 554, 558; Select Committee on Proceedings relating to Sir Francis Burdett, Second Report, CJ (1810) 732; Lord Denman CJ in *Sheriff of Middlesex* (1840) 113 ER 419 esp at 426; and 1 Hatsell, App 6. Cf also *Demicoli v Malta*, where the European Court of Human Rights considered proceedings taken under the European Convention on Human Rights against the Maltese House of Representatives for an exercise of penal jurisdiction in response to the publication of an allegedly defamatory charge against members of that House. The court judged the impartiality of the House as adjudicating body open to doubt, because the Members who had allegedly been defamed participated in the finding of guilt and the determination of sentence. The Maltese House was therefore in breach of the Convention (App No 13057/87, Ser A vol 210, (1992) 14 EHRR 47).

[39] In some cases the fact that the act is done within the precincts of the House is the essence of the offence. Thus, the arrest of a Member on a criminal charge, if effected within the precincts of the House, while it was sitting, would constitute a contempt, but not if it took place beyond the walls of Parliament, see Report from the Select Committee on the Official Secrets Acts, HC 101 (1938–39) pp 23 and 93.

[40] See 2 Cav Deb 321 for the Speaker's suggestion that service of the order of the House by leaving a copy thereof at the usual place of abode of the person therein named should be deemed personal service.

[41] CJ (1892) 157; Parl Deb (1892) 3, c 700; CJ (1897) 361; ibid (1901) 414. LJ (1578–1614) 201, 256, 296; ibid (1660–66) 252 etc; CJ (1547–1628) 175, 680, 886; ibid (1667–87) 351; ibid (1727–32) 705; ibid (1774–76) 323; ibid (1825) 445; ibid (1826–27) 561; ibid (1840) 30, 56, 59; ibid (1880) 70; *Gosset v Howard* (1847) 116 ER 1582, and see also Appendix IX to Second Report of Select Committee on Printed Papers, HC 397 (1845) p 104.

complaints of breaches of privilege or contempt.[44] While the Houses retain the undoubted right to exercise such powers, they have not been used for many years and may be considered inappropriate in modern circumstances.[45]

Committal

The origin of the power to punish for contempt is probably to be found in the mediæval concept of the English Parliament as primarily a court of justice. The power to fine or imprison for contempt belongs at common law to all courts of record. The House of Lords has been held to be a court of record,[46] and as such has power not only to imprison but to impose fines (see p 196). It may also imprison for a fixed time, and order security to be given for good conduct; and their customary form of committal is by attachment. The Commons' power to commit offenders was exercised frequently until the end of the nineteenth century;[47] and repeatedly recognised by the courts.[48] Offenders committed by order of either House have been either detained in one of HM prisons[49] or in the custody of Black Rod,[50] or the Serjeant at Arms,[51] as the case may be.[52]

[44] See precedents collected in the Appendix to the Second Report of the Select Committee on Printed Papers, HC 397 (1845) p 104.

[45] See *Gosset v Howard* (1847) 116 ER 172.

[46] Per Lord Mansfield, reminiscing obiter, in *Jones v Randall* (1774) 98 ER 708. It has been held, in *R v Flower* (1799) 101 ER 1408, that the Lords, while exercising a legislative (as opposed to judicial) capacity, are not a court of record. However, that case concerned a breach of privilege, and the court accepted that in punishing such a breach by committal to prison and a fine the House was 'sitting in a judicial capacity'. In the absence of any explicit provision on this point in the Constitutional Reform Act 2005, it appears likely that the House of Lords remains a court of record for certain purposes.

[47] It was calculated in 1810 that the number of instances of committal of delinquents at the order of the Commons was 'little less than a thousand' (C W Williams Wynn *Argument upon the Jurisdiction of the House of Commons* (1810) 7). Between 1810 and 1880 there were a further 80 committals. The latest case in the Commons of detention of a Member is that of *Bradlaugh* (CJ (1880) 235), and in respect of a non-Member, that of *Grissell* in the same year (CJ (1880) 77).

[48] *The Aylesbury Men, R v Paty* (1704) 92 ER 232; *Brass Crosby's case* (1771) 95 ER 1005; *Burdett v Abbot* (1811) 104 ER 501; *Sheriff of Middlesex* (1840) 113 ER 419; Select Committee on Printed Papers, HC 305, 397 (1845); HC 39 (1847). For consideration of whether the House of Commons is a court of record, see p 196 and *Erskine May* (23rd edn, 2004) p 160.

[49] LJ (1767–70) 189; ibid 575; ibid (1779–83) 191; ibid (1783–87) 613, 647; ibid (1787–90) 338; ibid (1790) 649; ibid (1794–96) 241; ibid (1796–98) 509; ibid (1798–1800) 182; ibid (1801–02) 105; ibid (1810–12) 371, 372; ibid (1850) 367, 478; CJ (1818) 289; ibid (1826–27) 582; ibid (1835) 501; ibid (1843) 528; ibid (1865) 336; ibid (1878–79) 435; ibid (1880) 77.

[50] LJ (1828) 34; ibid (1830–31) 471; ibid (1831–32) 387; ibid (1834) 743; ibid (1845) 729; ibid (1849) 133; ibid (1870) 77. See also ibid (1972–73) 56 and SO No 13.

[51] CJ (1825) 455; ibid (1835) 501; ibid (1843) 523; ibid (1851) 288–89; ibid (1865) 336; ibid (1878–79) 366; ibid (1880) 235.

[52] When at the time of committal the place of punishment was not determined (Parl Deb (1819–20) 41, c 1014) or the person adjudged guilty of contempt was not in the Serjeant's custody (CJ (1835) 501; ibid (1843) 523), the Commons has made an order for the offender to be taken into the custody of the Serjeant and then committed him to prison. The Joint Committee on Parliamentary Privilege recommended the abolition of both Houses' powers of imprisonment, but not the power of temporary detention of those misconducting themselves within the precincts (HL 43-I, HC 214-I (1998–99), para 303).

Committal without a warrant

The Serjeant, without specific order of the House of Commons,[53] but by virtue of Standing Order No 161, takes into custody strangers who intrude themselves into the House or otherwise misconduct themselves (in the gallery or elsewhere).[54] Black Rod has similar powers under Lords Standing Order No 13(1).

Otherwise the Lords attaches and commits persons by order, without any warrant. Such an order, signed by the Clerk of the Parliaments, is the authority under which the officers of the House and others execute their duty. In the Commons also, in earlier times, it was not the custom to prepare a formal warrant for the execution of its orders, and the Serjeant arrested persons with the Mace as his only authority.[55]

Warrants of committal[56]

The Commons, when ordering the committal of an offender, direct the Speaker to issue a warrant to the Serjeant at Arms and, if appropriate, also to the governor of a prison.[57]

Warrants issued by order of the House of Commons are not vitiated by or reversible on the grounds of irregularities of form. The courts have considered it their duty to presume that the orders of the House and their execution are according to law.[58] Such warrants are construed on the same principles as the writs of a superior court, and not as the warrants of a magistrate.[59]

Warrants are sometimes expressed in general terms, as for instance that the prisoner is committed for a 'high contempt' or a breach of privilege,[60] and in this case it has been universally admitted that it is incompetent for the courts to inquire further into the nature of the contempt.[61] This is the case although

[53] CJ (1761–64) 23; ibid (1818–19) 537; ibid (1830) 461; ibid (1830–31) 323; ibid (1833) 246; ibid (1847) 99.

[54] An account of the practice of the Serjeant at Arms in dealing with persons against whom complaints are made or who are adjudged to be in contempt of the House (including strangers who misconduct themselves in the Gallery of the House) is contained in the Minutes of Evidence taken before the Select Committee on Parliamentary Privilege, 1967 (HC 34 (1967–68) p 157). In the past, the Speaker, when accompanied by the Mace, has ordered persons into custody for disrespect or other contempts committed in his presence, without any order of the House (2 Hatsell 241; D'Ewes 629; CJ (1667–87) 352, 353; Parl Deb (1812) 23, c 166). Upon information that a Member had been assaulted in the Lobby, the Speaker directed the Serjeant to take the supposed offender into custody (CJ (1824) 483).

[55] CJ (1547–1628) 109; 2 Hatsell 92; HC 397 (1854) p vi; and see W R McKay *Observations, Rules and Orders of the House of Commons* (1993) 93–99.

[56] For fuller details of the procedure used by the Commons to commit offenders, see *Erskine May* (22nd edn, 1997) pp 133–38.

[57] A refusal by the governor to receive and detain on the delivery of a warrant would be treated by the House as a gross contempt (Parl Deb (1819–20) 41, c 1017).

[58] *The Aylesbury Men, R v Paty* (1704) 92 ER 232; *Brass Crosby's case* (1771) 95 ER 1014; *Holdsworth's case* (1820) 106 ER 716; *Lines v Russell* (1852) 16 JP 491, 19 LT (os) 364.

[59] *Gosset v Howard* (1847) 116 ER 158, reversing *Howard v Gosset* (1845) 116 ER 139; and see *Howard v Gosset* (1842) 174 ER 553.

[60] *Earl of Shaftesbury's case* (1677) 86 ER 792; *Sheriff of Middlesex* (1840) 113 ER 419; CJ (1840) 25.

[61] CJ (1640–42) 960; 5 State Tr 948; *The Protector v Streeter* (1654) 82 ER 824; *Burdett v Abbot* (1811) 104 ER 558; *Sheriff of Middlesex* (1840) 113 ER 425; *Gosset v Howard* (1847) 116 ER 158 at 172. It was held in 1955 by the High Court of Australia that the full powers of the United Kingdom's House of Commons being enjoyed by the Commonwealth Parliament and

the Habeas Corpus Act 1679 is binding on all persons who have prisoners in their custody, and since 1704[62] it has been the practice for the Serjeant at Arms and others, by order of the House of Commons, to make returns to writs of *habeas corpus*.[63] Those who are committed for contempt may not be admitted to bail. The view was well stated in *Brass Crosby's case* in 1771:

> When the House of Commons adjudge anything to be a contempt or a breach of privilege, their adjudication is a conviction, and their commitment in consequence is execution; and no court can discharge or bail a person that is in execution by the judgment of any other court. The House of Commons, therefore, having authority to commit, and that commitment being execution . . . [this court] can do nothing . . . in such case this court is not a court of appeal.[64]

If, however, the warrants state the particular facts constituting the contempt,[65] divergent views have been held in the courts as to their duty of inquiry. In the earlier cases the judges disclaimed any power to inquire,[66] but subsequently judicial opinion changed. Lord Ellenborough observed in *Burdett v Abbot* in 1810 (which was an action for assault and not on a writ of *habeas corpus*) that he could conceive a cause of committal coming collaterally before the court in the form, for example, of a justification pleaded to an action of trespass, in such a way that the court might be obliged to consider it and pronounce it defective. It would be more doubtful, however, whether a matter coming directly before the court, such as on a return to a *habeas corpus*, would lead the court to relieve the subject from the committal of the House in any case whatever.[67]

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a warrant having been issued for the committal of two persons stating simply that they were 'guilty of a serious breach of privilege', the warrant was sufficient and conclusive (*R v Richards, ex p Fitzpatrick and Browne* (1955) 92 CLR 157 at 162).

62 In 1675 and in 1704 the Commons endeavoured to resist the operations of a writ of *habeas corpus* by orders to the Lieutenant of the Tower and to the Serjeant at Arms to make no return to it (CJ (1667–87) 356; ibid (1702–04) 565). In 1677, two years before the passing of the Habeas Corpus Act of 31 Charles 2, the Earl of Shaftesbury, who had been committed by the House of Lords 'for a high contempt', was remanded by the Court of King's Bench on the ground that it had no jurisdiction (1677) 86 ER 792.

63 *Sheriff of Middlesex* (1840) 113 ER 419; CJ (1840) 25; Parl Deb (1840) 51, c 550; *Lines v Russell* (CJ (1851) 147, 148, 153); and cf p 290.

64 (1771) 95 ER 1011. The position has been expressed by resolutions of the House of Commons (4 Parl Hist 1262; CJ (1667–87) 356, 357; ibid (1697–99) 174; ibid (1702–04) 505, 599), and has been confirmed by numerous decisions of courts of law when application was made for the discharge or release on bail of persons committed by either House (*Earl of Shaftesbury's case* (1677) 86 ER 792; *The Aylesbury Men, R v Paty* (1704) 92 ER 232; *Murray's case* (1751) 95 ER 629; *Brass Crosby's case* (1771) 95 ER 1005; *R v Flower* (1799) 101 ER 1408; *Hobhouse's case* (1820) 106 ER 716; *Sheriff of Middlesex* (1840) 113 ER 419; and *Lines v Russell* CJ (1851) 147, 148, 153; ibid (1852) 64, 68; 16 JP 491, 19 LT (os) 364). Lord Ellenborough observed in *Burdett v Abbot* in 1810 that 'if a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that court or of any other of the superior courts, inquire further' (*Burdett v Abbot* (1811) 104 ER 558). See also *Sheriff of Middlesex* (1840) 113 ER 425 and *Gosset v Howard* (1847) 116 ER 174.

65 *The Aylesbury Men, R v Paty* (1704) 92 ER 232; *Brass Crosby's case* (1771) 95 ER 1008; *Burdett v Abbot* (1810) 104 ER 501; *Hobhouse's case* (1820) 106 ER 716.

66 See *The Aylesbury Men, R v Paty* (1704) 92 ER 232, though even here there was a dissenting opinion which held that the prosecuting of the action complained of (which was taken against the constables of Aylesbury for not allowing a vote) being in itself legal could not be a breach of privilege. See also Wright J in *Murray's case* (1751) 95 ER 629 and Blackstone J in *Brass Crosby's case* (1771) 95 ER 1005.

67 104 ER 558. Lord Ellenborough went on to say:

> If a commitment . . . does not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law or natural justice; I say that, in the case of such commitment . . . we must look at it and act upon it as justice may require from whatever court it may profess to have proceeded.

This view received the support of Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1156 and in *Sheriff of Middlesex* (1840) 113 ER 424–26. See also *Hobhouse's case* (1820) 106 ER 716.

Warrants of committal issued by the Speaker by order of the House of Commons justify the officers acting under them against actions for trespass, assault, or false imprisonment, unless the causes of committal stated in the warrants appear to be beyond the jurisdiction of the House. It is not necessary that any cause of committal should be stated in the warrant, or that the prisoner should have been adjudged guilty of contempt before being taken into custody (see p 251). If the officer does not exceed his authority, he will be protected by the courts, even if the warrant should not be technically formal according to the rules by which the warrants of inferior courts are tested.

Resistance to the officers of either House, or others acting in execution of the orders of the House, is treated and punished as contempt.[68]

Period of committal and discharge

The Lords has power to commit offenders to prison for a specified term, even beyond the duration of the session.[69]

The Commons abandoned its former practice of imprisoning for a time certain,[70] and is now considered as without power to imprison beyond the session;[71] prisoners are accordingly released on prorogation. The practice of the Commons has been not to commit offenders for any specified time, but generally or during pleasure; and to keep them in custody until they presented petitions expressing proper contrition for their offences and praying for their release,[72] or until, upon motion made in the House, it was resolved that they should be discharged.[73] A similar course has been pursued by the Lords.[74]

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68 See, eg LJ (1805–06) 340, 610; 1 Hatsell 53; CJ (1688–93) 227; and p 285.

69 LJ (1767–70) 575; ibid (1796–98) 509; ibid (1791–1800) 182; ibid (1801–02) 105; ibid (1850) 478. If, on the other hand, no time is mentioned in the order of committal, it has been said that prisoners committed by the Lords could not be discharged on *habeas corpus*, even after a prorogation (per Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1161; HC 283 (1839) 147); but in *Lord Shaftesbury's case* a doubt was expressed by one of the judges whether the imprisonment, which was for an uncertain time, would be concluded by the session; and another said that if the session had been determined the prisoner ought to have been discharged ((1677) 86 ER 792, and cf LJ (1741–46) 420).

70 CJ (1547–1628) 269, 333, 639, 655; ibid (1651–59) 531, 591; ibid (1667–87) 543, 687, 737.

71 Per Lord Denman CJ, in *Stockdale v Hansard* (1839) 112 ER 1112 esp at 1156; HC 283, 142 (1839). See also CJ (1688–93) 537.

72 It was customary to order such petitions to be printed and considered on a future day (CJ (1842) 180, 209; ibid (1851) 151; ibid (1857–58) 196; Parl Deb (1857–58) 150, c 1198; CJ (1878–79) 381). In one instance where a petition was presented from a person in the custody of the Serjeant expressing contrition for his offence and praying to be discharged from custody, the House ordered him to be brought to the Bar forthwith in order to his being reprimanded and discharged (CJ (1825) 469, 470).

73 CJ (1840) 291, 337; ibid (1842) 224; ibid (1880) 241. The earlier practice current in both Houses of requiring the offender to appear at the Bar to be reprimanded (eg LJ (1850) 380, 384; ibid (1870) 77; CJ (1842) 420, ibid (1851) 289) has been dispensed with. Where, however, the House considered that an offender who had thus regained his liberty had not been sufficiently punished, he was again committed in the next session and detained until the House was satisfied (Parl Deb (1879) 249, c 989; CJ (1750–54) 303; ibid (1860) 70, 73, 77).

74 LJ (1767–70) 189; ibid (1779–83) 191; ibid (1783–87) 613, 647; ibid (1787–93) 250, 338, 649; ibid (1794–96) 241; ibid (1801–02) 115, 221, 225, 230; ibid (1828) 34; ibid (1830–31) 471; ibid (1831–32) 387; ibid (1834) 745; ibid (1845) 730; ibid (1849) 135; ibid (1850) 367, 380, 384; ibid (1870) 77.

Persons who are taken into custody of the Serjeant at Arms acting by virtue of the directions given to her by Standing Orders Nos 161 and 162 to take into custody those who misconduct themselves in the gallery or in a select or a general committee (see pp 14–15, 817) are normally discharged at the rising of the House on the day in question.

Punishment of non-Members other than by committal

Fines

The House of Lords in its capacity as a court of record has had power to inflict fines, either in substitution for, or in addition to, committal.[75]

The status of the House of Commons as a court of record has been doubted, and the Commons has not imposed a fine since 1666.[76] Select committees in 1967 and 1977 and the Joint Committee on Parliamentary Privilege in 1999 have recommended legislation to give the Commons a statutory power to fine.[77]

Reprimand or admonition

Where the offence is not so grave as to warrant the committal of the offender he is generally directed to be reprimanded[78] or admonished formally[79] by the Speaker or Lord Speaker.[80]

In the Commons, the offender, if he is in attendance, is brought to the Bar of the House forthwith by the Serjeant at Arms, and is there reprimanded by the Speaker in the name and by the authority of the House.[81] The offender is then

[75] LJ (1620–28) 276; ibid (1660–66) 554; ibid (1666–75) 174; ibid (1685–91) 144; ibid (1760–64) 493 (Report of Precedents); ibid (1767–70) 575; ibid (1796–98) 509; ibid (1798–1800) 181; ibid (1801–02) 60, 105. Cases are recorded in which the Lords ordered security to be given for good conduct (ibid (1660–66) 554; ibid (1790–93) 331).

[76] CJ (1660–67) 690; cf ibid (1547–1628) 609, and 1 Parl Hist 1250. In *Jones v Randall*, Lord Mansfield remarked (*obiter*) that the Commons were not a court of record: (1774) 98 ER 706, 944, and in *R v Pitt*, he said (again obiter) that the Commons did not have power to fine, (1762) 97 ER 861. The Fines Act 1833 (c 99), ss 23–25, implicitly confirmed the understanding that the House of Lords imposes fines and the House of Commons does not, by requiring from the Clerk of the Parliaments a sessional return of fines and recognizances, and from the Clerk of the House of Commons a return of recognizances only. In *Burdett v Abbot* (1811) 104 ER 554, however, the court held that the House of Commons, whether or not it was a court, ought to have the power to protect itself from obstruction and insult, and to maintain its dignity and character. (See also p 283.)

[77] HC 34 (1966–67) para 197; HC 417 (1976–77) para 15; HL 43-I, HC 214-I (1998–99) paras 279, 303.

[78] LJ (1767–70) 187; ibid (1798–1800) 646; ibid (1801–02) 60; ibid (1810–12) 341, 399; ibid (1830–31) 335; ibid (1850) 89; CJ (1826–28) 399; ibid (1837–38) 316; ibid (1839) 278; ibid (1840) 23; ibid (1887) 306; ibid (1901) 418.

[79] LJ (1826–27) 206; CJ (1831–32) 294; ibid (1833) 218; ibid (1842) 143; ibid (1874) 189; ibid (1892) 166; ibid (1929–30) 503.

[80] No such admonition or reprimand has been made since the Lord Speaker was elected in 2006. The Lords have formerly ordered offenders to be taken into the custody of Black Rod and then to be called in and reprimanded by the Lord Chancellor and to be discharged upon payment of their fees (LJ (1805–06) 610), or to be continued in custody until they have entered into recognizances for good behaviour (ibid (1805–06) 340). In one instance, the Lords ordered that an offender should be discharged without any punishment but should be acquainted that if he repeated his offence he would not meet with such leniency (ibid (1767–70) 212).

[81] CJ (1947–48) 22; and cf ibid (1956–57) 64, 66. The practice of making prisoners kneel at the Bar to receive the judgment of the House has long been discontinued (ibid (1770–72) 594), having been last insisted upon in 1730 (14 Parl Hist 894 ff and Horace Walpole (ed John Brooke) *Memoirs of King George II* (1985) i, 14, and 2 Hatsell 144.

discharged. If, however, he is not in attendance, he may be ordered either to be taken into the custody of the Serjeant and brought to the Bar the following or some later day, there to be reprimanded and discharged,[82] or to attend the House on a future day to be reprimanded.[83]

What is said by the Speaker in reprimanding or admonishing offenders is ordered to be entered in the Journals.

When an offender is brought to the Bar to receive judgment of committal, or any other punishment, or to be discharged out of custody (see p 195), the Serjeant at Arms stands by him with the Mace.[84]

Prosecution of offenders

In cases of breach of privilege which are also offences at law, where the punishment which the Commons has power to inflict would not be adequate to the offence, or where for any other cause the House has thought a proceeding at law necessary, either as a substitute for, or in addition to, its own proceedings, the Attorney-General has been directed to prosecute the offender.[85]

Punishment of Members: House of Commons

In the case of contempts committed against the House of Commons by Members, or where the House considers that a Member's conduct ought to attract some sanction (see pp 254–257), two other penalties are available in addition to those already mentioned: suspension from the service of the House,[86] and expulsion,[87] sometimes in addition to committal.[88]

Reprimand or admonition

In the Commons, it was previously the case that Members received a reprimand or admonition standing in their places,[89] unless they were in the custody of the Serjeant, in which event they were reprimanded at the Bar. When a Member is ordered to be reprimanded or to be admonished he may be called in to receive the reprimand or admonition forthwith,[90] or he may be ordered to attend the House in his place the following or some later day.[91]

[82] CJ (1819) 618.

[83] CJ (1887) 306.

[84] 2 Hatsell 143.

[85] CJ (1693–97) 734; ibid (1697–99) 288; ibid (1699–1702) 230–31, 735; ibid (1741–45) 394; ibid (1750–54) 304; ibid (1778–80) 902; ibid (1841) 394, 413; ibid (1854) 159; ibid (1857) 355; ibid (1860) 258; ibid (1866) 239; ibid (1889) 363. In two subsequent cases the House authorities informally invited the police to consider proceeding against those responsible for gross misbehaviour in the gallery (ibid (1970–71) 68; ibid (1977–78) 438).

[86] CJ (1888) 385; ibid (1890–91) 481; ibid (1911) 37.

[87] CJ (1882) 62; ibid (1947–48) 22.

[88] CJ (1547–1628) 917; ibid (1640–42) 158, 703; ibid (1642–44) 526; ibid (1646–48) 295; ibid (1648–51) 591; ibid (1667–87) 576, 642.

[89] CJ (1790) 516; ibid (1837–38) 316; ibid (1892) 167; ibid (1929–30) 503; ibid (1947–48) 23; ibid (1967–68) 362.

[90] CJ (1892) 167; ibid (1947–48) 23; ibid (1967–68) 362.

[91] CJ (1790) 516; ibid (1837–38) 312.

More recently, however, Members have been reprimanded (and suspended) by virtue of a resolution of the House to that effect, and have not then received the House's censure, standing in their place or otherwise.[92]

Suspension

Although suspension from the service of the House of Commons is now prescribed under Standing Order No 44 for Members who have disregarded the authority of the Chair or abused the rules of the House (see pp 456–458), such a disciplinary power existed under ancient usage.[93]

Suspensions may also be carried out by specific order of the House. Such suspensions most frequently follow reports by select committees, most notably the Committee on Standards and Privileges, in respect of allegations made against the Member,[94] and for conduct falling below the standards the House was entitled to expect,[95] but there have also been suspensions in respect of the terms of a letter addressed by a Member to Mr Speaker and of his conduct in the House on preceding days;[96] for publishing a letter reflecting on Mr Speaker's conduct in the Chair;[97] and for damaging the Mace (after the rising of the House) and conduct towards the Chair on a preceding day.[98]

Suspension and the salary of Members

Since the passing of Standing Order No 45A in 1998, withholding of the Member's salary is an automatic consequence of suspension.[99] Subsequently the House agreed with a recommendation from the Committee on Standards and Privileges that, in appropriate cases, the Committee should recommend as a penalty the withholding of a Member's salary for a specified period without suspending the Member.[100]

Expulsion

The expulsion by the House of Commons of one of its Members may be regarded as an example of the House's power to regulate its own constitution,

[92] CJ (1989–90) 227 and HC Deb (1989–90) 168, c 973; and CJ (1994–95) 286 and HC Deb (1994–95) 258, c 382. Cf also HC Deb (1993–94) 244, c 342, where the Speaker rebuked a Member whose conduct in her opinion fell below the standards the House was entitled to expect.

[93] There are a number of cases of such suspensions for varying periods in the seventeenth century (CJ (1642–44) 128, 302; ibid (1648–51) 123; ibid (1661–67) 289; ibid (1667–87) 120, 156; ibid (1688–93) 846). Although there had been no cases since 1692, the Speaker ruled in 1877 that 'any Member persistently and wilfully obstructing public business without just and reasonable cause is guilty of a contempt of this House, and is liable to punishment, whether by censure, suspension from the service of the House or commitment, according to the judgment of the House' (Parl Deb (1877) 235, c 1814).

[94] CJ (1989–90) 227; HC Deb (1989–90) 168, c 889 ff; and HC 135 (1989–90).

[95] CJ (1994–95) 286; HC Deb (1994–95) 258, c 350 ff; and HC 351 (1994–95).

[96] CJ (1890–91) 481.

[97] CJ (1911) 37.

[98] CJ (1987–88) 463; HC Deb (1987–88) 131, cc 680–683, 929–50.

[99] CJ (1997–98) 596. Previously, some Orders for suspension also provided for the Member's salary to be withheld, eg ibid (1997–98) 191. For suspensions since this Order was made, see eg ibid (2001–02) 159, 355.

[100] HC Deb (2002–03) 407, cc 1239–56; HC 403 (2002–03).

though it is, for convenience, treated here as one of the methods of punishment at the disposal of the House. Members have been expelled for a wide variety of causes.[101]

Members have been expelled who have fled from justice, without any conviction or judgment recorded against them.[102] Where Members have been legally convicted of offences which may incline the House to consider their expulsion, the record of their conviction has been laid before the House.[103] In other cases the proceedings have been founded upon reports of commissions or committees of the House or other sufficient evidence.[104] The Member, if absent, is ordered to attend in his place before an order is made for his expulsion,[105] so as to give him an opportunity to vindicate himself;[106] but where it is apparent that no question of vindication can arise, an order for attendance has not been made.[107] Where an order has been made that a Member should attend in his place, service is made upon him of the order of the House for his attendance, or evidence furnished proving that service is impossible. If he is in prison, the governor of the prison has been ordered to bring him to the House in custody, if he desires to be brought.

Expulsion, though it vacates the seat of a Member and a new writ is immediately issued, does not create any disability to serve again in the House of Commons, if re-elected. The House's attempts in the mid-eighteenth century to be rid of John Wilkes, who was three times expelled and once had his return amended in favour of his defeated opponent, ended, some years later, only in the expunging from the Journal as 'subversive of the rights of the whole body of electors of this kingdom' of the earlier resolution that, following his expulsion, he was incapable of being re-elected in that Parliament.[108] In 1882, when Bradlaugh was expelled and immediately re-elected, no question of the validity of his return arose.[109]

[101] Being in open rebellion (CJ (1714–18) 336, 467); being guilty of certain criminal offences, such as forgery (ibid (1722–27) 702; ibid (1954–55) 25), perjury (ibid (1782–83) 770), fraud or breach of trust (ibid (1718–21) 406, 412, 413; ibid (1727–32) 871; ibid (1812) 176; ibid (1892) 120; ibid (1922) 273, 276, 293, 319; and see Colchester ii, 373), conspiracy to defraud (CJ (1813–14) 433), misappropriation of public money (ibid (1702–04) 171; ibid (1810) 398), and corruption either in the administration of justice (ibid (1547–1628) 588) or in public office (ibid (1711–14) 30, 97); having misconducted themselves in the exercise of their duties as Members of the House (ibid (1667–87) 24; ibid (1693–97) 274 and 5 Parl Hist 900–910; CJ (1693–97) 283); having behaved in a manner unbecoming an officer and a gentleman (ibid (1795–96) 661; ibid (1890–91) 268, 272, 282); and being guilty of contempts, libels, or other offences against the House (ibid (1547–1628) 917; ibid (1640–42) 301, 537; ibid (1667–87) 431; ibid (1711–14) 513; ibid (1714–18) 411; ibid (1722–27) 391; ibid (1882) 61; ibid (1947–48) 22). See also Report of Precedents, HC 79 (1806–07).

[102] CJ (1856) 379; Parl Deb (1856) 143, c 1386; CJ (1857) 48; Parl Deb (1857) 144, c 702. See also CJ (1890–91) 456, 469; ibid (1892) 67.

[103] CJ (1782–84) 770; ibid (1812) 176; ibid (1813–14) 433; ibid (1954–55) 20.

[104] CJ (1693–97) 283; ibid (1722–27) 141, 391; ibid (1727–32) 870; ibid (1810) 433.

[105] CJ (1795–96) 661; ibid (1810) 399; ibid (1812) 176; ibid (1813–14) 433; ibid (1856) 367.

[106] Parl Deb (1856) 143, c 1404; ibid (1857) 144, c 710; ibid (1891) 353, c 574.

[107] In these cases, a Member who had pleaded guilty, and one who was convicted on his own confession were not ordered to attend, though a communication was sent through the Home Office of the intended motion for expulsion (CJ (1890–91) 282 and Parl Deb (1891) 353, c 574; CJ (1892) 120). In similar circumstances, when no order for attendance was made, a Member was informed of the proposed motion for expulsion and told that he might write to the Speaker; and his letter was communicated to the House before the motion was made (ibid (1954–55) 25). In one case, a letter from a convicted Member was communicated to the House on the reading of the order for his attendance (ibid (1922) 319).

[108] CJ (1761–64) 721–23; ibid (1768–70) 178–79, 228–29, 385, 386, 387, 451; ibid (1780–82) 977. See also 1 Cav Deb 352.

[109] CJ (1882) 62.

Procedural fairness

The Joint Committee on Parliamentary Privilege drew attention to the need for procedural fairness in handling cases of Members of the House facing potential suspension and loss of reputation. Among the minimum requirements of fairness are for the Member accused of a contempt (which the Joint Committee recognized to be a serious matter) to be given

- a prompt and clear statement of the precise allegations against the Member;
- adequate opportunity to take legal advice and have legal assistance throughout;
- the opportunity to be heard in person;
- the opportunity to call relevant witnesses at the appropriate time;
- the opportunity to examine other witnesses;
- the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence.

In determining a Member's guilt or innocence, the criterion applied at all stages should be at least that the allegation is proved on the balance of probabilities. In the case of more serious charges, a higher standard of proof may be appropriate.[110] These recommendations, not fully implemented, were also recommended by previous Committees.[111]

Punishment of Members: House of Lords

In 2009 the Committee for Privileges reviewed the House's disciplinary powers, following the appearance in January 2009 of allegations against four Lords.[112]

The Committee's conclusions were based on advice that Lords enjoy a 'fundamental constitutional right', by virtue of their letters patent, to a 'seat place and voice' in Parliament, It follows therefore, as previous editions of *Erskine May* have stated, 'that a resolution by the Lords as a legislative body could not exclude a member of that House permanently'.[113]

However, the right to a 'seat place and voice' in Parliament is not in itself enforceable. In practice it means that every peer not otherwise disqualified has a right to a writ of summons either upon first creation or at the start of each Parliament.[114] Only upon receipt of the writ is the peer entitled to take up his or her seat. But while the letters patent confer upon peers a *right* to a 'seat place and voice' in Parliament, a right fulfilled by the issuing of a writ of summons, the writ itself imposes a *duty*.[115] The House possesses an inherent power to discipline its Members; the means by which it chooses to exercise this power falls within the regulation by the House of its own procedures. The duty imposed by the writ is thus not absolute, but is subject to various implied conditions, which are reflected in the many rules governing the conduct of Members which have been adopted over time by the House.

The Committee for Privileges therefore concluded that:

(1) The House has no power, by resolution, to require that the writ of summons be withheld from a Member otherwise entitled to receive it; as a result, it is not within the power of the House by resolution to expel a Member permanently.

(2) The House does possess the power to suspend its Members for a defined period not longer than the remainder of the current Parliament.

On 20 May 2009 the House formally adopted these conclusions.[116] The same day, two Lords were suspended from the service of the House for the remainder of the 2008–09 session of Parliament.[117] In October 2010 three further Lords were suspended, one for the remainder of the 2010–12 session of Parliament, the others for four and eight months.[118]

Such suspensions take immediate effect. Any suspended Lord is expected to withdraw immediately from the precincts of the House, and is barred from access to the precincts for the duration of the suspension. He or she is not entitled to stand or vote in any election for the office of Lord Speaker (Standing Order No 19).

POWER TO SUMMON WITNESSES

Either House may summon witnesses to appear before it and answer questions. For details of the procedure, see pp 817–825, 896 and 898.

MINISTERIAL ACCOUNTABILITY TO PARLIAMENT

Following a recommendation of the Public Service Committee of the Commons,[119] both Houses came to Resolutions to the following effect:

> That, in the opinion of this House, the following principles should govern the conduct of ministers of the Crown in relation to Parliament: ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and Next Steps Agencies; it is of paramount importance that ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister; ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should

[110] HL 43 (1998–99); HC 214 (1998–99) para 281.

[111] Select Committee on Parliamentary Privilege, HC 34 (1967–68) paras 184–191; First Report of the Select Committee on Standards in Public Life, HC 637 (1994–95) Appendix 2 (b) 'modus operandi'.

[112] See Committee for Privileges, *The Powers of the House in respect of its Members*, First Report, HL 87 (2008–09) (LJ (2008–09) 390–405); and *The Conduct of Lord Moonie, Lord Snape, Lord Truscott and Lord Taylor of Blackburn*, 2nd Report, HL 88 (2008–09) (LJ (2008–09) 406–509).

[113] *Erskine May* (23rd edn, 2004) p 50.

[114] This right was asserted by the House in the Earl of Bristol's case of 1626.

[115] See the remark of Viscount Birkenhead LC in *Viscountess Rhondda's Claim* ([1922] 2 AC 339, 364): 'It will be observed that [the writ] is imperative in its terms. It does not purport to confer a right or privilege, but to demand the fulfilment of a duty'.

[116] Committee for Privileges, First Report, HL 87 (2008–09) para 8, agreed by the House on 20 May 2009 (LJ (2008–09) 537).

[117] LJ (2008–09) 537.

[118] See Committee for Privileges and Conduct, Fourth, Fifth and Sixth Reports, HL 36, 37 and 38 (2010–12); Minutes of Proceedings, 21 October 2010.

[119] See Second Report, HC 313 (1995–96); First Special Report, HC 67 (1996–97); First Report, HC 234 (1996–97), HC Deb (1996–97) 292, cc 1046–47 and HL Deb (1996–97) 579, cc 1053–62. See also a resolution reaffirming the principle that Ministers should be as open as possible with Parliament, CJ (1997–98) 667.

be decided in accordance with relevant statute, and the government's Code of Practice on Access to Government Information (second edition, January 1997); similarly, ministers should require civil servants who give evidence before parliamentary committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information, in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code.[120]

The Resolutions were presented as clarifying the roles of Ministers in relation to Parliament.[121] It was not intended to affect or derogate from the duties Ministers owe to Parliament in their capacity as Members of one of the Houses: and imposing on Ministers the additional duty to offer their resignation to the Prime Minister does not affect the right of either House to proceed against them in a case of alleged contempt, as it might proceed against any other Member.

[120] The Code was issued in 1996 under the Civil Service (Amendment) Order in Council 1995, as amended in 1999 to take account of devolution.

[121] HC 234 (1996–97) Qq 63–66. For a Speaker's statement on how Ministers' adherence to obligations under the resolution could be enforced, see HC Deb (2001–02) 375, c 971. There the Speaker has made it clear that ministers are responsible for the contents of their answers. Members are entitled to a response from a Minister when the accuracy of a ministerial answer has been reasonably challenged (HC Deb (2005–06) 442, c 1283).

THE PRIVILEGE OF PARLIAMENT

WHAT CONSTITUTES PRIVILEGE

Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; 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] Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.

Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other rights and immunities, such as the power to punish for contempt and the power to regulate its own constitution, belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity.[2] Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members.[3] The Speaker has ruled that parliamentary privilege is absolute.[4]

When any of these rights and immunities is disregarded or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament. Each House also claims the right to punish contempts, that is, actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers. The power to punish for contempt has been judicially considered to be inherent in each House of Parliament[5] not as a

[1] In this and the five following chapters, the term 'privilege' is used in the sense of fundamental right necessary for the exercise of constitutional functions. The use of the term in the context of the financial powers of the Commons, including rights both against the Crown and against the Lords, is dealt with separately in Chapters 32 to 36.

[2] The Commons asserted in 1675 that privilege existed so that Members might 'freely attend the public affairs of the House, without disturbance or interrupcion' (CJ (1667–87) 342).

[3] HC Deb (2007–08) 474, c 1313. The ruling related to the privilege of freedom of speech.

[4] The position of Parliament in the United Kingdom thus differs from that of independent Commonwealth or colonial legislatures, for which see *Kielly v Carson* (1842) 12 ER 225. That decision was followed by the Privy Council in *Fenton v Hampton* (1858) 14 ER 727; *Doyle v Falconer* (1866) 16 ER 293; *Barton v Taylor* (1886) 11 App Cas 197; and *Fielding v Thomas* [1896] AC 600; and by the Supreme Court of Canada in *Landers v Woodworth* (1878) 2 SCR 158, esp 210–12. See also *New Brunswick Broadcasting Corpn v Nova Scotia (Speaker of House of Assembly)* (1993) 100 DLR (4th) 212, esp 243, 262. The doctrine is accepted that under the common law only such powers are inherent in a legislative assembly as are necessary to its existence, and the proper exercise of its functions and duties as a

necessary incident of the authority and functions of a legislature (as might be argued in respect of certain privileges) but by virtue of their descent from the undivided High Court of Parliament and in right of the *lex et consuetudo parliamenti*.

Since parliamentary privilege is a means to the collective discharge by each House of Parliament of its functions, occasions have arisen and will continue to arise when one House or the other is content not to insist upon its privileges, either generally or in a particular instance.[5]

In 1607, the House of Commons gave leave, at his request, for a Member to be sued, a process against which Members were then protected by privilege.[6] In current practice, tacit permission is normally given to Members of the Commons to attend a court on a day on which that House sits, though it is equally possible for the Member to insist on the undoubted privilege not to do so (see p 248). Similarly, though service of a writ within the precincts of Parliament on a sitting day is a contempt (see pp 260–261), select committees of the Commons have contemplated an application to the House for leave to serve and execute process.[7] The House will no longer entertain complaints of privilege in respect of the publication of debates or proceedings except when these were held in private or publication was prohibited.[8]

There is, however, an area where such considerations do not arise. Article IX of the Bill of Rights 1689 lays on courts an obligation not to 'impeach or question' proceedings in Parliament. The prohibition is statute law and, unless there has been amending legislation, the protection it confers cannot be waived or not insisted upon by either House (see pp 233–240).[9] In 1917, a court permitted the examination of what a plaintiff, who was a Member of the House of Commons, had said in Parliament, evidently in an attempt to assess the merits of an argument (which was based on a rebuttal of what had been said in the House) about the extent to which the defendant enjoyed a qualified

legislature. Among these necessary powers is the right to order the production of State papers, including those for which legal, professional or public interest immunity might be claimed (*Egan v Willis and Cahill* (1996) 40 NSWLR 650 and *Egan v Chadwick* (1999) 46 NSWLR 563). Wider power must depend on express grant by statute of constitutional power, as in the case of Victoria (*Dill v Murphy* (1864) 15 ER 784) and New South Wales (*Harnett v Crick* [1908] AC 470–77 and *Armstrong v Budd* (1969) 71 SR (NSW) 386).

5 In 1831, in the case of *Wellesley v Duke of Beaufort (Mr Long Wellesley's case)* (1831) 39 ER 538, Lord Brougham LC observed that 'if a court of law or equity . . . entertains an opinion that a Member of either House of Parliament has privilege of Parliament, that court is . . . bound to give him the benefit of the privilege, and to give it to him with all its incidents'. This, his Lordship added, would be true even if a claim to the privilege had actually been abandoned by Parliament, because the court had no means of knowing judicially, short of a statute, what Parliament had decided (at 544). But no subsequent judicial authority seems to have followed Brougham's view in its entirety.

6 CJ (1547–1628) 378. The decision was relatively soon regarded as significant, since it gained a place in Henry Scobell's *Memorials* (1656) 95. Cf a case in 1559, where the House divided on whether a Member in outlawry should—as would normally have been the case—have privilege (CJ (1547–1638) 55).

7 For example, Committee of Privileges, First Report, HC 31 (1945–46) p vii. No such application seems, however, to have been made. The Joint Committee on Parliamentary Privilege recommended that it should be made clear that personal service should be a contempt (whether or not Parliament is sitting) but postal service should not be (HL 43-I, HC 214-I (1998–99) para 335).

8 CJ (1970–71) 548; and see p 223.

9 It was held by Lord Hatherley LC in *Duke of Newcastle v Morris* (1870) LR 4 HL 661 that a privilege of Parliament, established by common law and recognised by statute, should not be abrogated except by express words in a statute.

privilege at law.[10] It was subsequently judicially assumed that the court in 1917 considered that it was no more than taking notice of the fact that the speech had been made.[11] Certainly the House of Commons had taken no steps to 'waive' any statutory duty—which in any event rests on the courts and not on the House—not to impeach or question proceedings in Parliament. The most recent authority for the contention that the privilege enshrined in the Bill of Rights may be altered only by an amending statute is the view implicitly taken by the Judicial Committee of the Privy Council in 1994. The committee reversed a conclusion reached by the New Zealand Court of Appeal to the effect that article IX need not be interpreted so as to exclude the possibility of waiver by a resolution of a legislature to the proceedings of which it applied.[12]

LORDS: PRIVILEGES OF PARLIAMENT AND OF PEERAGE

The Lords enjoy their privileges simply because of their immemorial role in Parliament as advisers of the Sovereign.

In addition to privilege of Parliament, which is enjoyed by all Members of the House of Lords, whether they are bishops or peers, there is a separate privilege of peerage, which extends to all peers, whether or not they have seats in the House, including peers who are minors, and also to wives and widows of peers.[13] Unlike privilege of Parliament, it is not interrupted by a long prorogation or dissolution.[14] The extent of the privilege of peerage is not entirely clear, but it has been shown in recent times to confer immunity from

10 *Adam v Ward* [1917] AC 309, commented on in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335–36, [1994] 3 All ER 407 at 416–17 per Lord Browne-Wilkinson.

11 Lord Dunedin LJ, however, explicitly recognised that absolute privilege attached to speeches in the House of Commons 'for motives of high public policy'; but he added that it was not right that such privilege, intended to safeguard liberty of discussion, should be turned into 'an abominable instrument of oppression' (*Adam v Ward* [1917] AC 324).

12 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, [1994] 3 All ER 407. Both the New Zealand House of Representatives and its Privileges Committee had come to the conclusion reflected in the Privy Council's judgment (New Zealand Debates, vol 536, pp 16191–95, and Interim Report of the New Zealand Privileges Committee, 1991–93). For the reasoning of the New Zealand Court of Appeal in a contrary sense, see *Television New Zealand Ltd v Prebble* (1993) 3 NZLR 513, esp 520–21.

13 By the Acts of Union of 1706 and 1800 peers of Scotland and Ireland were accorded the same privileges as peers of England (*Holiday et al v Colonel Pitt* (1734) 27 ER 767, 93 ER 987; case of Viscount Hawarden (LJ (1828) 28–34)). If, however, a peer of Ireland is elected to the Commons he is not entitled to privilege of peerage so long as he continues to be a member of that House (Union with Ireland Act 1800, art 4). The Peeresses Act 1441 (20 Hen 6, c 9) conferred the right of trial by the House of Lords upon peeresses; since that time it has been the law that women peers and wives and widows of peers have had the same immunity from arrest on civil process as peers (Countess of Rutland's case, ed J H Thomas and J F Fraser *Reports of Sir Edward Coke* (1826) vi, 52; cases of Lady Purbeck (1625); Lady De la Warr (1642); Lady Dacre (1660); Lady Petre (1664); Countess of Huntingdon (1676); Countess of Newport (1699); Lady Abergavenny (1727); LJ (1828) 28–34). A peeress by marriage forfeits her privilege of peerage if she marries a commoner (SO No 83).

14 For interruption of privilege of Parliament, see p 249; House of Lords SO No 82; Sir Edward Coke *First Part of the Institutes* (1823) s 9 [16b]; LJ (1660–66) 298; ibid (1691–96) 241; ibid (1666–75) 714; ibid (1675–81) 67, 79, 80, 659.

arrest on civil process.[15] The Joint Committee on Parliamentary Privilege recommended its abolition.[16]

HISTORICAL DEVELOPMENT OF PRIVILEGE

At the commencement of every Parliament it has been the custom for the Speaker, in the name, and on behalf of the Commons, to lay claim by humble petition to their ancient and undoubted rights and privileges; particularly to freedom of speech in debate, freedom from arrest, freedom of access to Her Majesty whenever occasion shall require; and that the most favourable construction should be placed upon all their proceedings. The Speaker's pronouncement is of symbolic importance rather than of practical effect.

The Presiding Commissioner of a Royal Commission under letters patent replies to the Speaker's petition that, 'Her Majesty most readily confirms all the rights and privileges which have ever been granted to or conferred upon the Commons, by Her Majesty or any of her royal predecessors'.[17]

By contrast with the Lords, the acquisition and enforcement of these privileges by the Commons was both complex and prolonged. The importance of privilege today cannot be entirely divorced from its past. Each of the Speaker's petitions is briefly considered in its historical context in this chapter, together with related powers and privileges. Subsequent chapters then develop each of the themes in current procedure.

Freedom of speech

The first claim in the Speaker's petition, and regarded as the most significant, is for freedom of speech in debate. By the latter part of the fifteenth century,[18]

[15] *Stourton v Stourton* [1963] P 302; *Peden International Transport, Moss Bros, The Rowe Veterinary Group and Barclays Bank plc v Lord Mancroft* (1989), see Patricia Leopold, 'The freedom of peers from arrest' *Public Law* Autumn 1989. See also pp 249–250.

[16] HL 43-I, HC 214-I (1998–99) para 329.

[17] LJ (1841) 571; ibid (1847–48) 8, etc; for the form of words used at the opening of the first new Parliament after an accession to the throne, see LJ (1906) 18; ibid (1911) 9; ibid (1945–46) 22; ibid (1955–56) 13.

[18] Earlier cases indicating the establishment of a distinct privilege of freedom of speech in debate seem inconclusive. The first possibility is *Haxey's case* (1396–97) (Rot Parl iii, 339, 341, 407, 430, 434). The fact that Haxey was not a Member of the House must alter the significance of the grounds on which the House petitioned that judgment against him should be reversed, viz the 'Libertes de lez diez Communes'. The petition of Younge (a Member) in 1455, that he should be compensated for having suffered for a speech he made in the House, a punishment meted out contrary to 'the olde liberte and fredom of the Comyns of this land . . . to speke and sey in the House . . . without any maner [of] chalenge, charge or punicion', should be considered in the light of the fact that he was asking a Yorkist Parliament to compensate him for the effects of an untimely and unwelcome political proposal made to its Lancastrian predecessor. Finally, the case of *Strode* in 1513, who was punished in the Stannary Court for having proposed in Parliament measures to regulate Cornish tinners, is of limited significance, despite its popularity in the early seventeenth century. The statute which voided the proceedings and sanctions against Strode bore similarly, it is true, on other suits against Members of that or future Parliaments 'for any bill, speaking or declaring of any matter concerning the Parliament'. But this can hardly be a manifesto directed at the most likely source of a limitation on freedom of debate, Henry VIII; nor was it probably intended to be such. A committee of the Commons concluded in 1667 that Strode's Act was:

> general law extending to indemnify all and every the Members of both Houses of Parliament in all Parliaments, for and touching any bills, speaking, reasoning or declaring of any matters in or concerning the Parliament to be commuted and treated of; and is declaratory . . . law of the ancient and necessary rights and privileges of Parliament.

This is, however, a political understanding some century and a half after the event (CJ (1667–87) 19). What the case did undoubtedly establish was the privileged position of the Commons against inferior courts, as a full partner in Parliament. For comments on the cases mentioned, see *Erskine May* (20th edn, 1983) pp 78–79; and see also Sir John Neale 'The Commons Privilege of Free Speech in Parliament' in eds E B Fryde and Edward Miller *Historical Studies of the English Parliament* (1970) vol 2, 147 ff, and G R Elton *The Tudor Constitution* (1982) 260 ff.

the Commons of England seems to have enjoyed an undefined right to freedom of speech, as a matter of tradition rather than by virtue of a privilege sought and obtained. Earlier Speakers made no claim for such a privilege but instead to favourable construction of their remarks and those of the House.[19]

The earliest evidence of a shift of emphasis away from reliance on traditional assumptions and attempts to avoid the visitation of royal displeasure on the Speaker, and towards a distinct claim of privilege for the House, appears to be the petition of Speaker Sir Thomas More in 1523, asking Henry VIII 'to take all in good part, interpreting every man's words, how uncunningly soever they may be couched, to proceed yeat of a good zeale towardes the profitt of your Realme'. More's plea may or may not have been answered,[20] and what was sought in the immediately following Parliaments is not clear. By the first Parliament of Elizabeth, however, a claim for freedom of speech in debate was certainly made,[21] and in 1563 it was justified as 'according to the old antient order'.[22] Though no claim appears to have been made in 1566, by the end of the century the practice had become regular.

Although it was recognised that freedom of speech was important and the Crown ought not to act against a Member directly for something said in the House; it seems to have been common ground that decorum and obedience to the Sovereign's wishes ought to be respected. Just as the House increased its ability to protect its Members from arrest and molestation, so it was frequently ready to take punitive action, without waiting for the Crown or Council, against those who overstepped the mark in debate.[23] There was much in these views with which the Crown agreed. Lord Keeper Sir Edward Coke emphasized the executive's view in 1593 when he reminded the Speaker that:

> Her Majesty granteth you liberal but not licentious speech, liberty therefore but with due limitation . . . To say yea or no to bills, God forbid that any man should be restrained or afraid to answer according to his best liking . . . which is the very true liberty of the House; not, as some suppose, to speak there of all causes as him listeth . . . No King fit for his state will suffer such absurdities.[24]

Much of what was unresolved under Elizabeth remained debatable in the years before the civil war, though under Charles I the acuteness of successive political crises diminished the likelihood of resolution. Those who took the view that the basis of freedom of speech was inherent were still in evidence and argued in the Apology of 1604 that it was erroneous to believe that the House's privileges were 'of grace only, renewed every Parliament . . . upon petition and so to be limited'. The view was expressed in Committee on the Commons petition in 1610 that freedom of speech 'could not well be taken from us

[19] See eg the claim made by Mr Speaker Cheney in 1399, 3 Rot Parl 424, 425.

[20] See G R Elton *The Parliament of England, 1559–81* (1986) 331, 341–49.

[21] CJ (1547–1628) 37.

[22] D'Ewes 66.

[23] Elton *The Parliament of England, 1559–81* (1986) 342–49.

[24] Elton *The Tudor Constitution* (1982) 274.

without shaking the foundations of the liberties of Parliament'. In 1621, James VI and I challenged these assumptions. Privileges, he said, 'were derived from the grace and permission of our ancestors and us'. To this the House rejoined:

> that every Member of the House of Commons hath and of right ought to have freedom of speech . . . and . . . like freedom from all impeachment, imprisonment and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning or declaring of any matter or matters touching the Parliament or parliament business.

The Protestation of 1621 had much in common with Elizabethan views, not least because it explicitly contemplated the reference to the king of anything questioned or complained of in Parliament, provided it was 'with the advice and assent of all the Commons'.[25]

The actions of Charles I appeared to challenge this tradition, particularly when in 1629 Sir John Eliot and two other Members were arrested and found guilty in King's Bench of seditious words spoken in debate and for violence against the Speaker, who had been physically restrained in the Chair in order to delay the adjournment of the House. Among the Crown's arguments were the contentions that parliamentary privilege did not protect seditious comments in the Chamber, and that King's Bench could properly take note of day-to-day events in the High Court of Parliament, such as the assault on the Speaker.[26]

By the time of the final breakdown in the early 1640s, the House had in practice bypassed Elizabethan conventions which denied Members the initiative in debate on great matters of state, and the limits of what was unacceptable in criticism of the government had been drastically narrowed.

When the 11 years of Charles I's personal rule came to an end, the attention of the Commons returned to free speech and the events of 1629. Consequently, in 1641, as the political relationship between Parliament and the King was on the verge of breakdown, the arrests of Eliot and the others were declared to be contrary to the law and privilege of Parliament.[27] It is apparent that on the return of the Stuarts from exile in 1660, not only was Parliament anxious to preserve at least some of what had been gained in the years of the Republic and the Commonwealth but that the arrests of 1629 still rankled in some quarters. A bill for maintaining and confirming the rights and privileges of Parliament was read for the first time in the Commons within months of the re-establishment of the monarchy. Much of its purpose was of course to emphasise the illegality of the way the Commons had been treated in the 1640s and 1650s, but it also made the clear statement that 'the Parliaments of England and the Members thereof shall forever hereafter fully and freely enjoy all their ancient and just rights and privileges in as ample a manner as . . . formerly'.[28] The following year, the Treason and Seditious Practices Act

[25] See J P Kenyon *The Stuart Constitution* (1986) 24–27, 38–42.

[26] *R v Eliot, Holles and Valentine*, (1629) 3 State Tr 293–336, esp 309–10. In *R v Chaytor* [2010] UKSC 52 Lord Philips remarked that Eliot established that nothing said in Parliament by a Member as such could be treated as an offence by the ordinary courts, but that the House of Lords 'had carefully avoided the question' of whether the court could try a Member for an assault on the Speaker in the House, see p 241.

[27] CJ (1640–42) 203; 3 State Tr 294.

[28] CJ (1660–67) 42, 49, 80. Despite several reminders from the Commons, the Lords failed to return the bill before the end of the session (ibid 201).

repeated in statutory form the claim to freedom of speech in debate.[29] In 1667, a Commons committee was nominated to review the issue of freedom of speech, and in particular the case of the arrests, then nearly 40 years in the past. The Commons declared that the Court of King's Bench should not have accepted jurisdiction in the cases of Eliot and the others, and that the judgment was illegal and against the privileges of Parliament.[30] The Lords then took up the cause. One of those arrested in 1629, by then a peer, successfully moved to reverse the judgment.[31]

Though the decision of a court had been overturned, there remained the possibility of direct royal intervention in debate, in response to what Charles II or James II deemed politically unacceptable. In the event, such a threat failed to materialise.[32] Nevertheless, when in the revolutionary circumstances of 1688–89 the constitutional initiative passed to Parliament, the opportunity was taken to repeat in the fullest form the claim to freedom of speech, and to protect its status by grounding it in statute, secure from royal interference in or through the courts. The assertion in article IX of the Bill of Rights that freedom of speech and debates and proceedings in Parliament are not to be 'impeached or questioned in any court or place out of Parliament' was intended to stifle both the courts and the Crown.[33]

Chapter 13 will illustrate the elaboration in practice of the principles confirmed in 1689.

Freedom from arrest

The second of the Speaker's customary petitions on behalf of the Commons at the beginning of a Parliament is for freedom from arrest. The development of this privilege is in some ways linked to that of other privileges. Arrest was frequently the consequence of the unsuccessful assertion of freedom of speech, for example. At the same time, there are some distinctive features in chronology and development which mark off freedom from arrest from other such claims made by the House. Some elements which still underpin the

[29] 1661, c 1. The Act included a proviso that its main provisions should not deny Members of either House 'their just ancient freedom and privilege in debating any matters or business which shall be propounded or debated'.

[30] CJ (1667–87) 3, 19, 25.

[31] LJ (1666–75) 166, 223; 3 State Tr 331–33.

[32] It is, however, relevant to note the action taken in King's Bench in 1684–85 against Speaker Sir William Williams for licensing, in 1680 and on the order of the House of Commons, a pamphlet critical of the Duke of York, later James VII and II. Counsel for the Speaker argued that the court had no jurisdiction over the proceedings of the Commons, of which Williams' actions formed part. The court, however, found the publication a seditious libel, and went on to punish the former Speaker for his part in its publication (13 State Tr 1370 ff). The Commons subsequently declared the judgment to have been illegal and against the freedom of Parliament (CJ (1688–93) 215)—like that against Eliot—though it was never reversed. Lord Denman was to observe later that:

> *R v Williams* was ill decided, because he—(the defendant)—was questioned for what he did by order of the House within the walls of Parliament. *R v Dangerfield*—the individual who sold the offending pamphlet—is undoubted law, because he sold and published beyond the walls of Parliament, under an order to do what was unlawful
>
> (*Stockdale v Hansard* (1839) 112 ER 1112).

[33] The inclusion of the phrase 'proceedings in Parliament' as well as 'freedom of speech and debates' among those things protected by the Bill of Rights may reflect this distinction between direct royal interference with the business of Parliament, and indirect harassment of Members through the courts for what they had said in the House.

privilege are found at a very early period. In other areas, the House has subsequently voluntarily narrowed the scope of the privilege.[34]

Whatever the origin of the privilege of freedom from arrest, whether in some recollection of the liberties attached to attendance at traditional popular assemblies or in the principle that the King's servants doing their duty in a superior court should not be impeded by litigation in a lower tribunal, the principle was clearly established at a relatively early date. The first known assertion of freedom from arrest seems to date from 1340,[35] 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.[36]

Though the principle may have been deeply engrained, its implementation was patchy and often beyond the power of the Commons alone to enforce. The delay in releasing the Member in 1340 amply illustrates this, as does the case of Mr Speaker Thorpe, a century later, in 1452. Thorpe had been imprisoned and retained in gaol by order of the House of Lords, despite advice from their assistants the judges that he was entitled to his release. In that instance, the Commons accepted the position and elected a new Speaker.[37] Indeed in two separate cases in 1472, the courts disallowed writs of *supersedeas* staying actions for debt on the grounds that Members of Parliament and their servants were protected by custom from being arrested, imprisoned or impleaded for debt during the time of Parliament: the judges upheld the plaintiff's view that there was no such custom.[38]

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 recognized that privilege could not be pleaded against criminal offences, then adequately summed up as treason, felony, and breach of the peace. The Commons accepted this in 1429,[39] as did the judges in *Thorpe's case* in 1452.[40] A resolution of the Commons in 1675 declared that 'by the laws and usage of Parliament, privilege of Parliament belongs to every Member of the House of Commons, in all cases except treason, felony and breach of the peace'. In 1697 it was resolved 'that no Member of this House has any privilege in case of breach of the peace, or forcible entries or forcible detainers'.[41]

In connection with *John Wilkes' case*, although the Court of Common Pleas had decided otherwise, it was resolved by both Houses in 1763 that privilege of Parliament does 'not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence'.[42] 'Since that time', said the Committee of Privileges in 1831, 'it has been considered as established generally, that privilege is not claimable for any indictable offence'.[43]

The privilege as regards the Lords was explained by a resolution of 1626, 'that the privilege of this House is that no peer of Parliament, sitting the Parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety of the peace'.[44] The current Standing Order of the Lords (No 82) prescribes that 'when Parliament is sitting, or within the usual times of privilege of Parliament, no Lord of Parliament is to be imprisoned or restrained without sentence or order of the House, unless upon a criminal charge or for refusing to give security for the peace'. Notification of orders for imprisonment or restraint must be given to the House.[45]

It was not only the criminal law against which a plea of privilege would fail. In earlier days, the privilege could not prevail against more or less arbitrary detention at the order of the Crown. The most notable case under Elizabeth was that of Strickland in 1571, who was called before the Council and inhibited from attending the House (not strictly speaking arrested) for preferring a Bill to reform the Book of Common Prayer, against the Queen's wishes.[46] In the next two reigns, however, such activities became more common. In 1615, 1621 and 1622 Members were imprisoned without trial while the House was not sitting or after a dissolution. Charles I arrested Eliot and Digges in 1626 while the House was in session, and the further action of the King in 1629 has already been mentioned[47] (see p 208). After the Restoration, the practice effectively ceased.

From the earliest times,[48] therefore, freedom from arrest was regarded as confined to civil suits. In its original form, the privilege was even wider than freedom from arrest. Members were not to be 'impleaded', which was taken to prevent civil actions being maintained against them at all, by reason of their inability to maintain their private rights while in attendance upon Parlia-

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[34] An exhaustive review of the earlier historical basis for the privilege of freedom from arrest in civil cases is to be found in *Cassidy v Stewart* (1841) 133 ER 817. A claim of privilege previously made in this connection in respect of estates was omitted for the first time in 1852. Freedom from 'molestations' (for the precise meaning of which see HC 34 (1967–68) paras 109–12 and p 93) was claimed until 1866. The privilege of not being impleaded (ie sued) was considerably limited by statute in the late seventeenth and eighteenth centuries (see p 212) and the claim which afforded protection to menial servants, having been effectively extinguished by statute in 1770, was no longer made after 1892 (Parl Deb (1892) 7, c 18; 2 Hatsell 227; Colchester i, 65) (see p 214)).

[35] *Bulletin of the Institute of Historical Research* vol 43 (1970) 214–15.

[36] Following the punishment meted out to the individual who subjected Richard Chedder, a Member of the Commons, to 'orible batrrie et mal-fait', the Act 5 Hen 4, c 6 (1404) provided that those who assaulted the servants of Members of Parliament should pay double damages besides a fine (3 Rot Parl 542; 1 Hatsell 15–17). The same penalty was later imposed by a general statute for assaults on Members of either House coming to Parliament (11 Hen 6, c 11 (1432); 1 Hatsell 17).

[37] 5 Rot Parl 239; 1 Hatsell 28–34.

[38] 1 Hatsell 41–43.

[39] The case of Larke, the servant of a Member of the Commons, against whom damages for a trespass were awarded, 4 Rot Parl 357; 1 Hatsell 17–22.

[40] 5 Rot Parl 329; 1 Hatsell 28–34.

[41] CJ (1667–87) 342; ibid (1693–97) 784. See also ibid (1640–42) 261.

[42] LJ (1760–64) 426; CJ (1761–64) 674; 15 Parl Hist 1361–78. See also *R v Wilkes* (1763) 95 ER 737ff; 19 State Tr 982.

[43] CJ (1831) 701. See also LJ (1709–14) 31, 34 and ibid (1741–46) 492.

[44] LJ (1620–28) 562.

[45] For such notifications, see LJ (1953–54) 138; ibid (1965–61) 422; ibid (1974–75) 52; ibid (1980–81) 58; ibid (1987–88) 880; ibid (1993–94) 249; HL Deb (1995–96) 569, c 495; ibid 574, c 1371.

[46] D'Ewes 166–68, 175–76. The cases involving Peter Wentworth involve arrests either by the House's own order or for activities out of Parliament (Sir J E Neale *Elizabeth I and her Parliaments* i (1953) 325 ff and ii (1957) 157 ff and 260 ff).

[47] J P Kenyon *The Stuart Constitution* (1986) 24.

[48] Exemption from distraint in time of Parliament was not novel in 1290, when the bishop of St David's was protected against a petition for leave to distrain for rent of a house (1 Rot Parl 61 (No 192) and 1 Hatsell 3) and in 1315 (1 Hatsell 12).

ment.[49] The House insisted in 1477 that the privilege had existed 'whereof tyme that mannys mynde is not the contrarie'.[50] Writs of *supersedeas* were first issued to stay such actions but from the beginning of the seventeenth century the Speaker was ordered to stay suits by a letter to the judges,[51] and sometimes also by a warrant to the party;[52] and the parties and their attorneys who commenced the actions were brought by the Serjeant to the Bar of the House.[53]

In the sixteenth century, the privilege was not always allowed,[54] and subsequently statute first eroded[55] and then extinguished it. Under the Parliamentary Privilege Act 1770, any person may at any time commence and prosecute an action or suit in any court of law against peers or Members of Parliament and their servants; and no such action or process shall be interfered with under any privilege of Parliament. It is also, however, enacted that nothing in the Act should subject the person of any Member of Parliament to arrest or imprisonment. Under this Act[56] a Member of Parliament may be coerced by every legal process, except attachment of his body.

However well established the principle of freedom from arrest, practical problems remained. Where a Member of the Commons had been imprisoned in a civil suit, the House faced the difficulty of first how to secure his release, and secondly, when the Member was in execution, how to do so without damage to the rights of the plaintiff, since a Member released by pleading his privilege could not be rearrested, and the creditor lost his claim.

[49] 1 Hatsell 6–9, 50. For procedures with regard to the issue of writs of *supersedeas* in 1588, see D'Ewes 436.

[50] 6 Rot Parl 191; 1 Hatsell 48–50. The 'time whereof the memory of man runneth not to the contrary' is taken to have ended with the accession of Richard I in 1189 cf Prescription Act 1832.

[51] CJ (1547–1628) 342, 381, 525, 861.

[52] CJ (1547–1628) 804.

[53] D'Ewes 348, 350; CJ (1547–1628) 211, 368, 371, 655, 922, 928. For a refusal of the judges in 1626 to obey the Speaker's letter, see William Prynn *Fourth Part of Brief Register of Writs* (1664) 810; CJ (1547–1628) 861; 1 Hatsell 184, 185. For cases in which Members waived their privilege and upon petitions from the parties suits were allowed to proceed, see CJ (1547–1628) 378, 421, 595, etc; ibid (1688–93) 280, 300, 600; ibid (1693–97) 557, etc.

[54] In 1585 the Lord Chancellor sitting in Chancery 'very gently and courteously' demanded precedents to support a claim for privilege in the case of the service of a subpoena on a Member (D'Ewes 347).

[55] The Act 12 & 13 Will 3, c 3 enacted that any person might commence and prosecute actions against any peer, or Member of Parliament, or their servants, or others entitled to privilege, in the court at Westminster, and the duchy court of Lancaster, immediately after a dissolution or prorogation, until the next meeting of Parliament, and during any adjournment for more than 14 days; and that during such times the court might give judgment and award execution. Soon afterwards it was enacted, by 2 & 3 Anne, c 12, that no action, suit, process, proceedings, judgment or execution, against privileged persons, employed in the revenue, or any office of public trust, for any forfeiture, penalty, etc, should be stayed or delayed by or under colour or pretence of privilege of Parliament. The Act of William III had extended only to the principal courts of law and equity; but by the Parliamentary Privilege Act 1737, all actions in relation to real and personal property were allowed to be commenced and prosecuted in the recess and during adjournments of more than 14 days, in any court of record. The last occasion upon which the House of Commons treated the service of writ upon a Member as itself a breach of privilege was in 1757 (CJ (1754–57) 686), and the privilege was abolished by statute in 1770 (see above).

[56] Cf also the Acts 11 Geo 2, c 24 (Parliamentary Privilege Act 1737); 4 Geo 3, c 33; 45 Geo 3, c 124; and 47 Geo 3, sess 2, c 40; and also *Cassidy v Stewart* (1841) 133 ER 817 for further information on the history of peivilege in relation to legal process. In 1958, the Privy Council decided that the Parliamentary Privilege Act 1770 did not render the issue of a writ against a Member of the Commons in respect of a speech or proceeding in Parliament a breach of peivilege ([1958] AC 332, esp at 349 ff); though of course the Bill of Rights will inhibit a court from impeaching or questioning proceedings in Parliament (see p 233ff).

Initially, these problems were solved (as in 1340) with the assistance of the Crown or of the courts, when a writ of privilege would be issued by the Lord Chancellor addressed to the keeper of the prison.[57] To save the rights of plaintiffs special statutes might authorize the Lord Chancellor to issue writs for the release of Members.[58] *Ferrers' case* in 1542 is often seen as signifying an advance on previous arrangements for securing the release of an imprisoned Member. Ferrers, a Member, was arrested as surety for a debt, and the House took the novel step of sending the Serjeant, with the Mace as his only authority, to secure Ferrers' release from the City authorities. When this was resisted, the Commons laid the matter before the Lords, 'who, judging the contempt to be very great, referred the punishment thereof to the Commons House'. The Commons refused the Lord Chancellor's offer of a traditional writ of privilege. By this time Ferrers had been released, but the House sent for and committed for contempt those who had been responsible for his detention.

Although this was in the past seen as the assumption of striking new authority by the Commons, the significance of *Ferrers' case* is probably more limited. His release may have been obtained principally because Ferrers was Henry VIII's servant, not because he was Burgess for Plymouth, against the background of the King's reported remark that he, 'being the head of Parliament and attending in his own person upon the business thereof ought in reason to have privilege for himself and all his servants attending there upon him', and 'whatsoever offence or injury . . . is offered to the meanest Member of the House is to be judged against our person and the whole court of Parliament'.[59] Moreover, the practice of seeking writs of privilege out of Chancery in order to secure the release of Members, in preference to sending the Serjeant with the Mace, continued after 1542, though no writ was obtained without a warrant previously signed by the Speaker. In particular, in *Smalley's case* in 1576, when a Member attempted to use privilege in order to avoid repaying the sum owed and not merely to escape prison for himself or his servant, the House first maintained that a writ out of Chancery was necessary, and only at the insistence of Arthur Hall, Burgess for Grantham and Smalley's master, did the House resort to enforcing the privilege by the authority of the Mace.[60] It seems clear, however, both from the events of *Smalley's case* and from incidents in 1572 when the action taken over Ferrers was quoted though not followed,[61] that at least there was a current of opinion in favour of the House's assumption of executive authority to protect and enforce freedom from arrest.[62]

[57] For example, CJ (1547–1628) 48, 536–37; and see D'Ewes 430; 4 Rot Parl 357; 5 ibid 111, 239, 374; 6 ibid 160, 191; 1 Hatsell 35.

[58] 4 Rot Parl 357; also 5 ibid 111, 239, 374; 6 ibid 160, 191; 1 Hatsell 51.

[59] See G R Elton *The Tudor Constitution* (1982) 261 n and 275–77, where the reliability of the report of the King's speech is doubted. See also 1 Hatsell 53–59.

[60] When Hall's fraud was discovered, he was committed by order of the House till the debt was paid and severely censured by the House (CJ (1547–1628) 107, 108; and see Sir J E Neale *Elizabeth I and her Parliaments* i (1953) 333 ff and G R Elton *The Parliament of England, 1559–81* (1986) 333–34). (The fraud attempted by Hall and Smalley was not unique, cf CJ (1547–1628) 55.)

[61] Ed T E Hartley *Proceedings in the Parliaments of Elizabeth I* (1981) 381, 411.

[62] In the case of Fitzherbert in 1593 the House ordered that the Speaker should seek a writ of *habeas corpus* out of Chancery to secure the release of an imprisoned Member, though the alternative of following the *Ferrers* precedent was also argued (D'Ewes 479, 481, 502, 514, 518), and the Lord Keeper himself thought it best 'in regard to the ancient liberties and privileges of the House' that the Serjeant be sent with the Mace. See also CJ (1547–1628) 807, 820; ibid (1667–87) 411; ibid (1711–14) 6; 1 Hatsell 167.

The next stage in the development of the privilege in the Commons came in 1604. Sir Thomas Shirley, who had been elected to the Commons, but had been imprisoned in the Fleet in execution before the meeting of Parliament, was discharged at the demand of the Serjeant, acting on the order of the House (though not before an attempt to bring him into the House by *habeas corpus* had failed). The Warden of the Fleet was committed for contempt, having initially refused to release the Member.[63] These events were followed by the Privilege of Parliament Act 1603,[64] which statutorily recognized the privilege of freedom from arrest, the right of either House to set a privileged person at liberty, and the right to punish those who make or procure arrests. In order to reconcile this with the reasonable rights of creditors, it was enacted that once the privilege claimed had expired with the session or the Parliament, parties might sue forth and execute a new writ. No sheriff or similar officer from whose arrest or custody persons were delivered by privilege was to be chargeable with any action.

The principal earlier cases in the Lords show an uncertainty in their practice similar to that of the Commons, privileged persons being sometimes released immediately by order and sometimes by writ.[65] During the same period, when the property of peers or of their servants was distrained, the Lords was accustomed to interfere by its direct authority,[66] but privilege did not apply to property held by a peer as a trustee only.[67] A statute of 1700,[68] while it maintained the privilege of freedom from arrest with more distinctness than the 1603 Act, made the goods of privileged persons liable to distress infinite and sequestration, between a dissolution or prorogation and the next meeting of Parliament, and during adjournments for more than 14 days. In suits against the King's immediate debtors, execution against Members was permitted even during the sitting of Parliament, and the privilege of freedom from arrest in such suits was not reserved to servants. By a further Act of 1703[69] executions for penalties, forfeitures, etc, against privileged persons, being employed in the revenue or any office of trust, were not to be stayed by privilege. Freedom from arrest, however, was still maintained in such cases for the Members of both Houses but not for their servants.

The freedom of a Member from arrest in civil cases having been put on a statutory footing, the means of securing a Member's release changed. Peers, peeresses and Members of the Commons were normally discharged immediately upon motion in the court from which the process issued,[70] and writs of privilege have been discontinued.

[63] CJ (1547–1628) 155 ff; 1 Hatsell 157.
[64] 1 James 1, c 13. Despite its name this Act was passed in May 1604.
[65] LJ (1578–1614) 66, 93, 201, 205, 230, 238, 241, 270, 296, 299, 302, 388; ibid (1620–28) 30; ibid (1628–42) 634; ibid (1645–46) 577, 601, 635, 639; D'Ewes 603, 607.
[66] LJ (1620–28) 776, 777; ibid (1647–48) 611.
[67] LJ (1666–75) 194, 390; ibid (1685–91) 36, 78; ibid (1696–1701) 294; ibid (1722–26) 412.
[68] 12 & 13 William 3, c 3, afterwards extended by the Parliamentary Privilege Act 1757 (11 Geo 2, c 24).
[69] 2 & 3 Anne, c 12.
[70] See *Holiday et al v Colonel Pitt* (1734) 27 ER 767, 93 ER 987. Even after the passing of the Act of 1700, the Commons acted to secure the release of a Member by sending the Serjeant with the Mace to the prison concerned (CJ (1705–08) 471). The House ordered the release of a Member entitled to privilege (ibid (1807) 654; ibid (1819) 44). Action has also been taken by the Lords to punish those who caused the arrest (see LJ (1810–12) 60, 63; ibid (1828) 34; and Report of Precedents 28) and by the Commons in respect of those who brought an action for a Member's escape against the keeper of a gaol who released a Member in accordance with the orders of the House (CJ (1819–20) 286).

Since the enactment of the Judgments Act 1838, s 1 and subsequent legislation, imprisonment in civil process has been practically abolished.[71] The position of Members in respect of imprisonment (or attachment) for contempt of court, bankruptcy and statutory detention is dealt with at pp 245–249, as are the related privileges of exemption from attendance as a witness and the privilege of exemption from jury service.

Chapter 14 deals more fully with freedom from arrest or molestation in modern times.

Freedom of access

The third of the Speaker's petitions is for freedom of access to Her Majesty whenever occasion shall require. This claim is medieval (probably fourteenth century) in origin, and in an earlier form seems to have been sought in respect of the Speaker himself, and to have encompassed also access to the Upper House.[72] Even when the four petitions were only hesitantly becoming standard in the mid-sixteenth century, the claim for access seems to have been consistently made. The privilege of freedom of access is exercised by the Commons as a body and through their Speaker, though it is not now exercised in Parliament on the initiative of the House. The Commons attends the Queen on summons to the House of Lords, for purposes prescribed by Her Majesty. Out of Parliament, the Commons exercises its right of access for the purpose of presenting Addresses (see pp 168–170), which may deal with any subject of public policy chosen by the House. Such an Address may be presented by the whole House or, more usually, the House will order the Address to be communicated by such Members as have access to Her Majesty as Privy Councellors or as members of Her Majesty's Household.

The right of access to Her Majesty is a corporate privilege of the House; it is denied to individual Members,[73] so that the Queen receives only the decisions of the House as a whole and cannot take notice of matters pending in the House, still less of debates or the speeches of individual Members.[74] Indeed, the Commons has long established the principle that the sovereign may not, even as a spectator, attend its debates.

The House of Lords, like the Commons, is entitled to access to the Sovereign, as a body, and peers in addition possess the right of access as individuals, as part of the privilege of peerage (see pp 205–206). No principle exists restricting the Sovereign's attendance at debates in the Lords.[75]

[71] See L O Pike *A Constitutional History of the House of Lords* (1894) 259.
[72] CJ (1547–1628) 73; D'Ewes 16. Rather surprisingly, the claim for freedom of access was omitted in 1523 by Speaker Sir Thomas More, when he made his well-known request for freedom of speech (see p 207).
[73] The only right claimed and exercised by individual Members in availing themselves of the privilege of access to the Queen is that of entering the presence of royalty, when accompanying the Speaker with Addresses, in their ordinary attire, the privilege entitling them to dispense with the forms and ceremonies of the court.
[74] 3 Rot Parl 456 (1400); CJ (1641–42) 345.
[75] 2 Hatsell 371 n.

Favourable construction

The final petition which the Speaker makes is that the most favourable construction should be placed upon all the House's proceedings. As in the case of the privilege of free access, this claim was, before the reign of Elizabeth, for the benefit of the Speaker rather than the House (see above). Even in 1559, Speaker Sir Thomas Gargrave asked that 'if in anything himself should mistake or misreport or overslip that which should be committed unto him to declare, that it might without prejudice to the House be better declared, and that his unwilling miscarriage therein might be pardoned'; to which the Queen replied that the petition should be granted, provided that 'your diligence and carefulness be such, Mr Speaker, that the defaults in that part be as rare as may be'.[76] The request is now little more than a formal courtesy, as the proceedings of the House are guarded against any interference on the part of the Crown not authorized by the laws and constitution of the country; and as by the law and custom of Parliament the Queen cannot take notice of anything said or done in the House, but by the report of the House itself.

Privilege with respect to membership of the House

It is a privilege of the House of Commons to provide for its own proper constitution as established by law.

The origins of this privilege are to be found in the sixteenth century. In 1515, Henry VIII transferred to the Speaker, acting for the House, the authority to license Members to depart before the end of the session.[77] Though much was to flow from the elaboration of this principle, the transfer of substantial authority was delayed. In 1536 the King authorised Thomas Cromwell to continue to sit in the Commons though he had been elevated to the peerage before the session began.[78] Thereafter, however, the House steadily advanced its claims to consider qualifications for membership. In 1571 a select committee approved returns from boroughs which had not elected Members to the previous Parliament, though only eight years previously such action had required the agreement of the Lord Steward.[79] In 1576, the House determined the vexed questions of whether a Member who was also Queen's Serjeant should take his seat in the Commons or act as an official assistant in the Lords and similar issues concerning those ill, or abroad on official duty, or peers' sons.[80] At the same period, general rules were laid down by the House on the right to continue to sit of those who were arrested for debt, indicted for felony or even outlawed.[81] In the 1580s, Chancery began to issue writs for new elections only when notified by the House of a vacancy,[82] and for the first time the House decided the outcome of a disputed election.[83] In 1593, the scrutiny of elections and returns was entrusted to the Committee of Privileges which

[76] D'Ewes 17.
[77] 6 Hen 8, c 16.
[78] G R Elton *The Tudor Constitution* (1982) 264.
[79] CJ (1547–1628) 63, 83 and G R Elton *The Parliament of England, 1559–81* (1986) 338–40.
[80] CJ (1547–1628) 106; see also ibid 15, 104.
[81] CJ (1547–1628) 104, 118, 122, 124.
[82] CJ (1547–1628) 118; D'Ewes 283.
[83] D'Ewes 244, 395–400. See also D Hirst 'Elections and Privileges of the House of Commons' in *Historical Journal* (1975) vol 18, 851.

(leaving aside the appointment of *ad hoc* bodies in previous sessions) had first been set up in 1584–85.[84]

In the following reign, however, events were to show that much disputed ground remained, particularly as the Buckinghamshire election dispute of 1604, in which an attempt was made by Chancery to unseat a Member because of his technical outlawry, ended in a compromise. The exclusive right of the Commons to determine the legality of returns and the conduct of returning officers was not recognized by the courts till the case of *Barnardiston v Soame* in 1674[85] upheld by the House of Lords in 1689[86] and by other contemporary cases.[87] The Commons' jurisdiction in determining the right of election was further acknowledged by the Parliamentary Elections (Returns) Act 1695.[88] But in regard to the right of electors the cases of *Ashby v White* and *R v Paty*[89] led the House of Lords to draw a distinction between the right of electors and the right of the elected, the one being a freehold by common law, and the other a temporary right to a place in Parliament.[90] In the eighteenth century, however, the Commons continued to exercise the sole right of determining whether electors had the right to vote,[91] while inquiring into the conflicting claims of candidates for seats in Parliament; until, in 1868, the House delegated its judicature in controverted elections to the courts of law, retaining its jurisdiction over cases not otherwise provided for by statute.

Whenever a doubt arises as to the qualification of any of its Members the House also has the right to inquire into the matter and decide whether a new writ ought to be issued.[92]

MODERN APPLICATION OF PRIVILEGE LAW

Throughout the long history of parliamentary privilege, the need to balance two potentially conflicting principles—both first enunciated in the seventeenth century—has become clear. Indeed the clarity of the need is heightened in modern times by actual or potential conflict with European or human rights[93] law. On the one hand, the privileges of Parliament are rights 'absolutely

[84] M F Keeler 'The Emergence of Standing Committees for Privileges and Returns' in *Parliamentary History* (1982) vol 1, 25–46; D'Ewes 349, 471.
[85] See p 283 for a description of the case.
[86] 6 State Tr 1092; *Barnardiston v Soame* (1674) 86 ER 615; and LJ (1685–90) 253.
[87] *Onslow's case* (1680) 86 ER 294 and *Prideaux v Morris* (1661) 87 ER 1065.
[88] 7 & 8 Will 3, c 7.
[89] For description see pp 285–287.
[90] See 3 Hatsell, App 1, a report of the Conferences between the Houses in *Ashby v White*.
[91] For example, CJ (1766–68) 211, 229, 279, 293.
[92] Particularly in the eighteenth century, Members who held or had accepted offices of profit under the Crown which might possibly involve the vacation of their seats used to bring their cases before the House itself with a view to securing its decision, and in more recent times the matter was usually referred to a select committee. Since the passing of the House of Commons Disqualification Act 1957 (since replaced by the 1975 Act), no case has arisen, though the House has used its statutory power to direct that a particular disqualification should be disregarded (see pp 40–41). Whichever way the House might proceed, the decision would be entirely within its hands, and there would, of course, be no question of an appeal to a court of law.
[93] For example, *A v The United Kingdom* (Application 35373/97) (2002) 36 EHRR 917, ECtHR, a case which raised issues so far-reaching that third-party comments in support of the United Kingdom position were submitted by eight other European governments (see p 301).

necessary for the due execution of its powers';[94] and on the other, the privilege of Parliament granted in regard of public service 'must not be used for the danger of the commonwealth'.[95] In consequence, it was agreed in 1704, for example, that 'neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament'.[96] A number of privileges have been surrendered or modified over the years. A few examples may suffice. Following the Parliamentary Privilege Act 1770, the privilege of freedom from arrest previously enjoyed by Members' servants was extinguished (see p 212). The Privileges Committee concluded at the beginning of the Second World War that the detention of a Member under emergency powers legislation should be regarded as akin to arrest under the criminal law, so that no breach of privilege was involved.[97] The Criminal Justice Act 2003 abolished the category of persons 'excusable as of right' from jury service, including Members and officers of either House (see p 249).

The conclusions of the Select Committee on Parliamentary Privilege of 1967–68,[98] and the recommendations of the Privileges Committee in 1976–77[99] (the latter agreed to by the House)[100] established the contemporary frame of reference for the House's exercise of its penal jurisdiction. In general, the House exercises such jurisdiction in any event as sparingly as possible and only when satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its officers from such improper obstruction or attempt at or threat of obstruction causing or likely to cause, substantial interference with the performance of their respective functions (see pp 261–265).

The report of the 1967–68 committee also recommended that 'legislation be promoted to extend and clarify the scope of both absolute and qualified privilege.'[101] This theme was picked up by several subsequent committees (see pp 238–239). In 1999 the Joint Committee on Parliamentary Privilege recommended the introduction of a Parliamentary Privileges Act to implement a number of its recommendations and to include a statutory code covering 'the whole field of parliamentary privilege'.[102] The recommendations of the Joint Committee are noted at the appropriate points in subsequent chapters. In 2009 the report of the Joint Committee on the Draft Bribery Bill rejected the Government's proposal to allow the use of proceedings in Parliament as evidence in court where they related to the 'words or conduct' of Members accused or co-accused of bribery offences. The Committee argued that legislating in a piecemeal fashion risked undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so.[103]

[94] 1 Hatsell 1.
[95] CJ (1640–42) 261. This important statement is, however, the observation of a committee rather than the conclusion of the House.
[96] CJ (1702–04) 555, 560.
[97] HC 164 (1939–40).
[98] HC 34 (1967–68).
[99] HC 417 (1976–77).
[100] CJ (1977–78) 170. The House took note of the 1967–68 report (ibid (1968–69) 321).
[101] HC 34 (1967–68) para 87.
[102] Report of the Joint Committee on Parliamentary Privilege, HL 43, HC 214 (1998–99) para 378; HC Deb (1998–99) 336, cc 1020–74.
[103] Report of the Joint Committee on the Draft Bribery Bill, HL 115, HC 430 (2008–09) para 222–8.

In a limited number of instances the House of Commons had historically dealt with allegations of misconduct by Members as matters of conduct or standards and not privilege (see pp 254–255). The development of the Register of Members' Interests had in a sense institutionalized such an approach. Developments in the 1990s, however, went much further in this direction. Following the first report of the Committee of Privileges in 1994–95[104] and the report of the Nolan Committee on Standards in Public Life,[105] the Commons appointed a Select Committee on Standards in Public Life which made a number of far-reaching recommendations.[106] In response to the proposals of that select committee, the House clarified and elaborated its requirements in respect of Members' interests and activities inside and outside the House; agreed to a comprehensive Code of Conduct for Members; remodelled the Committee of Privileges as the Committee on Standards and Privileges, with appropriately extended powers; and appointed a Parliamentary Commissioner for Standards (see p 108 and Chapter 5).

[104] HC 351 (1994–95) on a complaint concerning an article in *The Sunday Times* relating to the conduct of Members.
[105] Cm 2850.
[106] HC 637 (1994–95).

Misconduct by officers

The Serjeant at Arms has been regarded as in contempt of the House of Commons for wilfully neglecting to take into his custody persons committed to him,[47] and for permitting persons committed to have liberty without any order of the House.[48] An officer of the Lords has been considered in contempt for failing duly to execute an order for the attachment of certain persons,[49] and doorkeepers have offended by admitting strangers into the Lords contrary to the order of the House.[50] The shorthand writer gave evidence in court in relation to proceedings in the House without first obtaining leave, and the Commons agreed to a resolution stipulating that leave must be given in such circumstances.[51]

CONSTRUCTIVE CONTEMPTS

Reflections on either House

Indignities offered to the House by words spoken or writings published reflecting on its character or proceedings have been punished by both the Commons and the Lords upon the principle that such acts of abuse tend to obstruct the Houses in the performance of their functions by diminishing the respect due to them.[52]

Reflections upon Members, the particular individuals not being named or otherwise indicated, are equivalent to reflections on the House. (For cases of reflections on individual Members, see pp 262–264)

The resolution of the Commons of February 1978, set out in detail at p 273, is particularly relevant to contempts of this character. The House resolved to take action only when satisfied that it is essential to do so in order to provide reasonable protection against improper obstruction causing or likely to cause substantial interference with its functions.

[47] CJ (1667–87) 351; 3 Grey Deb 233–238.
[48] CJ (1714–18) 436, 455–456, 458.
[49] LJ (1726–31) 536.
[50] LJ (1722–26) 476.
[51] CJ (1818) 389; Parl Deb (1818) 38, cc 971–972. See pp 394, 487 for procedures arising on petitions for leave to give evidence touching proceedings in Parliament.
[52] Such reflection on either House have taken the form of the publication of false or scandalous libels on the House or its proceedings (LJ (1796–98) 506, 509; CJ (1547–1628) 125; 1 Hatsell 93; D'Ewes 291; CJ (1547–1628) 925, 927; ibid (1790) 508, 516; ibid (1805–06) 214, 216; Parl Deb (1805) 4, cc 381, 384; CJ (1810) 252; Parl Deb (1810) 16, cc 136, 257, 454; CJ (1819–20) 55, 57; Parl Deb (1819) 41, cc 1009–26; CJ (1947–48) 19–22). In 1702, the House of Commons resolved that to print or publish any books or libels reflecting on the proceedings of the House or any Member for or relating to his service therein was a high violation of its rights and privileges (ibid (1699–1702) 767). Reflections may also involve the speaking of defamatory words (LJ (1660–66) 87, 88; ibid (1714–18) 132; ibid (1722–26) 365, 367, 380; CJ (1547–1628) 60; D'Ewes 366; CJ (1640–42) 63; ibid (1688–93) 512; ibid (1693–97) 277, 371, 651; ibid (1699–1702) 124, 126, 735; ibid (1837–38) 306, 307, 312, 313, 316; ibid (1921) 393; HC Deb (1921) 148, c 228; CJ (1926) 338, 340; HC Deb (1926) 199, cc 561, 709; CJ (1929–30) 477, 489, 503; HC Deb (1929–30) 242, cc 42, 309, 742; CJ (1950–51) 33, HC Deb (1950–51) 481, cc 653–62; HC 129 (1964–65); and HC 228 (1974)). A cartoon, with text, has been found by the Committee of Privileges to constitute a contempt (HC 39 (1956–57)).

Publication of false or perverted reports of debates

The House of Commons agreed in 1971 to rescind their ban on the publication of their debates and proceedings, or those of any committee.[53] Since that time no complaint based on a report of debate, whether or not misrepresentation was alleged to be involved, has been received. However the Speaker has ruled that deliberate or reckless misrepresentation of the House's proceedings remains a contempt and is unlikely to attract qualified privilege in the courts.[54]

The Lords have a Standing Order (No 16) which declares that the printing or publishing of anything relating to the proceedings of the House is subject to the privilege of the House and in the past action was taken against those whose publication of debates was in some way offensive to the House on particular grounds.[55]

Premature publication or disclosure of committee proceedings[56]

As early as the mid-seventeenth century it was declared to be against the custom of Parliament for any act done at a committee to be divulged before being reported to the House.[57] Subsequently, though the House of Commons found it increasingly difficult to enforce effectively its rules against the disclosure of proceedings in the Chamber, the privacy of committee proceedings and the prior right of the House itself to a committee's conclusions was upheld,[58] and punishment was inflicted on a newspaper proprietor who published the contents of a draft report laid before a select committee but not considered by it or presented to the House.[59] In 1837, the House of Commons resolved that:

> according to the undoubted privileges of this House, and for the due protection of the public interest, the evidence taken by any select committee of this House and the documents presented to such committee and which have not been reported to the House ought not to be published by any Member of such committee, or by any other person.[60]

Between 1837 and the middle of the twentieth century, there were relatively few cases of premature publication of committee proceedings or unreported evidence.[61] Subsequently, however, a number of cases arose, the majority

[53] CJ (1970–71) 548.
[54] HC Deb (2003–04) 421, cc 1116–17.
[55] These grounds have included where the account of proceedings which was published was false (LJ (1765–67) 212) or forged (ibid (1756–60) 16 and 15 Parl Hist 779), a scandalous misrepresentation (ibid (1801–02) 57, 60), related to proceedings ordered to be expunged from the Journals (ibid (1801–02) 104), libelled counsel while purporting to be a report of committee proceedings (ibid (1798–1800) 638, 646) or misrepresented speeches (ibid (1847) 146 and Parl Deb (1847) 91, c 1150).
[56] See also pp 838–839.
[57] See Clarendon *History of the Rebellion* (1826 edn) ii, 159. It should, however, be added that the rule was very convenient for Clarendon's political argument (in 1642) and that he buttressed it with a vague reference to a statute to the same effect, which cannot be traced.
[58] CJ (1722–27) 99; ibid (1727–32) 238; ibid (1737–41) 148; ibid (1750–54) 754; ibid (1763–64) 207.
[59] CJ (1831–32) 360, 365.
[60] CJ (1837) 282; Parl Deb (1837) 38, cc 170–171.
[61] CJ (1837) 269–70, 282; Select Committee on Postal Communications between London and Paris, HC 381 (1850) p vi; CJ (1875) 141, 148, 152 and Select Committee on Foreign Loans, HC 152 (1875); CJ (1899) 327 and Select Committee on Cottage Homes Bill, Second Special Report, HC 271 (1899) p x; CJ (1901) 80 and Select Committee on the Civil List, HC 87

involving the disclosure of the contents of draft reports,[62] though one concerned evidence taken in private.[63] Although successive Committees of Privileges concluded that such interference with the work of select committees and contraventions of the Resolution of 1837 were a contempt of the House and damaging to the work of Parliament, in most of the modern cases involving draft reports it has not been possible to identify those responsible for the original disclosure. In the absence of such information, Committees of Privileges were usually unwilling to recommend exercise of the House's penal powers against those who gave wider publicity to the disclosure, and when they did so the House was not prepared to agree.[64] In a recent case involving the leaking of the heads of report of a select committee, the Committee on Standards and Privileges recommended that certain individuals' access to the House (as research staff) be withdrawn. The House agreed to the Committee's recommendation and the individuals were ordered to withdraw from access to the House and its facilities.[65]

The procedure for dealing with improper disclosure of select committee evidence or proceedings was altered in 1985, following a report from the Committee of Privileges.[66] For an account of current practice, see Chapter 37. The Chair has continued to deprecate premature disclosure.[67]

Other indignities offered to either House

Other acts, besides words spoken or writings published reflecting upon either House or its proceedings which, though they do not tend directly to obstruct or impede either House in the performance of its functions, yet have a tendency

(1901); CJ (1950–51) 257–258, HC Deb (1950–51) 489, cc 1381–93, and Select Committee on Estimates, HC 227 (1950–51).

62 Committee of Privileges, Second Report, HC 180 (1971–72) (Select Committee on the Civil List); First Report, HC 22 (1975–76) (Select Committee on a Wealth Tax) and CJ (1975–76) 64; First Report, HC 376 (1977–78) (Select Committee on Race Relations and Immigration); CJ (1982–83) 324; Committee of Privileges, First Report, HC 308 (1984–85) (Home Affairs Committee), and First Report, HC 376 (1985–86) (Environment Committee). See also pp 838–839.

63 Committee of Privileges, Second Report, HC 357 (1967–68) and CJ (1967–68) 361. Written evidence already circulated to third parties before being sent for by a committee may be referred to in the House or elsewhere before being reported, notwithstanding that it was marked confidential on reaching the committee (HC Deb (1984–85) 69, cc 349–50, 351). See also Local Government (Access to Information) Act 1985, ss 1 and 2 of which oblige local authorities to make publicly available papers—which may include draft Memoranda to be submitted to select committees—under consideration at public meetings of the authority.

64 The Committee of Privileges recommended in 1975–76 (First Report, HC 22 (1975–76)) that the editor of a weekly journal in which a disclosure was published and the journalist who wrote the article should be excluded from the precincts for six months. The House rejected the recommendation (CJ (1975–76) 64); and no legislation has been enacted to enable the House to fine offenders, as the Committee believed appropriate to the case. In 1985–86, the Committee of Privileges recommended the temporary exclusion from the precincts of a journalist in similar circumstances, and the reduction for a time of the number of Lobby passes available to the newspaper (HC 376 (1985–86)). Again the House took a different view (CJ (1985–86) 374).

65 CJ (2008–09) 402–403 and see Culture, Media and Sport Committee, *Unauthorised Disclosure of Heads of Report*, First Special Report, HC 333 (2008–09); and Committee on Standards and Privileges, *Unauthorised Disclosure of Heads of Report from the Culture, Media and Sport Committee*, Seventh Report, HC 501-I and HC 501-II (2008–09).

66 CJ (1985–86) 252; Committee of Privileges, Second Report, HC 555 (1984–85) paras 64–70.

67 HC Deb (2006–07) 463, c 622.

to produce this result indirectly by bringing such House into odium, contempt or ridicule or by lowering its authority, may constitute contempts.

For example, serving or executing civil or criminal process within the precincts of either House while the House is sitting without obtaining the leave of the House is a contempt,[68] as is disorderly conduct within the precincts of either House while the House is sitting.[69] However, where such misconduct has led to criminal proceedings against the individual or individuals concerned the House has not pursued the matter as a contempt. This was the case when hunt protestors invaded the Commons Chamber but were handed over to the police.[70] The House of Commons has considered the sending of a letter to the Speaker in very indecent and insolent terms in connection with the execution of a warrant issued by the Speaker to be a contempt,[71] and counterfeiting or altering an order or warrant,[72] or slighting an order of either House[73] has been similarly condemned. Another example is representing oneself to be a parliamentary agent (see p 950) without possessing the necessary qualifications.[74]

The crowned portcullis has for many years been used as the emblem of the House of Commons. In 1997, its use by the House was formally authorised by licence granted by Her Majesty. The Speaker has indicated that it is important for the dignity of the House that the emblem should not be used where its authentication of a connection with the House is inappropriate or where there is a risk that its use might be wrongly regarded or represented as having the authority of the House.[75]

OBSTRUCTING MEMBERS OF EITHER HOUSE IN THE DISCHARGE OF THEIR DUTY

The House will proceed against those who obstruct Members in the discharge of their responsibilities to the House or in their participation in its proceedings. Not all responsibilities currently assumed by Members fall within this definition. Correspondence with constituents or official bodies, for example, and the provision of information sought by Members on matters of public concern will very often, depending on the circumstances of the case, fall

68 Report of the Committee of Privileges, HC 31 (1945–46) and CJ (1945–46) 198, and First Report of the Committee, HC 144 (1972–73). See also Report of the Select Committee on the attempted service of a summons on Mr Sheehy, CJ (1888) 503 and Parl Deb (1888) 332, cc 102–24; Report of the Committee of Privileges, HC 244 (1950–51) and CJ (1950–51) 319; Second Report from the Committee, HC 221 (1969–70); Home Affairs Committee, First Special Report, HC 107 (1993–94); Joint Committee on Parliamentary Privilege, HL 43-I, HC 214-I (1998–99) paras 334–35 (see p 204, n 7); and also LJ (1685–91) 298, 301; and Parl Deb (1827) 17, c 34.

69 CJ (1547–1628) 259, 260; ed D H Willson *Parliamentary Diary of Robert Bowyer* (1931) 8; CJ (1646–48) 232; ibid (1651–59) 410; ibid (1722–27) 185; ibid (1761–64) 845; and see Report from the Committee of Privileges, HC 36 (1946–47) and CJ (1946–47) 91.

70 The incident occurred on 15 September 2004, see HC Deb (2003–04) 424, c 1337 and Speaker's Statement, ibid, c 1423.

71 CJ (1810) 260, 273.

72 LJ (1660–66) 91; CJ (1806–07) 288, 296.

73 LJ (1660–66) 131.

74 HC Deb (1948–49) 464, c 1665.

75 Authorisation has been given for display of the emblem on official stationery and publications, on furniture and furnishings used within the Palace of Westminster and certain other goods (HC Deb (1996–97) 288, c 21. See also ibid (1980–81) 3, c 789, and ibid (1993–94) 236, c 632).

outside the scope of 'proceedings in Parliament' (see pp 269–271) against which a claim of breach of privilege will be measured (see p 203).[76]

Arrest

An attempt to infringe the privilege of freedom from arrest in civil causes enjoyed by Members of both Houses is itself a contempt and has been punished.[77]

Molestation, reflections and intimidation

It is a contempt to molest a Member of either House while attending the House, or coming to or going from it, and in the eighteenth century both Houses roundly condemned 'assaulting, insulting or menacing Lords or Members' going to or coming from the House[78] or trying by force to influence them in their conduct in Parliament.[79] Members and others have been punished for such molestation occurring within the precincts of the House, whether by assault[80] or insulting or abusive language,[81] or outside the precincts.[82] The Commons took no action on an incident where a member of the public endeavoured to dissuade a Member from entering a room where a standing committee was meeting.[83]

To molest Members on account of their conduct in Parliament is also a contempt. Correspondence with Members of an insulting character in reference to their conduct in Parliament or reflecting on their conduct as Members,[84] threatening a Member with the possibility of a trial at some future time for a question asked in the House,[85] or for repeating certain allegations claimed to be defamatory,[86] calling for his arrest as an arch traitor,[87] offering to contradict a Member from the gallery,[88] or proposing to visit a pecuniary

[76] See HC Deb (2002–03) 413, c 304.

[77] LJ (1810–11) 58, 60; CJ (1722–27) 504; ibid (1809) 210, 213 and Parl Deb (1809) 14, c 31. When a Member of the House of Commons was arrested in error, the House regretted the indignity offered to him, but considering the arrest to have been a mistake, did not think it necessary to proceed further (CJ (1888) 30 and Parl Deb (1888) 322, c 262).

[78] The Metropolitan Police Act 1839 (c 47), s 52 is the principal means by which Parliament is currently protected from tumultuous assemblies (see p 12).

[79] LJ (1765–67) 209; CJ (1732–37) 115; ibid (1778–80) 902.

[80] CJ (1688–93) 348, 354, 355; ibid (1824–25) 483 and Parl Deb (1824) 11, c 1204; and CJ (1946–47) 54, 91. In the last case, it was decided that the contempt committed by the Member concerned, who struck the first blow, was greater than that of the other who retaliated (Report of the Committee of Privileges, HC 36 (1946–47)).

[81] CJ (1646–48) 42; ibid (1660–67) 186; ibid (1688–93) 782; ibid (1877) 144 and Parl Deb (1877) 233, cc 951, 956; and CJ (1887) 377, 389 and Parl Deb (1887) 317, cc 1167, 1631.

[82] Officials of the Liberty of Westminster were committed in 1751 for having apprehended, insulted and abused a Member and refusing to discharge him except upon an assurance of his silence (CJ (1750–54) 175–76).

[83] HC Deb (1948–49) 470, cc 1535–38.

[84] LJ (1830–31) 285, 335; CJ (1862–63) 80, 84; ibid (1890–91) 481 and Parl Deb (1891) 356, c 419. Challenging Members to fight on account of their behaviour in the House (CJ (1780–82) 535, 537; Parl Deb (1844) 74, c 286; CJ (1845) 589 and ibid (1862) 64) or of remarks made outside the House touching proceedings in the House (CJ (1883) 232, 238) has been considered a contempt.

[85] Report of the Committee of Privileges, HC 284 (1959–60).

[86] See p 251, n 2.

[87] Report of the Committee of Privileges, HC 462 (1966–67) and CJ (1966–67) 415.

[88] CJ (1826–28) 395, 399 and Parl Deb (1827) 17, cc 282, 343.

loss on him on account of conduct in Parliament[89] have all been considered contempts. The Committee of Privileges has made the same judgment on those who incited the readers of a national newspaper to telephone a Member and complain of a question of which he had given notice.[90] Speeches and writings reflecting upon the conduct of Members as Members have been treated as analogous to their molestation on account of their behaviour in Parliament.[91]

Written imputations, as affecting a Member of Parliament, may amount to contempt, without, perhaps, being libels at common law, but to constitute a contempt a libel upon a Member must concern the character or conduct of the Member in that capacity.[92]

Reflections which have been punished as contempts have borne on the conduct of the Lord Chancellor in the discharge of his judicial duties in the House of Lords[93] or that of the Chairman of Committees.[94] In the same way, reflections on the character of the Speaker or accusations of partiality in the discharge of his duties[95] and similar charges against the Chairman of Ways and Means[96] or chairman of a standing committee[97] or a select committee[98] have attracted the penal powers of the Commons.

Imputations that a Member nominated to a select committee would not be able to act impartially in that service,[99] and similar reflections on Members serving on private bill committees[100] have been considered contempts. An individual who claimed that he could control the decision of a private bill committee (and offered to do so for a corrupt consideration) has been punished, along with another who assisted him.[101] More general reflections on Members accusing

[89] CJ (1898) 381.

[90] Report of the Committee of Privileges, HC 27 (1956–57); CJ (1956–57) 31, 50.

[91] The Commons Select Committee on Parliamentary Privilege recommended in 1967 that a Member who considered that he had been defamed should seek a remedy in the courts, and not be permitted to invoke the penal jurisdiction of the House in lieu of or in addition to that remedy (Third Report, HC 34 (1967–68) para 42). Subsequently, the Committee of Privileges took the view that it would be unsatisfactory for the House to appear to rely on action by an individual Member in the courts as a substitute for its own penal jurisdiction. The Committee might have added that difficulties such as those which subsequently gave rise to the Defamation Act 1996 (see p 299) were likely to arise in such an action. It therefore recommended that the Speaker should take into account the possibility of other remedies when deciding on whether to give precedence to a complaint that a contempt might have been committed (see pp 273–274) (Third Report, HC 417 (1976–77) para 5; CJ (1977–78) 170).

[92] See the action taken by the House, Parl Deb (1875) 222, cc 1185–1204; cf also Parl Deb (1888) 329, c 1251; ibid (1890) 341, c 43; ibid (1893) 8, c 1592. For more recent cases in which this question was considered, see HC 247 (1963–64) and HC 269 (1964–65).

[93] LJ (1834) 704, 737, 743, Parl Deb (1834) 24, cc 892, 941, 946, 1006, 1065.

[94] LJ (1867) 31, 33, 46, 72.

[95] CJ (1772–74) 452, 456; CJ (1888) 385 and Parl Deb (1888) 329, c 48; CJ (1890–91) 481 and Parl Deb (1890–91) 356 c 419; CJ (1893–94) 123, 408, 416 and Parl Deb (1893–94) 9, c 1866; Parl Deb (1893–94) 14, cc 820, 1094; and CJ (1937–38) 213.

[96] HC Deb (1909) 8, c 31; CJ (1928–29) 50, 136, 159; and ibid (1950–51) 319 and Report of the Committee of Privileges, HC 235 (1950–51).

[97] CJ (1924) 180 and Report of the Committee of Privileges, HC 98 (1924).

[98] CJ (1874) 181, 189 and Parl Deb (1874) 219, cc 752, 755 and CJ (1950–51) 299. In a case in 1968–69, the Committee of Privileges considered that an assertion that a Member who was chairman of a sub-committee of a select committee would not be able to form a sufficiently fair and dispassionate view of events when hearing evidence in her own constituency was not a contempt (HC 197 (1968–69)).

[99] CJ (1900) 178.

[100] CJ (1831–32) 278, 294; ibid (1857–58) 189, 196, 201 and Parl Deb (1857–58) 150, cc 1022, 1063, 1198; HC Deb (1909) 7, c 235; Parl Deb (1921) 145, c 831; and CJ (1932–33) 141.

[101] CJ (1878–79) 326, 366; Parl Deb (1879) 247, cc 1866 and 1956 and ibid 248, cc 602, 633, 971, 1100, and Report of the Select Committee on Privilege (Tower High Level Bridge

them of corruption in the discharge of their duties,[102] challenging their motives or veracity,[103] or describing their conduct as 'inhuman' and degrading[104] have also been found objectionable and proceeded against.

To attempt to intimidate a Member in his parliamentary conduct by threats is also a contempt, cognate to those mentioned above. Actions of this character which have been proceeded against include impugning the conduct of Members and threatening them with further exposure if they took part in debates;[105] threatening to communicate with Members' constituents to the effect that, if they did not reply to a questionnaire, they should be considered as not objecting to certain sports;[106] publishing posters containing a threat regarding the voting of Members in a forthcoming debate;[107] informing Members that to vote for a particular bill would be regarded as treasonable by a future administration;[108] summoning a Member to a disciplinary hearing of his trade union in consequence of a vote given in the House;[109] and threatening to end investment by a public corporation in a Member's constituency, if the Member persisted in making speeches along the lines of those in a preceding debate.[110] When a Member stated his intention of influencing a local authority to the detriment of other Members, a complaint was referred to the Committee of Privileges which concluded that the words spoken constituted a threat but recommended no further action.[111]

In 1966 the then Prime Minister said that he had given instructions that there was to be no official tapping of telephones of Members of the House of Commons (known as the Wilson Doctrine). In exceptional circumstances the House would be informed.[112] The doctrine has been several times restated by the Prime Minister and most recently, in a case involving a Member, by the Home Secretary.[113] The Committee on Standards and Privileges has concluded that in certain circumstances 'phone hacking', which it defined as 'gaining of unauthorised direct access to a remotely stored mobile telephone communication', in respect of Members' mobile phones could potentially constitute a contempt.[114]

(Metropolis) Committee), HC 294 (1878–79).

[102] CJ (1667–87) 88, 95; ibid (1732–37) 245; ibid (1836) 658, 676 and Parl Deb (1836) 35, cc 167, 253; CJ (1893–94) 631 and Parl Deb (1893–94) 20, c 112; CJ (1901) 414, 418; Report of the Committee of Privileges, HC 138 (1946–47) and CJ (1947–48) 22. See also ibid (1935–36) 203 and HC Deb (1935–36) 311, cc 1349–52.

[103] CJ (1901) 355; ibid (1926) 99; Report of the Committee of Privileges, HC 55 (1926); Committee of Privileges, First Report, HC 302 (1974–75); and see also Report of the Committee, HC 112 (1947–48).

[104] CJ (1880) 46, 54 and Parl Deb (1880) 250, cc 797, 1108.

[105] CJ (1873) 60 and Parl Deb (1873) 214, c 733.

[106] CJ (1934–35) 201 and HC Deb (1934–35) 301, c 1545.

[107] Report of the Committee of Privileges, HC 181 (1945–46).

[108] Committee of Privileges, Second Report, HC 228 (1964–65).

[109] HC Deb (1974) 877, cc 466, 673. The complaint was not pursued, following a letter of apology.

[110] Report of the Committee of Privileges, HC 214 (1980–81). Although the Committee was unable to establish the facts alleged, it observed that 'such an allegation, if established, would certainly reveal a serious affront to the privilege of freedom of speech'.

[111] Report of the Committee of Privileges, HC 564 (1983–84). See also HC Deb (1993–94) 238, c 21.

[112] HC Deb (1966–67) 736, c 639; ibid (2001–02) 377, c 367W (and, for the House of Lords, HL Deb (1999–2000) 616, cc WA137–8).

[113] HC Deb (2007–08) 472, cc 538–39. For examples of restatements by the Prime Minister, see HC (Deb) (2005–06) 444, cc 95–96WS; HC Deb (2006–07) 463, 2103W.

[114] Fourteenth Report, HC 628 (2010–12).

Improper influence

Attempts by improper means to influence Members in their parliamentary conduct may be considered contempts. One of the methods by which such influence may be brought to bear is bribery; and it is as culpable for an individual to offer a corrupt consideration to a Member of either House with a view to influencing his conduct in that capacity as it is for the consideration to be accepted. For a detailed treatment of contempts of this character, see pp 254–256.

A committee of the Commons concluded that 'pressure' involved a positive and conscious effort to shift an existing opinion in one direction or another; and premeditation was not an essential precondition. Thus, the committee considered that the chairman of a select committee (on Members' Interests) had exceeded the bounds of propriety in participating in a conversation with a government whip about matters within that committee's remit, and the whip ought not to have raised with the chairman a matter critical to the deliberations of the committee.[115]

Conduct not amounting to a direct attempt improperly to influence Members in the discharge of their duties but having a tendency to impair their independence in the future performance of their duty may be treated as a contempt. An example of such a case is the Speaker's ruling that a letter sent by a parliamentary agent to a Member informing him that the promoters of a private bill would agree to certain amendments provided that he and other Members refrained from further opposition to the bill constituted (under the procedure then in force) a *prima facie* breach of privilege.[116]

Influence by private solicitation in certain circumstances has also been found objectionable. The Lords have resolved that the private solicitation of Members on matters of claims to honours or other judicial proceedings was a breach of privilege.[117] Upon the same principle, it would be a contempt, when Members are acting in a judicial or quasi-judicial capacity, eg when serving on committees on private bills, to attempt, by letters, anonymous or other, to influence them in the discharge of their duties.[118]

Misrepresenting Members

A select committee has commented on an allegation that a third party sent a letter purporting to be from a Member;[119] and a Member has made a personal statement to the House, apologizing for having tabled amendments to a bill in the name of another Member but without his knowledge or consent.[120]

[115] Select Committee on Standards and Privileges, First Report, HC 88 (1996–97).

[116] CJ (1962–63) 251. The Member concerned, having received an apology, did not submit a motion to the House.

[117] LJ (1802–03) 227.

[118] LJ (1810–11) 332, 341; CJ (1884) 167 and Parl Deb (1884) 287, c 11; and HC Deb (1921) 145, c 831. See also Select Committee on Standards and Privileges, First Report, HC 88 (1996–97).

[119] Committee of Privileges, Report HC 351 (1994–95).

[120] HC Deb (1994–95) 260, c 612.

committee's report,[21] it will then go on to consider the punishment appropriate to the offence[22] (see pp 191, 196–200). At this juncture also the persons named by the committee and now found guilty of a breach of privilege may be ordered (sometimes in the custody of the Serjeant[23]) to attend the House in order to be heard in extenuation or mitigation.[24]

Where, after the House had made an order for the attendance of the parties incriminated by a report, a petition was presented to the House from the offenders acknowledging their offence and expressing their contrition and entreating the House to dispense with their attendance on the House and accept their submission and apology, the House resolved that in consideration of the petitioners' having acknowledged their offence and expressed their contrition, the House was content to proceed no further in the matter, and the order for their attendance was discharged.[25]

In one case, after the House had considered a special report from a select committee and had resolved that the offence reported constituted a contempt of the House, a motion was made for the attendance of the incriminated party. Debate on this motion was adjourned until the next day. On the order of the day being read for resuming the adjourned debate, the Speaker announced that he had received a letter of apology from the offender, which he read; the motion for attendance was not proceeded with.[26]

The House has not always agreed with the committee that a breach of privilege has been committed,[27] and in a case where a penalty was recommended for refusal to answer questions put by the committee, the House decided that no action needed to be taken[28] (see pp 252–253).

PROCEEDINGS AGAINST MEMBERS

In modern practice, most privilege complaints against Members of the Commons are proceeded with on motions made on consideration of or following reports from the Committee on Standards and Privileges, or such other committee as may have been appointed in the circumstances of the case.[29] The usual procedure in cases arising from such reports of the Committee on Standards and Privileges is described in Chapter 5 (pp 87–88).

The Member complained of is sometimes heard before the motion founded on the report is made,[30] and otherwise after the motion has been made, which has been done formally.[31] Though the older practice of the House was to require the withdrawal of the Member under criticism as soon as he had been heard, the practice was not invariable and the House exercises its discretion according to the circumstances.[32]

When a Member has made an acceptable apology for the offence, the critical motion has sometimes been withdrawn.[33] In two instances, the House condemned the Member's conduct as a breach of its privileges, but resolved that in consequence of the full and ample apology he had offered to the House, or that having regard to his withdrawal of the expressions complained of, it would not proceed any further in the matter.[34]

A Member having withdrawn but not yet adjudged guilty of contempt may return to his place when debate on his conduct has been adjourned,[35] but it is otherwise if he has been adjudged guilty, even though debate on the question of the punishment to be inflicted on him has been adjourned.[36]

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21 In some cases the House, on taking the report of a committee into consideration, has adjudged the person incriminated guilty of a contempt or a breach of the privileges of the House, without first resolving that it agreed with the committee in their report (CJ (1825–26) 445; ibid (1826–28) 561; ibid (1865) 336; ibid (1887) 306; ibid (1947–48) 22). But it is more regular for the House to agree to the report of the committee before proceeding to act on it (Parl Deb (1833) 29, cc 1250–51).

22 The House, after agreeing to the report, has then proceeded to adjudge the offender guilty of a breach of privilege or of a contempt (CJ (1833) 501; ibid (1843) 523; ibid (1851) 288; ibid (1929–30) 503). This step, however, is unnecessary in cases where the committee has reported that, in its opinion, the person implicated has been guilty of a breach of the privileges of the House, or of an offence which amounts on the face of it to a breach of privilege.

23 CJ (1825–26) 445, 455; ibid (1826–28) 561, 577, 581. The House has ordered the incriminated party to be taken into the custody of the Serjeant, and, when that officer reported that he had been taken into custody, adjudged him guilty of a breach of privilege and committed him to Newgate (ibid (1818) 282, 289).

24 CJ (1819–20) 243, 244; ibid (1956–57) 66. In the latter case the person attended and was heard. He then withdrew and the House resolved that he had been guilty of a serious contempt but that in view of his apology the House would proceed no further in the matter.

25 CJ (1819–20) 286.

26 CJ (1950–51) 298–299, 303.

27 For example, CJ (1957–58) 260.

28 CJ (1975–76) 64.

29 For the procedure when a privilege complaint against a Member is made directly in the House, see *Erskine May* (21st edn, 1989) pp 138–39; and cf the case of a Member who was suspended from the service of the House for damage to the Mace, CJ (1987–88) 463. In analogous circumstances in the past, the House ordered the attendance of Members who were complained of but who were not thought likely to attend. Members who have been ordered to attend but failed to do so, the order having been duly served, have been ordered into the custody of the Serjeant or even expelled (ibid (1667–87) 85). More frequently, the House has ordered their presence on another day (ibid (1697–99) 643, 645). If the Serjeant has been unable to serve the order on the Member (ibid (1782–84) 739; ibid (1810) 295 and cf ibid (1813–14) 427) or the Member has indicated in writing that he is unable to attend through indisposition (ibid (1697–99) 661; ibid (1770–72) 279, and cf ibid (1761–64) 709) the House has fixed another day for the proceedings. Where a Member ordered to attend to answer a charge absconded, the House proceeded with its investigation (ibid (1727–32) 810, 876; ibid (1761–64) 722).

30 HC Deb (1989–90) 168, c 889 (when the Member spoke after the motion that the report be now considered had been agreed to); ibid (1998–99) 335, cc 23, 26; ibid (2001–02) 373, cc 884–85.

31 HC Deb (1994–95) 258, c 350; ibid (1999–2000) 345, c 428; ibid (2001–02) 380, c 213; ibid (1987–88) 131, c 934, where a Member who was suspended for damaging the Mace spoke during the course of the debate on the motion for the suspension; and ibid (2006–07) 463, c 627 where a Member, the subject of a report from the Committee on Standards and Privileges, was named by the Speaker for wilfully disregarding the authority of the Chair.

32 See CJ (1883) 280 and Parl Deb (1883) 280, c 812; CJ (1887) 389 and Parl Deb (1887) 317, cc 1633–38; and CJ (1941–42) 129. Members who withdrew have been readmitted to make a further explanation: see CJ (1790) 516; ibid (1893–94) 631; ibid (1911) 37 and HC Deb (1911) 21, c 1553; and cf also CJ (1547–1628) 862. In some instances, Members have remained in the Chamber, ibid (1976–77) 448; and cf HC Deb (1983–84) 62, c 159 ff. Two Members whose conduct was under criticism in a motion both withdrew after making a short statement (ibid (1994–95) 258, c 351).

33 CJ (1873) 61; ibid (1875) 46; ibid (1887) 377; ibid (1911) 36–37; ibid (1921) 393; ibid (1928–29) 159; ibid (1935–36) 203.

34 CJ (1845) 589; ibid (1880) 54. In one case, after the Commons had resolved that a Member (who had in writing reflected on the Speaker's conduct in the Chair) was guilty of a contempt, the Speaker suggested that he be recalled to afford him an opportunity, which he took, of apologizing to the House (ibid (1893–94) 417).

35 Parl Deb (1877) 235, cc 1815, 1833.

36 Parl Deb (1846) 85, c 1198 and cf Parl Deb (1845) 85, c 1291.

COMPLAINTS AGAINST MEMBERS OR OFFICERS OF THE OTHER HOUSE

Since the two Houses are wholly independent of each other, neither House can punish any breach of privilege or contempt offered to it by a Member or officer of the other. If a complaint is made against a Member or officer of the other House, the appropriate course of action is to examine the facts and then lay a statement of the evidence before the House of which the person complained of is a Member or officer.[37]

In one instance, after a complaint had been made in the Commons of a speech delivered (outside the House) by a Member of the House of Lords, a motion was made to refer the matter to the Committee of Privileges, but was withdrawn after the Speaker had announced that he had received a letter of apology from the Lord concerned, which he read to the House.[38]

When a Member, officer, or servant of either House has been guilty of any offence either against the other House or against its Members, which would be punishable by the latter if committed by one of its own Members, officers, or servants, it is the duty of the House to which such offender belongs, upon being apprised of the fact, to take appropriate measures to inquire into and punish the offence in a proper manner.

COMPLAINTS REPORTED BY COMMITTEES

In both Houses complaints from committees are normally made in the form of special reports.[39] Matters complained of in such special reports have included disorderly conduct in the committee; or some contempt of the committee's authority, for example a person summoned as a witness refusing to attend or to answer questions, or prevaricating or giving false evidence; as well as presumptions on the part of the committee that a breach of privilege or other contempt of the House has been committed, such as a libel upon the chairman of the committee, or interference in or failure to co-operate with the committee's inquiry. A complaint of an alleged contempt from a joint committee has been considered by both the Committee on Standards and Privileges in the Commons and the Committee for Privileges and Conduct in the Lords.[40]

According to present usage in the Commons, such reports when presented are ordered as of course to lie upon the Table.[41] Thereafter, the procedure upon them is the same as that upon reports from the Committee on Standards and Privileges (see pp 87–88, 275). Any Member may bring a report of this

[37] 3 Hatsell 67, 71. A different course was pursued where the subject of the complaint was the interference of peers in the election of Members to serve in Parliament, for reasons explained in 3 Hatsell 72 n.

[38] CJ (1951–52) 201–2.

[39] When a joint committee made a report of a possible contempt, the Speaker accorded precedence to a motion to refer the matter to the Committee on Standards and Privileges on receipt of a letter from the chairman of the joint committee, HC Deb (2009–10) 506, c 21.

[40] Committee on Standards and Privileges, Formal Minutes (2009–10) 9, 16, 23 and 30 March 2010 and Committee for Privileges and Conduct, First Report, HL 15 (2010–12).

[41] In earlier practice, reports were considered immediately upon presentation (CJ (1874) 182; ibid (1887) 203).

description before the House, but it is usual to leave this duty to the chair of the committee.[42]

Upon consideration of the report, the parties implicated have been ordered to attend the House,[43] or the report may be referred to the consideration of a select committee,[44] or referred back to the committee with an instruction to inquire into the circumstances of the case.[45]

In the past, when it has been manifest that an offence has been committed, and the offence was of such a nature that no explanation the offender might offer could extenuate it, as, for example, where a committee reported that a witness has been guilty of prevarication, or had given false evidence, or refused to answer questions,[46] or that a person summoned as a witness had evaded all attempts to secure his attendance before the committee,[47] or that it appeared, on evidence taken before the committee that certain persons had prevented the attendance of a person summoned as a witness, and had given him money to induce him to abstain from giving evidence before the committee,[48] the House has proceeded at once, without hearing the offender, to punish him for his contempt, a practice which is unlikely to be followed any longer.[49]

On consideration of a special report from a select committee, a motion to refer the report to the Committee of Privileges was amended so as to constitute a resolution that certain conduct by a member of the public was a gross libel on the chairman of the select committee concerned, and a contempt of the House. Debate on a second motion ordering the offender to attend was adjourned and not resumed, a letter of apology from the offender having been read to the House by the Speaker.[50]

In the Lords it is usual when a report of this description is appointed for consideration on a future day to order the parties to be summoned. When a report from a committee directing the attention of the House to what is *prima facie* a breach of privilege has been appointed for consideration on a day named, it is given precedence on the day so appointed over any other business appointed for that sitting.[51]

COMPLAINTS BY OFFICERS OF EITHER HOUSE

Formerly, when a complaint has been made by Black Rod to the Lords or by the Serjeant at Arms to the Commons (the Serjeant usually made a written

[42] Parl Deb (1892) 3, c 598.

[43] LJ (1798–1800) 639; ibid (1862) 321; CJ (1836) 464; ibid (1842) 131; ibid (1874) 182; ibid (1892) 157; ibid (1946–47) 377.

[44] CJ (1835) 421; ibid (1878–79) 327; ibid (1889) 332.

[45] CJ (1887) 203.

[46] LJ (1870) 77; CJ (1809) 70; ibid (1827) 473; ibid (1848) 258; ibid (1857) 354.

[47] CJ (1851) 147–48.

[48] CJ (1851) 147–48.

[49] Failure of a Member to obey an order to attend a private bill committee was, on the report of the committee, accounted a contempt, and the Member was committed (CJ (1846) 582, 603). A private bill committee reported respecting the forgery of signatures on a petition against a bill. The House found that a contempt had arisen, but that in the circumstances it was not necessary to proceed further (ibid (1878–79) 176).

[50] CJ (1950–51) 298–99, 303.

[51] Formerly, such reports were taken into consideration on being presented (LJ (1810–12) 371; ibid (1845) 545; ibid (1870) 77) or appointed for consideration on a future day by motion made on presentation of the report (ibid (1798–1800) 638; ibid (1862) 300).

report to the Speaker[52]), the person complained of was called in[53] or ordered to be brought to the Bar forthwith[54] or ordered to attend the House on a future day to answer the matter of the complaint.[55] Other action considered appropriate has also been taken.

In one instance, the Speaker acquainted the House that he had received a report from the Serjeant at Arms relating to the conduct of certain Members. The report stated that the messengers of the House acting under his orders had been forcibly obstructed in the execution of their duty by certain Members of the House. No immediate action was taken by the House, but it was indicated that the Prime Minister proposed to invite the attention of the House to the report and to ask that appropriate action be taken. At the next sitting the Members concerned expressed their profound regret and unreservedly apologized for their conduct, and the House accepted their apologies. The proceedings were ordered to be entered in the Journal.[56]

DISCLOSURE FOLLOWING SECRET SESSION

Arising from an alleged report of proceedings in the Commons in secret session, criminal proceedings were taken which led to the trial of a private individual on a charge of contravening the Defence (General) Regulations 1939, reg 3(2). This regulation made it an offence to report or purport to report the proceedings of a secret session. As it was necessary for the prosecution to prove the resolution of the House for going into a secret session, leave of the House was given to a clerk to attend the court.[57]

On 5 May 1942 a complaint was made in the Commons of breach of privilege by an alleged disclosure by a Member of proceedings in secret session. The matter of the complaint was then debated in secret session.[58] A report of the proceedings issued by the Speaker showed that the matter of the complaint was referred to the Committee of Privileges on a division. Later the Committee made a secret report thereon (see p 833, n 212), which was not published till the end of the Second World War.[59]

Later the same month, another complaint was made by a Member that a breach of privilege had been committed by a Member by disclosing proceedings in secret session, and this matter was also referred to the Committee of Privileges, after being considered in open session.[60]

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[52] Alternatively, the Speaker may acquaint the House that the Serjeant has a communication to make; whereupon the Serjeant comes to the Bar and makes his communication directly to the House (CJ (1946–47) 54). The subject-matter of the communication may be taken into consideration forthwith (ibid (1840) 25; ibid (1851) 147) or appointed for consideration upon a future day (ibid (1882) 183; ibid (1883) 365).

[53] LJ (1805–06) 332.

[54] LJ (1783–87) 613, 647; ibid (1787–90) 338; ibid (1789–90) 649; ibid (1794–96) 241; in the last instance the complaint was made by the Deputy Great Chamberlain.

[55] LJ (1805–06) 332, 608.

[56] CJ (1930–31) 335.

[57] CJ (1939–40) 235.

[58] CJ (1941–42) 96.

[59] HC 47 (1946). The Committee found that the charge made against the Member had not been proved.

[60] CJ (1941–42) 98; Report of Committee, HC 93 (1941–42). The Committee exonerated the Member concerned of any intention to infringe the rules of the House, and recommended no further action.

17

THE COURTS AND PARLIAMENTARY PRIVILEGE

THE OPPOSING VIEWS

For some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House in matters of privilege has been disputed. A degree of comity has been achieved and some recognition of respective areas of jurisdiction has been arrived at pragmatically over the generations through a series of cases described in this chapter. The courts have recognized the need for an exclusive parliamentary jurisdiction, as a necessary bulwark of the dignity and efficiency of either House.[1] Neither House by itself maintains the earlier claim to supremacy over the courts of law enjoyed by the undivided High Court of Parliament of medieval England.

The earliest conflicts between Parliament and the courts were about the relationship between the *lex parliamenti* and the common law of England. Both Houses argued that under the former, they alone were the judges of the extent and application of their own privileges, not examinable by any court or subject to any appeal.[2] The courts initially professed judicial ignorance of the *lex parliamenti*, but after a time came to regard it not as a particular law but as part of the law of England, and therefore wholly within their judicial notice. There might be areas of the application of privilege within which it was proper for either House exclusively to make decisions, but particularly—though not solely—where the rights of third parties were concerned, the courts considered that it was for them to form their own view of the law of Parliament and to apply it (see pp 285–287).

By the middle of the nineteenth century, this aspect of contention over the *lex parliamenti* and the common law had largely been resolved. Parliamentary claims to determine both whether a privilege existed and whether it had been breached were abridged; the Houses yielded the first to the courts. Attention turned to the determination of the proper limits of the proceedings of Parliament, distinguishing what was a proper matter for the Houses, and what was not, on which the courts might be expected to rule. A number of important cases laid down guidelines for the relationship between Parliament and the courts (see pp 287–291). Speaking over a century ago of the possibilities of future conflict, Lord Coleridge, the Lord Chief Justice, was

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1 For example, in *Burdett v Abbot* (1811) 104 ER 559, 561; *Stockdale v Hansard* (1839) 112 ER 1112 at 1156; and *Bradlaugh v Gossett* [1883–84] 12 QBD 271.

2 It was, however, admitted that the simple action of either House could not create a new privilege any more than either could by simple declaration alter the general law (CJ (1702–04) 556, 560; 24 Parl Hist 517).

prepared to contemplate a declaration by the courts that a resolution of either House was illegal, and unable to protect those who acted upon it.[3]

In the early part of the twentieth century, there were relatively few cases which raised fundamental issues of jurisdiction between Parliament and the courts. Since then, the development of judicial attitudes to parliamentary privilege has proceeded against a background in which two important elements are discernible. The first is the expansion of the role of the courts which has led them into broader areas of public life than was the case half a century ago—of which in a parliamentary context the decision in *Pepper v Hart* is only the most obvious example (see p 231). The second, which predates the first, is judicial reliance on the statutory expression of the right to freedom of speech in Parliament, contained in article IX of the Bill of Rights, when judicial decisions bearing on privilege are taken. None of the great nineteenth century cases did more than glance at article IX, if that: decisions then were based on constitutional first principles (see pp 287–288). More specifically, recent decades have seen decisions in a number of cases concerning privilege, in the course of which a new emphasis has emerged: the desire of the courts to uphold what they see as the rights of individuals, sometimes within explicit statutory guarantees (see pp 295–305).[4] This has been complicated by the enmeshing of the law of the various parts of the United Kingdom with that of the European Union and the opportunity for petitions to the European Court of Human Rights of a character which, at least prior to the enactment of the Human Rights Act 1998, would not be customarily entertained by UK courts. Nevertheless, even in jurisdictions where individual rights enjoy significant constitutional entrenchment, judges attempt to balance such rights against the traditional claims of Parliament.[5] On the other side of the fence, in 1999 Parliament itself conducted a thoroughgoing review of its privileges, which concluded in a recommendation that a 'modern presentation of parliamentary privilege' should be enshrined in legislation, thus 'confirming the existence of the right of Parliament to control parliamentary affairs'.[6] This recommendation, however, has not yet been implemented and the lack of a Parliamentary Privileges Act has been cited in a number of recent parliamentary inquiries.[7]

[3] *Bradlaugh v Gosset* [1883–84] 12 QBD 271 at 275.

[4] See eg the comment of Lord Radcliffe in *A-G of Ceylon v De Livera* [1963] AC 103 at 120 that, 'given the proper anxiety of the House to confine its own or its Members' privileges to the minimum infringement of the liberties of others, it is important to see that these privileges do not cover activities that are not squarely within a Member's true function'.

[5] See in particular the comment of McLachlin J in the Supreme Court of Canada, commenting on the effect of the Canadian Charter of Rights and Freedoms in *New Brunswick Broadcasting Company v Nova Scotia (Speaker of the House of Assembly)*:

> Absent specific Charter language to the contrary, however, the long history of curial deference to the independence of the legislative body, and to the rights necessary to the functioning of that body, cannot be lightly set aside, even conceding that our notions of what is permitted to government actors have been significantly altered by the enactment and entrenchment of the Charter.

[1993] 13 CRR (2d) 1 at 21.

[6] Report of the Joint Committee on Parliamentary Privilege, HL 43-I, HC 214-I (1998–99) paras 384, 385.

[7] For example, Report of the Joint Committee on the Draft Bribery Bill, HL 115-I, HC 430-I (2008–09) paras 226–28; Report of the Committee on Issue of Issue of Privilege, HC 62 (2009–10) para 151.

FIRST PHASE OF THE CONFLICT

The earlier views of the proper spheres of court and Commons were much influenced by political events and the constitutional changes to which they gave rise. Coke in the early seventeenth century regarded the law of Parliament as a particular law, distinct from the common law. For that reason 'judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti*'.[8] This line of argument was able to rely on the view taken by Fortescue CJ and his colleagues in the case of Mr Speaker Thorpe in 1452 (see p 210) that the 'determination and knowledge of that privilege [of the High Court of Parliament] belongeth to the Lords of the Parliament, and not to the justices'.[9]

A number of decisions in the latter part of the seventeenth century gave further support to the parliamentary claims.

In *Barnardiston v Soame* in 1674 a parliamentary candidate brought an action against a sheriff for a double return. The initial judgment favoured Barnardiston, the candidate,[10] but the decision was reversed on appeal, North CJ observing that the trial of elections and the functions of the sheriff were matters of privilege within the exclusive jurisdiction of the Commons. North also included in his judgment remarks about judicial ignorance of the privileges of Parliament and the right of the Houses to determine the extent and limit of their privileges.[11] In short, the outcome of *Barnardiston v Soame* seemed to put privilege outside, if not above, the general law. The issue was complicated by concern felt in the Commons about the consequences for the adequacy of the law on electoral fraud, and so it was provided by statute[12] that officers maliciously making double returns could be sued 'in any of His Majesty's courts of record at Westminster'; but it was also illegal for a returning officer to make any return which conflicted with 'the last determination in the House of Commons of the right of election'. The Commons thus attempted to have the best of both worlds—to retain the right exclusively to determine the qualifications of electors, but to provide individual Members with a remedy at law against returning officers.

When in 1677 an attempt was made to release the Earl of Shaftesbury on a writ of *habeas corpus* from the imprisonment to which the Lords had committed him for 'high contempts', it was argued for his Lordship that such a general allegation was too uncertain for the court to come to an opinion: the jurisdiction of the Lords was limited by common law and examinable in the courts. The unanimous decision of the Court of King's Bench, however, was that they could not question the judgment of the Lords, as a superior court, on a committal order for contempt.[13]

[8] Sir Edward Coke *Fourth Part of the Institutes of the Laws of England* (1797) 14.

[9] 5 Rot Parl 239–40; 1 Hatsell 28–34. For judicial observations on this case, see *Burdett v Abbot* (1810) 104 ER 511, 3 State Tr (ns) 857, 914. It should be noted, however, that the judges were not trying the case but acting as assistants to the Lords, so that the reply cannot be construed as a disclaimer of their ability to decide any such point should it arise in their own courts. Nevertheless, they did give their opinion on what they would hold in such a case, and the Lords adopted and acted on it.

[10] 6 State Tr 1068; (1674) 86 ER 615.

[11] LJ (1685–91) 253.

[12] Parliamentary Elections (Returns) Act 1695 (7 & 8 Will 3, c 7), made permanent by 12 Anne, c 15, now repealed.

[13] (1677) 86 ER 792, 799–800.

Arguments in such terms were remarkably long-lived. De Grey CJ in 1771 observed that 'we cannot judge of the laws and privileges of the House [of Commons] because we have no knowledge of these laws and privileges',[14] and Lord Brougham LC in 1831 accepted that 'a court knows nothing judicially of what takes place in Parliament till what is done there becomes an Act of the legislature'.[15] In 1836–37, the Attorney-General argued that the constitution supposed that the *lex parliamenti* was not known to the judges of the common law. They had no means of arriving judicially at any information. The law of Parliament was as distinct from the common law as that administered in the equity, admiralty or ecclesiastical courts.[16]

Elements of the opposing view—that decisions of Parliament on matters of privilege can be called in question in other courts, that the *lex parliamenti* is part of the common law and known to the courts, and that resolutions of either House declaratory of privilege will not bind the courts—are found at almost as early a date, and they gained impetus as time went by.[17] In 1664, a court decided for a Member of the Commons who was sued for a debt, on the grounds that he was entitled to the benefit of the Limitation Act 1623 (21 James 1, c 16) notwithstanding that in the intervening period he had been secured from the creditor by his privilege as a Member. Though it was unnecessary for the court to make any direct inquiry into the questions of privilege involved,[18] Bridgeman CJ made some observations on the duty of the courts to decide such questions incidental to matters properly within their jurisdiction. He denied that decisions of the House of Commons regarding its privileges should necessarily be accepted by the courts as conclusive, and drew a distinction as regards the claim of the House to exclusive jurisdiction between matters of privilege arising *ab intra*, and (by implication) those in which persons outside were concerned.[19]

Two decades later, Sir William Williams was sentenced to be fined by a court for his action some years previously, in signing, as Speaker and by order of the House, a paper which was said to have libelled James II (then Duke of York), and which was printed and published. His defence that the court lacked jurisdiction over the action on which the charge was founded was unavailing.[20] The process was, however, so obviously political in intention that after the Revolution the House declared the judgment to be 'illegal and subversive of the freedom of Parliament', and the Bill of Rights condemned the prosecution for having been taken in King's Bench when the matter was cognizable only in Parliament (see p 209, n 32).[21] Later judgments have not relied on the case, and it seems to have been used by counsel on only one occasion.[22]

[14] *Brass Crosby's case* (1771) 95 ER 1005 at 1011. Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1112 at 1158 wholly rejected De Grey's line of argument: 'nothing could . . . be less needful or less judicial than the mere assertion of privilege that was volunteered by the Chief Justice'.

[15] *Wellesley v Duke of Beaufort* (1831) 36 ER 538.

[16] *Stockdale v Hansard* (1839) 112 ER 1112.

[17] There are several late-medieval cases in which judges or court decided a question as to the existence of parliamentary privilege; see eg *Downe v Walsh* (1472) 1 Hatsell 41, *Rymer v Cousins* (1472) 1 Hatsell 43 and *Atwell's case* (1477) 1 Hatsell 65–69.

[18] See Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1112 at 1142–43, 1163.

[19] *Benyon v Evelyn* (1664) 124 ER 614 esp at 619.

[20] 13 State Tr 1370 ff.

[21] CJ (1688–93) 146, 177, 213, 215; *R v Williams* (1689) 89 ER 1048.

[22] Lord Denman CJ in *Stockdale v Hansard* (1839) 112 ER 1112 at 1160, and see Erskine's argument in *R v Wright* (1799) 101 ER 1396 and 13 State Tr 1370 n.

Perhaps more significant in the development of the courts' case against Parliament's exclusive jurisdiction is the case of *Jay v Topham* (1682–9), in which (after a dissolution) judgment was given in King's Bench against the Serjeant at Arms of the Commons for having taken the plaintiff into custody and brought him to the Bar for an offence committed in breach of privilege.[23] The House roundly condemned the verdict, sent for the judges, and, having examined them, committed them to the Serjeant.[24] The judges claimed that they had not questioned the legality of the orders of the House. They emphasized that if there had been a plea in bar of the court's jurisdiction, the defendant would have been entitled to judgment;[25] and they admitted that if the entire matter had been transacted in the House (as they argued it had not been) it would have been proper to plead such a matter to be outside the jurisdiction of the court. They did, however, reassert the right of the courts to examine privilege incidentally arising.[26]

Subsequent observations in the courts have been critical of the Commons action towards the judges in *Jay v Topham*.[27] It has been pointed out in rebuttal, however, that Topham's petition to the House stated that there had in fact been a plea in bar of the court's jurisdiction, which had been overruled.[28]

At the same period, the Lords too collided with the increased readiness of the courts to challenge the exclusive nature of their jurisdiction. In 1694, a defendant indicted for murder as a commoner pleaded misnomer, on the ground that he was the legitimate holder of a peerage. The Crown argued that the defendant had petitioned the Lords to be tried by his peers, but that House had dismissed the petition, disallowed the peerage claim, and ordered him to be tried at common law. The court held for the defendant on the ground (among others) that the decision of the Lords was not conclusive against the peerage claim. The House had disallowed the claim neither as a court of appeal (this was an original case) nor on reference from the Crown:[29] and so their dismissal of the petition was not a judgment against the defendant's title or properly a judgment at all. Perhaps even more significantly, the court held that the law of Parliament (which according to the Attorney-General justified the proceedings of the House of Lords) was to be regarded as the 'law of the realm'; but even if it were a 'particular law', this would not prevent the King's Bench deciding a matter which was properly within their jurisdiction (ie even if it involved a question determinable by law of Parliament).[30]

In the early years of the eighteenth century there was a series of cases in which initially dissenting judicial opinions took on a growing significance. The first such case was that of *Ashby v White* in 1703–4. Three judges (with Holt CJ dissenting) found in favour of a plaintiff who had complained that the

[23] (1689) 12 State Tr 822–34.

[24] CJ (1688–93) 209, 210, 213, 227.

[25] 12 State Tr 826, 829.

[26] See *Burdett v Abbot* (1810) 104 ER 538; and *Stockdale v Hansard* (1839) 112 ER 1112 at 1167.

[27] Lord Ellenborough CJ thought the judges had been punished for a righteous judgment *Burdett v Abbot* (1810) 104 ER 543, and Lord Denman CJ considered that they had vindicated their conduct by unanswerable reasoning, *Stockdale v Hansard* (1839) 112 ER 1112 at 1163.

[28] By Sir John Campbell in *Stockdale v Hansard*, 1140, 1163.

[29] 'The proper course for the trial of the right of peerage is by petition from the claimant to the King, who, thereupon, if he has any doubt upon the matter, refers it to the Lords, to examine into it and make their report of it to him; and upon their report the King determines of it.' (Attorney-General in *Burdett v Abbot* (1810) 104 ER 542), assented to by Lord Ellenborough.

[30] *R v Knollys* (1694) 91 ER 904.

returning officers for Aylesbury had fraudulently and maliciously refused his vote. The grounds of the conclusions of the majority of the court were perfectly in line with the succession of cases mentioned at pp 283–284. The matter was properly cognizable only by Parliament and, until the House of Commons had determined the matter, the plaintiff could not be said to have a right to vote at all.[31] The plaintiff appealed, and the Lords reversed the decision on the basis of Holt CJ's dissenting judgment in the lower court.[32] Holt had argued that the right to vote was a matter of property, an injury to which imported a damage. This was a matter determinable at common law; and the objection that the matter was cognizable in Parliament did not exclude the jurisdiction of the court, because it was determinable in Parliament only as a question incident to the trial of a controverted election.[33] The Commons made a spirited rejoinder, asserting that any attempt to challenge its jurisdiction would amount to a breach of privilege.

The House also adopted the resolution that, 'according to the known laws and usage of Parliament it is the sole right of the Commons of England . . . (except in cases otherwise provided for by Act of Parliament) to examine and determine all matters relating to the right of election of their own Members'; and that Ashby, in prosecuting an action at common law against White, was guilty of a breach of privilege. The Lords regarded this as 'in effect to subject the laws of England to the votes of the House of Commons'.[34] The matter had not been resolved by conferences between the Houses when a second action arose out of the same election, which raised very similar issues.

The House of Commons, by warrant of the Speaker, had committed a number of *Aylesbury Men*[35] for having raised an action against the constables of Aylesbury who refused their votes, in contempt of the jurisdiction and in open breach of the known privileges of the House. Writs of *habeas corpus* were sued out, and it was argued that the warrant was informal and, furthermore, that it disclosed no breach of privilege since the prosecution of a suit was lawful. A majority of the court concluded that the warrant was not reversible for form (see pp 193–195) and that the court had no jurisdiction, the Commons being proper judges of their own privileges. Powell J declared that the Commons did not commit by the common law, but by the *lex parliamenti*; and that the Court of Parliament was a superior court.

Again Holt CJ dissented. He did not deny the power of the Commons to commit for contempt, but he held that the exercise of the power was examinable in the courts. If there were no breach of privilege—as he found to be the case in this instance—there was no contempt, and the prisoners should be discharged.[36]

When the possibility of an appeal threatened to bring the case—and the power of the Commons to commit—under the examination of the Lords, the Commons addressed Her Majesty, emphasizing its right to commit for contempt, and its exclusive jurisdiction in the matter. It was also denied that in such cases there was a possibility of appeal. For good measure, counsel and others were

[31] *Ashby v White* (1703–04) 92 ER 126. Powys J said that such issues were reserved to Parliament. 'We [the judges] are not acquainted with the learning of elections, and there is a particular cunning in it not known to us, nor do we go by the same rules' (ibid 130).
[32] LJ (1701–04) 369.
[33] (1703–04) 92 ER 134.
[34] CJ (1702–04) 308; LJ (1701–04) 534.
[35] *The Aylesbury Men, R v Paty* (1704) 92 ER 232.
[36] (1704) 92 ER 232.

found 'guilty of conspiring to make a difference between Lords and Commons' by prosecuting the writs of *habeas corpus* and were committed to the Serjeant.[37] When the Commons' Address was received, it was referred to the judges for consideration whether the grant of a writ of error (on which an appeal was founded) was of right or of grace. The judges decided for the first by ten to two. The Lords then passed resolutions prohibiting the arrest of the counsel for the Aylesbury Men. It denied the power of either House to create new privileges, asserting a right to seek redress by action at law where a defendant was not in his own person entitled to privilege of Parliament, and stating that in committing the Aylesbury Men, the Commons had 'claimed a jurisdiction not warranted by the constitution'.[38] Despite a series of conferences, compromise could not be reached, and the dispute between the Houses was cut short only by prorogation.[39]

THE SECOND PHASE: THE NINETEENTH CENTURY

In the nineteenth century, a series of cases forced upon the Commons and the courts a comprehensive review of the issues which divided them, from which it became clear that some of the earlier claims to jurisdiction made in the name of privilege by the House of Commons were untenable in a court of law: that the law of Parliament was part of the general law, that its principles were not beyond the judicial knowledge of the judges, and that the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive.

The facts in the case of *Burdett v Abbot* (1810) were that the plaintiff, a Member of the House of Commons, had been judged guilty of a contempt, arising from the publication of a libellous and scandalous paper. The House ordered his committal and in the course of the execution of Mr Speaker Abbot's warrant, the plaintiff's house was entered by force. He then brought an action of trespass against the Speaker. The significance of the outcome is twofold. In the first place, the House of Commons did not resort to the course of action for which earlier years provided ample precedent—committing for contempt counsel and others concerned in the prosecution of the Speaker for obeying an order of the House. The House preferred voluntarily to submit one of its privileges to the jurisdiction of the courts. Secondly, following further dispute on the old battlegrounds of whether the law of Parliament was a particular law or part of the law of the land, and whether the courts were entitled (or indeed bound) to decide questions of privilege coming incidentally before them, the Speaker's action was wholly vindicated.

Thus, about a century after the case of the *Aylesbury Men*, and commenting on it, Lord Ellenborough CJ held (in *Burdett v Abbot*), that the House had acted within its power, and that the powers to commit were no more than those enjoyed by all superior courts.[40] The court emphasized that the possession of

[37] CJ (1702–04) 549, 550, 552–53.
[38] LJ (1701–04) 676, 677–78.
[39] For further proceedings, see LJ (1701–04) 694–95, 698–715; CJ (1702–04) 555, 559–63, 565, 569–75.
[40] *Burdett v Abbot* (1810) 104 ER 554 and *Burdett v Colman* (1817) 3 ER 1289. The former provides one of the principal authorities for the Commons power to commit for contempt, as does that of *Lord Shaftesbury* for the Lords (see pp 192, 283).

such powers was essential for the maintenance of the dignity of both Houses, and that without them they would 'sink into utter contempt and inefficiency'.[41] At the same time, however, Lord Ellenborough contemplated the possibility of cases in which the courts would have to decide on the validity of a committal for contempt where the facts displayed could by no reasonable interpretation be construed as such (see p 194, n 67).

Events in the next case, *Stockdale v Hansard* (1836–37), proved to be more complex. Messrs Hansard, the printers of the House of Commons, had printed by order of that House a report laid on the Table by an inspector of prisons against which a Mr Stockdale brought an action for libel. The court did not consider Messrs Hansard's proof of the House's order to print a sufficient defence. Lord Denman CJ observed that the House's direction to publish all parliamentary reports was no justification for Hansard or anyone else.[42] Though Hansard succeeded in a plea of justification, the Commons felt it necessary in 1837 to appoint a committee to ascertain the law and practice of Parliament in reference to the publication of papers printed by order of the House.

The result of these inquiries was the passing of resolutions by the House, declaring that the publication of parliamentary reports, votes and proceedings was an essential incident to the constitutional functions of Parliament; that the House had sole and exclusive jurisdiction to determine upon the existence and extent of its privileges; that to dispute those privileges by legal proceedings was a breach of privilege; and that for any court to presume to decide upon matters of privilege inconsistent with the determination of either House was contrary to the law of Parliament.[43]

Despite the course of action implicit in those strong resolutions, when Stockdale commenced another suit against Hansard, the House did not proceed against him for contempt, but directed the firm to plead and the Attorney-General to defend them, arguing on the basis of the privilege of the House and its recent resolutions. Messrs Hansard in this case relied entirely upon the privileges of the House and its order to print. The defence was unsuccessful. The Attorney-General argued the case for regarding the High Court of Parliament as a superior court of exclusive jurisdiction binding on other courts, and its law a separate law. Each House separately, it was contended, possessed the whole power of the medieval English High Court of Parliament, and so subordinate were the courts of law to each that a writ of error ran from them to Parliament. Furthermore, were the privileges of the Commons subject to review by the courts, the Lords would be the arbiter not only of their own privileges but also of those of the Commons. For probably the last time, an appeal was made to the principle that the constitution supposed that the *lex parliamenti*, like the law administered in equity, ecclesiastical and admiralty courts, was a system different from the common law, the judges of which had no means of arriving judicially at knowledge of it. In such circumstances the courts must respect the general rule that they should follow the law of the court of original jurisdiction. Finally, the Attorney-General cited instances of

[41] *Burdett v Abbot* (1810) 104 ER 559 and esp the observations of Bayley J at 562. The judgment was later affirmed in Exchequer Chamber and in the House of Lords ([1814–23] All ER Rep 101).
[42] (1836–37) 173 ER 322.
[43] CJ (1837) 418–20.

the Commons exercising its inquisitorial powers as a court by examining and committing judges.[44]

The court rebutted nearly all these contentions. It was accepted that over their own internal proceedings the jurisdiction of the Houses was exclusive: but it was (in Lord Denman's view) for the courts to determine whether or not a particular claim of privilege fell within that category. Though the Commons had claimed that the publication of certain types of papers was essential to its constitutional functions, and the Attorney-General argued that the court was bound to accept such a declaration as evidence of the law, Lord Denman held that the court had a duty to inquire further. There was, in his opinion, no difference between a right to sanction all things under the name of privilege and the same right to sanction them by merely ordering them to be done. This would amount to an 'arbitrary and irresponsible' superseding of the law, in itself 'the most momentous and intolerable of all abuses'. The court could find no reason to believe that either House had 'either actually or virtually' claimed to authorize by resolution and relying on its privileges the publication of papers injurious to the character of an individual.[45]

As regards the difference between those matters of privilege arising directly in a cause before a court and those of indirect significance, on which a select committee had recently professed inability to discern a real distinction (which had led them to deny jurisdiction to the courts in either case),[46] the judges expressed reservations.[47] Lord Coleridge observed that 'whether directly arising or not, a court of law I conceive must take notice of the distinction between privilege and power; and where the act has not been done within the House (for of no act there done can any tribunal in my opinion take cognisance but the House itself) and is clearly of a nature transcending the legal limits of privilege, it will proceed against the doer as a transgressor of the law'.[48]

Lord Denman denied further that the *lex parliamenti* was a separate law, unknown to the judges of the common law courts. Either House considered individually was only a part of the High Court of Parliament, and neither could bring an issue within its exclusive jurisdiction simply by declaring it to be a matter of privilege. Any other proposition was 'abhorrent to the first principles of the constitution'. The resolutions of the House based on the conclusions of the select committee (see above) were not the action of a court, legislative, judicial or inquisitorial, so that the superiority of the House of Commons over other courts had nothing to do with the question. In any case, there was, it seemed to the judges, no basis for regarding the courts of law as in principle incapable of reviewing any decision of the House of Commons. Conversely, there was no parliamentary revision of court judgments for error. The Commons was not a court of law in the sense recognized in the

[44] *Stockdale v Hansard* (1839) 112 ER 1112 at 1118 ff, esp at 1120–22, 1123–26, 1129–30. See also p 285.
[45] CJ (1837) 419; (1839) 112 ER 1120–22, 1157 ff, 1167, 1168.
[46] CJ (1837) 352; Select Committee on Publication of Printed Papers, HC 286 (1837) paras 59, 60, 69.
[47] It was argued, for example, that the courts would find themselves in an impossible situation if the two Houses fell into dispute over the extent or existence of a privilege—as they had in *Ashby v White*—and the Committee's argument took no account of the possibility of a litigant's claiming a privilege as yet undetermined by either House (*Stockdale v Hansard* (1839) 112 ER 1112 at 1168).
[48] (1839) 112 ER 1197.

courts, and was unable to decide a matter judicially in litigation between parties, either originally or by appeal.[49]

Having received an unfavourable verdict, the House of Commons, again despite their strong view expressed in the resolutions referred to above, ordered to be paid the damages and costs for which Messrs Hansard were declared liable. It was, however, agreed that, in case of future actions, the firm should not plead and that the parties should suffer for their contempt of the resolutions and defiance of the House's authority.

When, therefore, a third action was commenced for another publication of the original report, judgment was given against Messrs Hansard by default. Damages were assessed and the sheriffs of Middlesex levied for the amount, though they delayed paying the money to Stockdale for as long as possible. In 1840, the Commons committed first Stockdale and then the sheriffs, who had declined to repay the money to Messrs Hansard. Proceedings for the sheriffs' release on a writ of *habeas corpus* proved unsuccessful.[50] Howard, Stockdale's solicitor, was also proceeded against, but escaped with a reprimand.

While in prison, the persistent Stockdale commenced a fourth action, for his part in which Howard was committed. Messrs Hansard were again ordered not to plead, and judgment was entered against them. At this point, the situation was in part resolved by the introduction of what became the Parliamentary Papers Act 1840, affording statutory protection to papers published by order of either House (see p 225).

The case of *Howard v Gosset* (1845) may be viewed, however, as a continuation of the conflict in some of its aspects. Howard brought an action against the Serjeant at Arms and others for having taken him into custody and committed him to prison in obedience of the House's order and the Speaker's warrant.[51] Leave to appear was given to the defendants and the Attorney-General was directed to defend them.[52] The court favoured the plaintiff, on the grounds of the technical informality of the warrant. The judges proceeded on the principle that the warrant might be examined with the same strictness as if it had issued from an inferior court (see p 193), while at the same time concluding that they might adjudge it to be bad in form 'without impugning the authority of the House or in any way disputing its privileges'.

A select committee roundly condemned this doctrine, but advised the House 'that every legitimate mode of asserting and defending its privileges should be exhausted before it prevented by its own authority, the further progress of the action'.[53] The House accepted the advice and an appeal was lodged.[54] In order, however, to avoid submission to any adverse judgment on appeal, the Serjeant was not authorized to give bail and execution was levied on his goods.[55] In the

[49] (1839) 112 ER 1153–54, 1188, 1196.
[50] *Sheriff of Middlesex* (1840) 113 ER 419. The sheriffs paid the money to Stockdale under an attachment (*Stockdale v Hansard* (1839) 112 ER 1112).
[51] CJ (1843) 59; (1845) 116 ER 158 and see also *Howard v Gosset* (1842) 174 ER 553. The House ordered Howard to attend at the Bar when he assisted in the bringing of Stockdale's fourth action against Hansard. He evaded the service of the order and the House, instead of resolving that he was in contempt, followed a precedent of 1731 (CJ (1727–32) 705) and ordered him to be sent for in custody of the Serjeant (ibid (1840) 59). This arrest was the action on which *Howard v Gosset* (1845) 116 ER 139 was founded.
[52] CJ (1843) 118 and Parl Deb (1843) 67, cc 22, 945.
[53] Select Committee on Printed Papers, Second Report, HC 397 (1845) p vi.
[54] CJ (1845) 642; Parl Deb (1845) 80, c 1097 and ibid (1845) 81, c 1208.
[55] CJ (1845) 563.

event, the decision of the lower court was overturned, and the court found that the privileges involved were not in the least doubtful. The warrant of the Speaker was valid as a protection to the officer of the House; and the warrant should be construed as if it were a writ from a superior court[56] (see p 193).

The last of the major nineteenth-century cases is *Bradlaugh v Gosset* (1884).[57] The Parliamentary Oaths Act 1866 required Charles Bradlaugh, who had been elected a Member of the House of Commons, to take the oath. The House, however, had passed a resolution restraining him from doing so, and ordering the Serjeant to exclude Bradlaugh from the House until he engaged not to disturb the proceedings further (following an attempt to administer the oath to himself).[58] The plaintiff then sought a declaration from the courts that the order of the House was *ultra vires* and so void, together with an order restraining the defendant, the Serjeant at Arms, from preventing him from entering the House and taking the oath as a Member. The court decided against Bradlaugh, on the ground that the order of the House related to the internal management of its procedure over which they had no jurisdiction. The exclusive jurisdiction of the House in this instance was considered essential for the discharge of its function, and based on necessity.[59]

EARLY AND MID-TWENTIETH CENTURY

Many subsequent cases had their origin in the desire to determine the proper limits of the statutory phrase 'proceedings in Parliament', some of them with a particular concern for what is internal to Parliament in the context of its claim to exclusive cognisance (pp 227–231, 235–239). In general, the judges have taken the view that when a matter is a proceeding of the House, beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts,[60] unless criminal acts are involved. Equally clearly, if a proceeding of the House results in action affecting the rights of persons exercisable outside the House, the person who published the proceedings or the servant who executed the order (for example) will be within the jurisdiction of the courts, who may inquire whether the act complained of is duly covered by the order, and whether the privilege claimed by the House does, as pleaded, justify the act of the person who executed the order.

The boundary lines were not so clear in practice. In *Bradlaugh v Gosset* it was decided that if the House of Commons 'is—as for certain purposes and in relation to certain persons it certainly is—the absolute judge of its own privileges, it is obvious that it can for these purposes and in relation to these persons practically change or practically supersede the law'. Stephen J went on to say that even if the House had wrongly interpreted a statute prescribing

[56] HC 39 (1847) p 164.
[57] (1884) 12 QBD 271. For the aspects of this case regarding the right of each House to be the sole judge of the lawfulness of its own proceedings, and the position of criminal acts in Parliament, see p 227 and below.
[58] CJ (1883) 332.
[59] [1883–84] 12 QBD 271. For other aspects of this case, see pp 102 and 237. The case was commented on by the Committee of Privileges, HC 365 (1986–87) para 29.
[60] Lord Denman CJ summed up this view by saying that 'all the privileges that can be required for the energetic discharge' of the Commons' trust are 'conceded without a murmur or doubt' (*Stockdale v Hansard* (1839) 112 ER 1112 at 1156, 1185, 1203; *Bradlaugh v Gosset* [1883–84] 12 QBD 274; *British Railways Board v Pickin* [1974] 1 All ER 609, esp the judgment of Lord Simon of Glaisdale). See also p 295.

rights within its own walls, the courts had no power to interfere, though he limited the rights on which the Commons could interpret the statute as those such as sitting and voting. He contrasted those with 'rights to be exercised out of and independently of the House' in which the court must be arbiter.[61]

In 1899, in a case involving the sale of liquor within the Palace of Westminster under the direction of the relevant committee of the House of Commons,[62] when it was contended that the general licensing law did not apply, Lord Russell CJ remarked that he was 'very far from saying that no offence had been committed . . . [and was] not at all impressed by the argument that, because many of the provisions of the Licensing Acts cannot be invoked with reference to the House of Commons, therefore the Acts do not apply'. It would not, however, have been fair to hold the servant of the select committee who sold the liquor responsible. The Lord Chief Justice therefore called for legislation 'to legalise and regulate what is going on'.

The judgment in the case of *R v Graham Campbell, ex p Herbert*[63] was along quite different lines. The court concluded that the sale of alcohol by servants of a committee of the Commons within the Palace fell within the scope of the internal affairs of that House and therefore within its privileges, so that no court of law had jurisdiction to interfere (see pp 227–231). Lord Hewart CJ took a much more liberal view of the proper extent of the internal proceedings of the House than his predecessor in 1899. In the matter complained of the House was acting collectively and 'any tribunal might well feel, on the authorities, an invincible reluctance to interfere'. Avory J added that to subject the House of Commons to the Licensing Acts would be to take away its right to regulate its own internal procedure.[64]

The select committee which reviewed the applicability of the Official Secrets Acts to Members of Parliament in 1938–39[65] (see p 236) acknowledged that the prosecution of a Member for an act which the House considered within his privilege as a Member would itself be a breach of privilege, and that all parties concerned in the prosecution would be at risk for proceedings for contempt. The committee commented, however, that 'this would not solve the difficulty', and quoted with implicit approval evidence given by the Attorney-General that the courts would be likely to give a broad construction to the term 'proceedings in Parliament' in the Bill of Rights, 'having regard to the great fundamental purpose which freedom of speech served'.

THE LATER TWENTIETH CENTURY

The Strauss case and the reference to the Judicial Committee

In the first of the important cases in the later twentieth century the House of Commons came to a significant conclusion about the limits of the phrase (and the protection afforded by) 'proceedings in Parliament'. The Attorney-

[61] [1883–84] 12 QBD 271.
[62] *Williamson v Norris* [1899] 1 QB 7–15.
[63] [1935] 1 KB 594.
[64] [1935] 1 KBD 594 at 594 ff, esp 602, 603. In *R v Chaytor* [2010] UKSC 52 (para 78) Lord Phillips thought that a presumption that without express provision statutes did not apply to Parliament within the Palace of Westminster was one which was 'open to question'.
[65] HC 101 (1938–39).

General's opinion which the 1938–39 select committee cited (see above) was given in the context of the possible consideration by the courts of:

> cases . . . of communications between one Member and another or between a Member and a Minister, so closely related to some matter pending in or expected to be brought before the House that, though they do not take place in the Chamber or a committee-room, they form part of the business of the House.

The House agreed with that committee's report,[66] and the Committee of Privileges in 1957 'adopted and followed' their predecessor's arguments and reasoning in considering whether a Member was protected by privilege against an action for defamation arising from a letter written to a Minister[67] (see p 237). The House, however, rejected these conclusions.[68]

A further novelty arising from this case was the action of the Commons (on the advice of the Privileges Committee) in voluntarily referring to a court—the Judicial Committee of the Privy Council—the question of law 'whether the House of Commons would be acting contrary to the Parliamentary Privilege Act 1770 if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges'.[69] The committee replied to the question posed with a clear negative, concluding that the Act (and a number of preceding statutes (see p 212, n 55)) apparently barring a plea of privilege of Parliament applied to proceedings against Members only in respect of their debts and acts as individuals and not in respect of their conduct in Parliament.[70]

Bilston Corporation v Wolverhampton Corporation

In 1942 a court refused to grant an injunction to a plaintiff to restrain a third party from opposing a private bill in Parliament, in accordance with an agreement previously reached between the parties. The court held that it had jurisdiction to grant or withhold such an injunction, but the instant case was not one in which the court believed it ought to interfere, since the questions of public policy involved were more suitable for determination by Parliament than by the courts. The ratification of the agreement some years previously by Parliament making the contractual obligation a statutory one in no way altered the point.[71]

[66] CJ (1938–39) 480.
[67] Committee of Privileges, Fifth Report, HC 305 (1956–57).
[68] CJ (1957–58) 260.
[69] CJ (1957–58) 42.
[70] Cmnd 431, 1958. A dissenting judgment, which would have permitted writs for defamation in respect of speeches in Parliament to be issued, but then struck out as soon as it appeared to the court that the action was in respect of a proceeding in Parliament is set out in (1985) *Public Law* 83–92. The dissenting judge averred:

> The Bill of Rights is directed to the courts of law. It directs them not to question proceedings in Parliament. The Parliamentary Privilege Act 1770 is directed to the two Houses . . . It directs them not to seek to impeach or delay actions in the courts. If each of these two . . . obey these mandates, there will be no conflict. The right of every Englishman to seek redress in the courts of law is preserved inviolate without interference by the House of Commons. The right of Members of Parliament to freedom of speech is preserved intact because the courts will refuse to entertain an action which questions it.

[71] *Bilston Corpn v Wolverhampton Corpn* [1942] 2 All ER 447; but see also p 923, n 10.

Dingle v Associated Newspapers

It was held in 1960 that to impugn the validity of a report of a select committee of the House of Commons is contrary to article IX of the Bill of Rights. In an action for libel raised against a newspaper,[72] it was decided that those who published such a report *bona fide* and without malice were entitled to the protection of the Parliamentary Papers Act 1840 (see p 225) and that it was not relevant to the action for the plaintiff to comment on the select committee's report or on the proceedings leading to its publication.

Stourton v Stourton

In 1962, a judicial decision re-opened the long-standing tensions in the relative authority of the Houses and the courts. In arriving at the conclusion that parliamentary privilege protected a peer from arrest on a writ of attachment the purpose of which was to compel performance of acts required by civil process rather than to punish for contempt of a criminal court, Scarman J said that while Parliament would consider the nature of the process and all the circumstances of the case before deciding whether to regard the arrest of a Member of either House as an invasion of privilege, he, sitting in the High Court of Justice, need not take the law to be applied only from the practice of the House (of Lords): 'I think that I have to look not only to the practice of the House but also to the common law as declared in judicial decisions in order to determine in this particular case whether privilege arises, and if so, its scope and effect'.[73]

Church of Scientology v Johnson-Smith

In 1972, in an action for damages, in which the plaintiff sought to prove malice and rebut the defendant's plea of fair comment by reading extracts from the Official Report of the Commons, the court held that the scope of parliamentary privilege was not limited to the exclusion of any cause of action in respect of what was said or done in the House, but extended to the examination of proceedings in the House for the purpose of supporting a cause of action. This was so even though the cause of action itself arose out of something done outside the House.[74] Some 20 years later, however, the House of Lords in its judicial capacity considered further the breadth of certain aspects of this judgment.[75]

[72] *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405.
[73] *Stourton v Stourton* [1963] 1 All ER 606 esp at 608.
[74] *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522.
[75] In *Pepper v Hart* [1993] 1 All ER 68 Lord Browne-Wilkinson, commenting on the earlier judgment, observed that it was rightly held that introducing as proof of malice evidence of what the defendant said in the House of Commons would be contrary to article IX of the Bill of Rights. However, 'to suggest that in no circumstances could the speeches be looked at other than for the purposes of seeing what was said on a particular date [would] have to be understood in the context of the issues which arose in that case'. Since these issues included a charge that the defendant acted improperly in Parliament, article IX was infringed.

British Railways Board v Pickin

The 1973–74 case of *Pickin* (see p 228)[76] demonstrated that, though the courts continued to be careful not to act so as to cause conflict with Parliament, there were two views in the judiciary about where the boundary between the concerns of each should be drawn. The Court of Appeal held that the question whether a court was competent to go behind a private (but not a public) Act to investigate whether it had been properly obtained was a triable issue. If on investigation an abuse was shown to have occurred, the court might be under a duty to report the matter to Parliament. Lord Denning MR stated that:

> it is the function of the court to see that the procedure of Parliament itself is not abused, and that undue advantage is not taken of it. In so doing the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament and, I might add, in aid of justice.

The House of Lords in its judicial capacity took an entirely opposite view.[77] The function of the court was to consider and apply the enactments of Parliament. Accordingly it was not lawful to impugn the validity of the statute by seeking to establish that Parliament, in passing it, was misled by fraud or otherwise. Any investigation into the manner in which Parliament had exercised its function would or might result in a conflict. The Lords upheld clear authorities from the nineteenth century onwards that (for example):

> all that a court of justice can look to is the parliamentary roll. They see that an Act has passed both Houses of Parliament and that it has received the Royal Assent, and no court of justice can inquire into the manner in which it was introduced into Parliament, what was done previously to its being introduced, or what passed in Parliament during the various stages of its progress.[78]

Lord Reid concluded that, for a century or more, both Parliament and the courts had been careful not to act so as to cause conflict between them. He would support the action moved for by the respondent only if compelled to do so by clear authority: 'but it appears . . . that the whole trend of authority for over a century is clearly against permitting any such investigation'. One of the reasons given by Lord Simon of Glaisdale for concurring in the judgment was that any other conclusion would impeach proceedings in Parliament, contrary to the Bill of Rights,[79] and he instanced the *sub judice* rule as a

[76] *British Railways Board v Pickin* [1974] 1 All ER 609. For proceedings in the Court of Appeal, see *Pickin v British Railways Board* [1973] 1 QB 219 at 230.
[77] It was said that the case on which the Court of Appeal had in large part founded its decision (*Mackenzie v Stewart* (1752) 9 Morison 7443 and 18 ibid 15459, and (1754) 1 Pat App 578 HL (Sc)) was not sufficient to support its conclusion, being most probably a decision on the construction of an Act. Lord Wilberforce expressed the further view that even if *Mackenzie v Stewart* had contained a clear *ratio decidendi*, it would be difficult to sustain it against the chain of explicit later decisions ([1974] 1 All ER 609 at 622–23).
[78] [1974] AC 765 at 786–87, a quotation from *Edinburgh & Dalkeith Railway Co v Wauchope* (1842) 8 ER 279 at 285. Other cases reinforcing this line of argument are *Earl of Shrewsbury v Scott* (1859) 141 ER 350; *Waterford, Wexford, Wicklow and Dublin Railway Co v Logan* (1850) 14 QB 672; *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576; and two Privy Council cases, *Labrador Co v The Queen* [1893] AC 104 and *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, [1941] 2 All ER 93, PC. More recently see also *Martin v O'Sullivan* [1982] STC 416 and a Commonwealth case, *Narrow Shire Council v Attorney-General of New South Wales* [1980] 2 NSWLR 639.
[79] [1974] AC 765 at 799–800. Cf the reaffirmation of the authority of article IX of the Bill of Rights in the Commons resolution giving leave for reference to the Official Report to be made in court proceedings, without a preliminary petition in individual cases (p 229). In the context of the desire of the courts to avoid conflict with Parliament, the observations of Pearson J in *Dingle v Associated Newspapers Ltd* [1960] 2 QB 410 may be noticed: 'The courts desire to

parliamentary means of avoiding conflict, just as the courts had been careful to exclude evidence which might amount to infringement of parliamentary privilege.[80]

Anderson Strathclyde

In the case of *R v Secretary of State for Trade, ex p Anderson Strathclyde plc* in 1983,[81] it was held that a report in the Official Report of the House of Commons of what had been said and done in Parliament could not be used to support a ground for relief in proceedings for judicial review in respect of something which occurred out of Parliament. Dunn LJ concluded that, were it otherwise, 'the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement . . . with a view to determining what was [its] true meaning . . . and what were the proper inferences to be drawn from [it]. This . . . would be contrary to article IX of the Bill of Rights. It would be doing what Blackstone[82] said was not to be done . . . Moreover, it would be an invasion by the court of the right of every Member of Parliament to free speech in the House'.

In 1993 the House of Lords found *Anderson Strathclyde* wrongly decided so far as the court in that instance refused to look at parliamentary materials to prove a fact (see p 229, n 44).[83]

Zircon

When, in 1987, the Attorney-General sought an injunction against a number of Members of the House of Commons with the intention of preventing them from showing a film in the House until the House had an opportunity of

co-operate as far as possible with the parliamentary authorities in matters where there may be some debateable ground on which a conflict might arise'; and see p 298, n 90.

80 See for example, *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405. See also an Australian case, *Comalco Ltd v ABC* (1983) 50 ACTR 1 at 5 and (1983) 64 ACTR 1 at 58, where it was held that a court complied with the Bill of Rights by ensuring that the substance of what was said in Parliament was not the subject of any submission or inference. The court upheld the privileges of Parliament not by a rule as to the admissibility of evidence, but by its control over the pleadings and proceedings in court. In *Fairfold Properties Ltd v Exmouth Docks Co Ltd* (1990) TLR 660 it was held that an order from a court causing the promoters of a private bill to write to the authorities of the Commons seeking to withdraw the bill which they had presented was not interference with the proceedings of Parliament. It could not deprive Parliament (which might or might not accede to the request) of the opportunity to consider the matter.

81 [1983] 2 All ER 233, esp at 239b.

82 Sir W Blackstone *Commentaries* (17th edn, 1830) i, 63: 'whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere'.

83 *Pepper v Hart* [1993] AC 593 at 639, [1993] 1 All ER 43 at 68. The Lords decision was founded on the Crown's lack of objection to a lower court's looking at the parliamentary material, and on the judgment, also in the Lords, in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696. For a recent Commonwealth case in which the courts ruled on an attempt to use the Official Report to prove more than what was said in Parliament, see *Australian Broadcasting Commission v Chatterton, Chapman and Chatterton* (1987) 46 SASR 1 esp at 18, 30ff and 38; but cf *Wright and Advertiser Newspapers v Lewis* (1989–90) 53 SASR 416, commented on in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 334–35, [1994] 3 All ER 407 at 415–16.

deciding whether or not the showing of the film should be allowed, the court refused the application, apparently on the ground (which was not set out in writing) that the matter could and should be under the control of the House authorities, even in advance of a formal decision by the House.[84]

The Australian Parliamentary Privileges Act 1987

In Australia, article IX of the Bill of Rights applies to the Commonwealth Parliament by virtue of section 49 of the Australian constitution. In 1985, the issue was raised in connection with the case of *R v Murphy*.[85] Parties in that case were permitted to make use of evidence given (some of it in private and unpublished) to committees of the legislature and witnesses were cross-examined on the evidence they had given to such committees. The court held that the provisions of article IX should be interpreted in the (restricted) sense that the exercise of the freedom of speech given to Members and witnesses may not be challenged by way of court or similar process having legal consequences for such persons because they had exercised that freedom. In other words, article IX was restricted to preventing parliamentary proceedings from being the cause of an action: it did not inhibit proceedings from being used in support of an action. The effect of the judgment was substantially reversed by the Australian Parliamentary Privileges Act 1987 which in general restored on a statutory basis the previous understanding of the meaning of article IX, defined 'proceedings in Parliament' (see pp 235–239) and made certain provisions regarding the extent to which courts might concern themselves with such proceedings.

In 1995, the Judicial Committee of the Privy Council concluded that the Australian Act 'declares what had been previously regarded as the effect of article IX' and the relevant subsection of s 16 of that Act (see p 234, n 68) 'is the true principle to be applied'.[86]

Pepper v Hart

In *Pepper v Hart* in 1993,[87] (see p 231) the House of Lords set aside the long-standing rule of the courts which prevented them from admitting parliamentary debates as an aid to their construction of statutes. Their Lordships unanimously agreed that their decision would not give rise to that 'impeaching or questioning' of parliamentary proceedings forbidden by the Bill of Rights (see p 232).

84 Report of the Committee of Privileges, HC 365 (1986–87). Among the conclusions of the Committee, which considered the issue partly in the context of the connection of the film with matters of national security, was that any restrictions which might be imposed on the disclosure in the House of such information should be imposed by the House and not by the courts (paras 47–48). In the event, however, the Committee found it unnecessary to recommend any changes in the privileges or procedures of the House relating to national security (para 59).

85 *R v Murphy* [1986] 5 NSWLR 18.

86 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333, [1994] 3 All ER 407 at 414.

87 [1993] AC 593, [1993] 1 All ER 47.

protection of any enactment or rule of law which—in an echo of the Bill of Rights which is not itself mentioned—prevents proceedings in Parliament from being impeached or questioned in any court or place out of Parliament. When protection has been waived, any such enactment or rule of law is not to apply to prevent evidence being given, questions asked, or statements, submissions, or findings being made about his conduct. None of these things is to be regarded as infringing the privilege of either House. The waiver by one person of protection does not affect its operation in relation to another person who has not waived it. The section does not operate so as to remove the protection from legal liability which is afforded by any enactment or rule of law to any person, including a person who has waived protection, in respect of words spoken or things done in the course of, or for the purposes of or incidental to proceedings in Parliament. Outside the limited area of the waiver, therefore, the protection afforded to Members, officers and those who have business in Parliament will remain.

The Joint Committee on Parliamentary Privilege drew attention to criticisms made of the Defamation Act 1996, s 13 and recommended its repeal. However, it also recommended that each House should be empowered to waive article IX of the Bill of Rights for any court proceedings (not limited to defamation) where the words spoken or the acts done in proceedings in Parliament would not expose the speaker of the words or the doer of the acts to any legal liability.[97] (See p 256 regarding proposals for waiver of article IX in corruption cases.)

Hamilton v Al Fayed

In 1998, relying on the Defamation Act 1996, s 13 and waiving the protection of parliamentary privilege accordingly, a former Member sued for defamation in regard to allegations made by the defendant in a television programme that the plaintiff had sought and accepted cash for asking questions on his behalf in the House of Commons. The defendant applied for the action to be struck out or stayed on any of three grounds, namely that a decision on the same allegations had already been made by the House of Commons following an investigation by the Parliamentary Commissioner for Standards; that the action would constitute re-litigation of a final decision made by another court, or would infringe parliamentary privilege by seeking to impugn or challenge that decision; or that a fair hearing would be prevented because parliamentary privilege would preclude the challenging of evidence already heard during the Commissioner's inquiry.

The High Court and the Court of Appeal dismissed the application, the latter ruling that a parliamentary decision was not analogous to a decision of a court (so as to bring into play the principle precluding re-litigation of a final decision) and that considerations of privilege did not apply, inter alia, because the waiver under s 13 of the 1996 Act applied (by virtue of sub-s (2)) to all parliamentary privilege. It declined to identify a category of privileges belonging to an individual Member distinct from the collective privileges of Parliament as a whole. The part of the decision relating to parliamentary privilege was the subject of an appeal to the House of Lords, which upheld the Court of Appeal's decision, although it observed that if s 13 had not applied,

[97] HL 43-I, HC 214-I (1998–99) para 89.

the Court of Appeal should have stayed the libel action. (The Court of Appeal had said that, even without s 13, no privilege would be infringed if the case went on.[98])

THE TWENTY-FIRST CENTURY

A v The United Kingdom

In 2002 the European Court of Human Rights considered a case which related to a central purpose of article IX of the Bill of Rights, namely to prevent Members' speeches being subject to actions for defamation. A Member referred in a critical manner to a named constituent in the course of debate, and the constituent appealed to the European Court of Human Rights on the grounds that the parliamentary privilege of freedom of speech violated article 6 of the European Convention, namely that 'In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law', and article 8, on respect for private and family life except as necessary for the protection of the rights and freedoms of others. The court did not decide whether article 6 was applicable (which turned on whether parliamentary privilege removed the entitlement to a hearing rather than the civil right not to be defamed), on the grounds that the issues would be the same as under article 8. However, the court ruled, by a majority, that parliamentary privilege did not impose a disproportionate restriction on the right of access to a court, or on respect for private and family life, and that articles 6 and 8 were accordingly not violated.[99] Although the ruling was a landmark one in terms of upholding article IX and the principle of unfettered free speech in Parliament, the judges were not uncritical of the exercise of privilege without recognition of modern human rights. In particular they took the view that a system of redress for citizens who felt unfairly treated should be incorporated into the procedures of national parliaments.

Jackson v Attorney-General

The appellants in this case sought to argue that the Hunting Act 2004 was not an Act of Parliament and therefore had no legal effect because it had been passed under the provisions of the Parliament Act 1949 which itself was not an Act of Parliament because it was passed under the provisions of the Parliament Act 1911 but was not an Act to which the provisions of that Act applied. This latter argument rested on assertions that legislation passed under the 1911 Act was in a different category from Acts of Parliament passed by both Houses and that the purposes for which the 1911 Act could be used were constrained, for example that it could not be used to amend itself or to enlarge the powers provided in it. In the leading judgment Lord Bingham of Cornhill first considered whether the case was appropriate for a court to consider. He recognised that, had the case concerned a question of parliamentary procedure it could have been resolved only by parliamentary inquiry, but, in his view,

[98] *Hamilton v Al Fayed* [2001] 1 AC 395, [1999] 3 All ER 317.
[99] *A v United Kingdom* (Application 35373/97) (2002) 36 EHRR 917, ECtHR. See also Malcolm Jack 'A v The UK in the European Court of Human Rights [2002]' *The Table* 73 (2003) pp 31–36.

Ex p Rees-Mogg

In the following year, an application came before Queen's Bench Division in which the applicant sought review of the Foreign and Commonwealth Secretary's decision to ratify the Treaty of European Union signed at Maastricht in February 1992.[88] There had been much debate in both Houses on the European Communities (Amendment) Bill 1992, which made amendments to United Kingdom law consequent on the Treaty, and the Speaker had publicly indicated that the Commons 'was entitled to expect . . . that the Bill of Rights [would] be required to be fully respected by all those appearing before the court'.[89] In the event, both the court and the parties were conscious of 'the need to confine judicial review within its proper sphere . . . the legality of government actions and intentions . . . The issues in the present case are as clearly within the proper sphere of judicial review, as questions of policy are within the sphere of Parliament'.[90]

Prebble v TV New Zealand

Two cases in the 1990s raised the hitherto unexplored situation where Members wished to demonstrate in actions in the courts that what they were alleged to have said or done in the House was true and honourable. The first such case, *Prebble v Television New Zealand Ltd* (see also pp 205, 233, 234, n 68), arose in New Zealand, where, as in the United Kingdom, article IX of the Bill of Rights is part of domestic law. Among the allegations in the case were that statements had been made in the New Zealand House of Representatives which were misleading, and that Members had procured the passing of a bill through that House as part of the implementation of a conspiracy. The lower court in New Zealand struck out these allegations, because they could not be judicially inquired into without infringing the Bill of Rights. The New Zealand Court of Appeal agreed, but ordered a stay unless and until the privilege involved was waived by the House of Representatives. That House then denied any power to effect such a waiver (see p 205). When the matter came before the Judicial Committee of the Privy Council,[91] their Lordships rebutted arguments that article IX operated to protect statements made in proceedings in Parliament only where they might have legal consequences for the Member who made them.[92] They also repelled the contention that

[88] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] 2 QB 552.

[89] HC Deb (1992–93) 229, cc 351–52.

[90] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552 at 561. See also the comments of Sir John Donaldson MR in *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657 at 666:

> It . . . behoves the courts to be ever sensitive to the paramount need to refrain from trespassing on the province of Parliament or, so far as this can be avoided, even appearing to do so . . . . I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing on the province of the courts

and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611. See further pp 296–297, n 79.

[91] [1995] 1 AC 321, [1994] 3 All ER 407.

[92] This was one of the arguments which the court found persuasive in the Australian case *R v Murphy* [1986] 5 NSWLR 18. The Judicial Committee were of the opinion that, whatever might be true of Australian law at the time, the judge in that case 'was not correct so far as the rest of the Commonwealth was concerned', because the judgment was in conflict with a long line of judicial dicta, was based on too narrow a construction of article IX, and could lead to exactly the conflict between Parliament and the courts which both had long been at pains to avoid ([1994] 3 All ER 414–15).

rules excluding parliamentary material did not apply when the action in question was brought by a Member of Parliament.[93] It seemed to the Judicial Committee that the privilege protected by article IX was that of Parliament itself, which could not be determined by an individual Member. The Committee therefore concluded that:

> parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception . . . .[94]

However the Committee also asserted that this principle did not exclude all references in court proceedings to what had taken place in Parliament, and concluded that 'if the defendant wishes . . . to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course'.[95]

Defamation Act 1996

Just such a statutory exception as was referred to by the Judicial Committee was shortly afterwards made in the United Kingdom, following a case in which the plaintiff, a Member, claimed that a newspaper article was defamatory, in that it alleged corruption by him in the discharge of his parliamentary responsibilities, and had led to his resignation as a Minister.[96] It was claimed for the defence that the issues could not be inquired into without infringing the privileges of Parliament, and they asked for the action to be stayed. After hearing argument, the judge, May J, felt himself constrained by the authorities, especially *Prebble*, to grant a stay of proceedings.

It was against this background that Parliament enacted the Defamation Act 1996, s 13. The scope of the section is expressly limited to defamation proceedings, and applies to both Houses. In such actions, where the conduct of a person in or in relation to proceedings in Parliament is in issue, he may waive, for the purposes of these proceedings and so far as concerns him, the

[93] Such a conclusion was reached by the South Australian supreme court in *Wright and Advertiser Newspapers Ltd v Lewis* (1989–90) 53 SASR 416, esp at 426. It was held in that case that those who published an allegedly defamatory statement should not be at risk of damages for imputations which they claimed were true but which they could not prove to be so by reason of parliamentary privilege. Such privilege should not therefore inhibit a defendant in an action which had been instituted by a Member. The rule that a Member cannot be compelled to answer questions about proceedings did not—the court averred—extend to an action brought by the Member. The Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335, [1994] 3 All ER 407 at 415–16 could not, however, accept that the fact that the Member who made an allegedly defamatory statement was the initiator of court proceedings could affect the question whether article IX was infringed.

[94] [1995] 1 AC 321 at 337, [1994] 3 All ER 407 at 417–18.

[95] AC 321 at 337.

[96] *Hamilton v The Guardian* (1995) Times, 8 June. See also *Allason v Haines* (1995) TLR 438, in which Owen J granted a stay in circumstances where, in order to defend a libel action, it would have been necessary to bring evidence of a Member's behaviour in the House of Commons, and such a defence would be in breach of the privilege of Parliament; while to enforce parliamentary privilege but refuse a stay would, the judge considered, be unjust to the defendants.

since instead it centred on whether the 1949 Act and thus the Hunting Act 2004 were 'enacted legislation' and that question depended on the statutory interpretation of the 1911 Act the courts could, and, in the absence of any other appropriate body, should, resolve it.[100]

On the question itself Lord Bingham rejected the proposition that the 1911 Act created a new category of legislation: 'The 1911 Act did, of course, effect an important constitutional change, but the change lay not in authorising a new form of sub-primary legislation but in creating a new way of enacting primary legislation'.[101]

Reliance on parliamentary proceedings

The principles set out in *Pepper v Hart* and in *Prebble* have received further judicial examination in several recent cases. The first and perhaps most important of these was the judgment of the Judicial Committee of the Privy Council in the case of *Toussaint v A-G of Saint Vincent and the Grenadines*.[102] In this case the Judicial Committee allowed the appellant to rely on statements made by the Prime Minister in the House of Assembly as evidence of unlawful motivation in a case of compulsory purchase. The Judicial Committee's decision was founded on two arguments. The first was that the House of Lords had on a number of occasions stated that use could be made of ministerial statements in Parliament in judicial review proceedings to explain conduct occurring outside Parliament. This approach was endorsed by the Joint Committee on Parliamentary Privilege.[103] The second was that the Prime Minister's statement was relied on simply for its explanation of the motivation of the executive's action outside the House. It was not being questioned or challenged.

The Speaker intervened in three cases in the High Court in 2007 and 2008. In the first case (*R (on the application of Bradley) v Secretary of State for Work and Pensions*)[104] the judge distinguished between reliance on evidence given to a select committee and reliance on a report of a select committee. In refusing to take either into account, he stated that the evidence was inadmissible because reliance on it would inhibit freedom of speech in Parliament and thus contravene article IX. The report itself was inadmissible on the grounds that the courts and Parliament were both astute to recognise their respective roles and it was therefore for the courts, not the select committee, to decide questions of law. In the second and third cases (*R (Federation of Tour Operators) v Her Majesty's Treasury*[105] and *Office of Government Commerce v Information Commissioner*)[106] the court expanded on the second point to state that in general the opinion of a parliamentary committee will be irrelevant to the issues before a court because of 'the nature of the judicial process, the independence of the judiciary and of its decisions and the respect that the legislative and judicial branches of government owe to each other'.[107]

[100] *Jackson (Appellants) v Her Majesty's Attorney General (Respondent)* [2005] UKHL 56, para 27.
[101] [2005] UKHL 56, para 24.
[102] [2007] UKPC 48.
[103] HL 43-I, HC 214-I (1998–99) paras 46–55.
[104] [2007] EWHC 242 (Admin).
[105] [2007] EWHC 2062 (Admin).
[106] [2008] EWHC 737 (Admin).
[107] [2008] EWHC 737 (Admin), para 48.

Wheeler

Reliance on passages from reports of select committees was also addressed in the case of *R (Wheeler) v the Office of the Prime Minister and the Secretary of State for Foreign and Commonwealth Affairs*, but in terms of parliamentary privilege the principal point determined was that, even if a case of a breach of the administrative law principle of legitimate expectation could be made out, the court could not make any order or declaration which might imply a duty or obligation on any Member of Parliament to take any action in his capacity as a Member of Parliament.[108]

Role of the Courts and the House of Commons: the Attorney-General's view

In April 2009 the Attorney-General laid a memorandum in the House of Commons Library on the relationship between the courts and the House of Commons and, in particular, on the question of the admissibility in criminal proceedings of material which might be used to impeach or question proceedings in Parliament.[109] The principal conclusion of the memorandum was that that the determination of whether material was inadmissible as evidence in a criminal trial by virtue of article IX was a question of law for the court. While it was open to the House to intervene in court proceedings to argue (for example) that reliance on particular material would contravene article IX 'the court is not bound by the views of the House and in some cases the courts have not accepted the submissions of the House (or have not accepted them in their entirety), eg *Pepper v Hart*'.[110] The Attorney-General's memorandum concluded that 'the respective roles of the courts and Parliament in relation to matters of privilege are now well settled. In particular, it is settled that it is the role of the courts to determine any questions of law relating to parliamentary privilege (especially in relation to article IX). There is a risk that the principle of comity would be undermined by a purported attempt by the House to determine such questions and thus usurp the determinative role of the courts'.[111]

A new Privileges Act?

Increased numbers of interventions by the House in cases before the courts where reliance on select committee evidence has been used by parties has revived discussion, following the recommendation of the Joint Committee on Parliamentary Privilege in 1999 (see p 218), about the need for a comprehensive Parliamentary Privileges Act.[112]

On 23 June 2009 the Government introduced a bill to establish an independent authority (the Independent Parliamentary Standards Authority) to regulate Members' allowances following revelations about claims made by Mem-

[108] [2008] EWHC 1409 (Admin), para 49 and see p 231.
[109] The Memorandum was published in the Report of the House of Commons Committee on Issue of Privilege, HC 62 (2009–10) Ev 130–31 and see p 240.
[110] HC 62 (2009–10) Ev 131 para 8.
[111] HC 62 (2009–10) Ev 131 para 10. One such risk would be that of prejudice to a criminal trial if there were to be prior debate and discussion of the evidence in the House before such a trial.
[112] For examples of recent interventions see HC 62 (2009–10) Ev 125 para 21, fn 24.

bers under the existing scheme. Provisions affecting privilege featured throughout the bill but in particular the bill laid aside the application of article IX to any court proceedings relating to matters governed by the provisions of the bill in a very broad way. The Justice Committee took evidence from the Clerk of the House and Speaker's Counsel which pointed to the seriously restrictive effects that those provisions would have on freedom of speech and debate. The Committee reported that evidence to the House prior to the Second Reading of the bill.[113] One relevant provision was removed by agreement from the bill in Committee of the whole House; a second clause was negatived on division.[114] Further provisions in the bill relating to privilege were amended in the House of Lords.

At much the same time the draft Bribery Bill brought forward by the Government included a provision which sought to permit evidence of parliamentary proceedings to be adduced in the prosecution of Members of either House of Parliament, notwithstanding the provisions of article IX. The joint committee considering the draft bill concluded that, while it was entirely proper for it to be possible to convict Members of both Houses of Parliament of bribery, because bribery was a very serious offence and Members ought to be subject to the same criminal laws as everyone else, that did not justify piecemeal and inconsistent encroachments on the protection of article IX. In its report, the Joint Committee stated,

> inconsistency risks confusion in the operation and application of the law and could bring about the unnecessarily broad erosion of fundamental constitutional principles by means of competing precedents. For this reason we believe it is unacceptable that the draft Bribery Bill should take a different approach to privilege from that taken in the Parliamentary Standards Bill, particularly as the two bills deal with overlapping areas of law . . . In order to achieve consistency with the Parliamentary Standards Act 2009, we recommend that the Government leave out clause 15 of the draft Bribery Bill.[115]

The Committee added that the most appropriate place to address potential evidential problems would be in the context of a Parliamentary Privileges Act.[116] In the event, the proposal to abridge the protection of article IX was not included in the Bribery Bill introduced by the Government in the Session 2009–10.

The wider implications of reform have been remarked upon by three other select committees. First, the Joint Committee on Human Rights in its report on the Parliamentary Standards Bill drew attention to the implications of how article 6(i) of the European Convention on Human Rights impacts upon privilege and how the requirements of fairness under the Convention might be met in relation to parliamentary privilege in legislation on privilege.[117] Second, in its report on *Constitutional Reform and Renewal*, the Justice Committee warned of the dangers of piecemeal reform and the need for a 'proper understanding of the position and role of Parliament in relation to the institutions of the State'.[118] Finally the Committee on Issue of Privilege (see pp 239, 240–241) without concluding on the merits of a statute on parliamentary

[113] Published in the Seventh Report of the Justice Committee, HC 791 (2008–09) Ev 1.
[114] CJ (2008–09) 489–490.
[115] Report of the Joint Committee on Draft Bribery Bill, HL 115-I, HC 430-I (2008–09) paras 224–225.
[116] HL 115_I, HC 430-I (2008–09) para 228.
[117] Joint Committee on Human Rights, Nineteenth Report, HL 124, HC 844 (2008–09).
[118] Justice Committee Eleventh Report, HC 923 (2008–09) para 95.

privilege, nevertheless recommended that a new Joint Committee of both Houses should undertake a comprehensive review 'setting out to define and limit parliamentary privilege in statute'.[119]

In 2011 the Government announced its intention to bring forward a draft Parliamentary Privilege Bill[120]. This is expected to be preceded by an examination of the recommendation of the Joint Committee on Parliamentary Privilege in favour of codification and to reflect any recent changes in the law.

[119] Report of the Committee on Issue of Privilege, HC 162 (2009–10) para 169.
[120] See HC Deb (2010–12) 528, c 639.

CHAPTER 47

CONTEMPT

At common law a legislature such as the House enjoyed no power to punish for contempt, though it could take direct action to coerce persons into obeying its orders (such as to leave its presence or to attend a sitting).[1] It was doubt about the House's ability to take action itself to enforce or vindicate a breach of its privileges or to punish any other contempt shown to it that was the motivating factor behind a general legislative statement of the House's powers early in its life. With the enactment of the *Parliamentary Privileges Act* 1865, the House was empowered to take action against persons who breached its privileges or showed contempt to it in any other way, and to punish those persons itself, rather than being forced to rely exclusively or mainly on the courts for protection. The power to punish for contempt is the power to take direct action that is sanctioned by law. (The types of punishment which the House may inflict are considered in Chapter 48.)

APPLICATION OF THE POWER TO PUNISH FOR CONTEMPT

The power to punish applies in respect of breaches of privilege. Any breach of one of the privileges of the House can be punished by the House. However, by the very nature of these privileges it is unusual for the House to be involved in enforcing them (except those relating to disclosure of select committee proceedings). Breaches are more likely to be raised in the context of legal proceedings before the courts and, being part of the general law of New Zealand,[2] are recognised and applied by the courts as may be necessary even if not specifically raised by the parties to the litigation.[3] Cases of breaches of specific privileges do arise before the House but they are comparatively infrequent.

But as well as the House's power to punish for contempt extending to punishing breaches of specific privileges, the power also includes the power to punish any act which the House considers to be a contempt whether or not that act violates a specific privilege. The distinction between a contempt and a breach of privilege is not always clearly drawn; there is a tendency to refer to a "breach of privilege" when what is really meant is a contempt.

There are many acts other than breaches of privilege which, although they do not interfere with freedom of speech, freedom from arrest or the House's other privileges, nevertheless interfere with the work of the House or its members or are a serious affront to their dignity. Not being violations of a specific privilege of the House, the courts cannot protect the House against them unless they are also crimes or in some sense unlawful. But the power to punish for contempt held by the House extends to punishing these types of acts too. They are not breaches of privilege, but just as breaches of privilege may be treated as contempts and punished, so may any other acts which "obstruct or impede [the House] in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers".[4] These types of acts, along with breaches of privilege, may be treated as contempts and punished accordingly. "Contempt", then, is a term which may embrace all breaches of privilege as well as a great many other types of conduct that the House considers to be worthy of censure.

[1] ... [illegible] ... 347; ... *Hunt* ... [illegible] ... R 35[illegible]
... [illegible] ... LR 65[illegible]

Definition of contempt

There is no formal legal definition of what constitutes a contempt. Ultimately, the House is the judge of whether a set of circumstances constitutes a contempt. This potentially open-ended nature of contempt has led to criticism of the lack of certainty for those indulging in conduct that might be treated as objectionable by the House. An attempt has therefore been made by the House to give greater definition to the types of conduct that it may decide constitute contempts. To this end, in 1996 a general statement defining contempt was adopted by the House together with a number of other particular statements of the types of conduct that may fall within the overall definition. It was emphasised, however, that these particular statements were not intended to be exhaustive and that new situations could arise which the House may wish to treat as contempts.[5] Its right to do so is declared to remain unimpaired.[6]

Using the contemporary edition of *Erskine May* as the model, the House has resolved that it may treat as a contempt—

> ... any act or omission which—
> (a) obstructs or impedes the House in the performance of its functions, or
> (b) obstructs or impedes any member or officer of the House in the discharge of the member's or officer's duty, or
> (c) has a tendency, directly or indirectly, to produce such a result.[7]

Although the statement refers expressly to the House, members and officers only, contempt can also embrace conduct involving other persons, such as witnesses and petitioners, insofar as it has deleterious effects on their participation in the parliamentary process and thus obstructs or impedes the House.

This general statement gives a context and background within which the House judges whether a contempt has occurred, but the specific examples of the types of conduct that may constitute a contempt stand in their own right as presumed obstructions or impediments to the House or its members. There is no two-stage test for contempt against both the specific examples and the general definition.[8]

Exercise of the power

The House may declare particular conduct to be a contempt without any antecedent inquiry into it.[9] But, under the House's rules, a deliberative process is usually followed before arriving at such a finding. Thus it is invariably the Speaker who decides, in the first instance, if a matter of complaint falls within the definition of contempt, as concerning a breach of a recognised privilege, or by falling within one of those areas of conduct identified by the House in its Standing Orders, or as otherwise being potentially justified for treatment as a contempt even though there is no definitional precedent of that type of conduct. But, reverting to the reason why parliamentary privilege exists in the first place, it has been emphasised that the power to punish for contempt is not a power to punish for its own sake. It may justifiably be utilised only in case of need – the need to vindicate the House's position because of an obstruction or impediment to carrying out its constitutional functions. If there is no need to exercise the power (notwithstanding that facts that would otherwise support its exercise exist), the matter will not be pursued.[10]

The fact that a matter may have been dealt with as a breach of order does not prevent that matter being punished as a contempt if the facts justify this. There is no "double jeopardy"

93-96, ... 18A, 6

rule in regard to breaches of order and punishment for contempt. (See Chapter 11.)

The view has also consistently been taken that the exercise of the power to punish, being vested in the House, is so significant a power and must be used with such deliberation that even the House cannot delegate it. It must be exercised by the House itself.[11] No committee, not even the Privileges Committee, has ever been delegated with the power to inflict punishment. But whatever action the House chooses to take, it must avoid acting in a disproportionate or unreasonable manner.[12] In Australia, a Senate committee has accepted that if a public servant refuses to answer a question or produce a document at the explicit direction of a Minister, the legislature's remedy should lie against the Minister and that it would be unjust to impose a penalty on the public servant in such circumstances.[13] If there is a personal culpability on the part of a witness, the House will proceed against the witness in a personal capacity, but political culpability should be addressed at the political level. By making such distinctions a legislature applies proportionality and reason in its proceedings.

The House's procedures for invoking the power to punish for contempt only after preliminary examination by the Speaker, inquiry by the Privileges Committee and endorsement by the House are designed to ensure that the power is used proportionately and reasonably. However, it is of the essence of parliamentary privilege that the House ultimately makes the judgment as to when to exercise its own privileges and there can be genuine differences of opinion as to whether an exercise in a particular case is justifiable.

The power to punish for contempt is a highly discretionary power and this discretion is much more commonly exercised to refrain from invoking it in circumstances where it may be justifiable, than the contrary.

EXAMPLES OF CONTEMPT

The House, in its Standing Orders, has given examples of the types of conduct that it may decide to treat as contempt.[14] These examples do not form a code of contempts, though it would be exceptional for a case not falling within them to be treated as a contempt.[15] It is always possible that a situation will arise that is not explicitly contemplated in these examples but which the House will wish to treat as a contempt. Some miscellaneous examples of conduct already identified as potential contempts, even though not falling within the specified examples of contempt, are described below. But to constitute a contempt such other conduct must fall within the House's overall definition of an act or omission obstructing or impeding the House or those executing the House's business.[16] If conduct does not have this quality, it cannot be a contempt.

The types of contempt recognised by the House are discussed below under several broad headings—

- breach of privilege
- attendance of members
- pecuniary contempts
- records and reports
- disobedience to the rules or orders of the House
- interference or obstruction
- misconduct
- punishing parliamentary contributions
- reflections
- other contempts.

[illegible]

Breach of privilege

The House may punish as a contempt a breach of one of the privileges of the House.[17] Because the privileges of the House (freedom of speech, freedom from arrest, exemption from legal process etc.) are part of New Zealand law, they should be observed in applying the law. The House may wish to be represented in legal proceedings in order to ensure that a point of parliamentary privilege is not overlooked and a court, in determining what the law is, may not agree with the House's view of the extent of its privileges.[18] But, given those inevitable tensions, a breach of privilege should be corrected or prevented in the same way as any other breach of law, by the parties concerned obeying the law, and, in the absence of them doing so, a court declaring and enforcing the law.

While the power to punish for contempt will not normally need to be invoked in such circumstances, it has been specifically affirmed by the House as remaining available to it,[19] and the House has, on occasion, reminded litigants that it remains an option, notwithstanding that the matter has also been dealt with in legal proceedings.[20]

Attendance of members

The House's Standing Orders imposing an obligation on members to attend the House and providing machinery for granting leave of absence were revoked in 1999.[21] However, it is still open to the House to resolve that a member who has absented himself or herself from parliamentary duties attend the House.[22] Failure to do so in response to such an order would be a contempt.[23] (See Chapter 3 for attendance of members generally.)

Pecuniary contempts

Disclosing financial interests

Members are under an obligation to disclose any financial interest that they have in the outcome of the House's consideration of any business before participating in consideration of that business.[24] (See Chapter 3.) Failure to disclose such an interest is a contempt.[25] In all cases it is the Speaker who determines whether or not the member actually has a financial interest. The Speaker's decision on this point is final[26] and is not subject to review or reversal by the Privileges Committee if an allegation that a contempt has been committed is referred to that committee.

Registration of pecuniary interests

Members are required to make initial and annual returns of pecuniary interests that they hold.[27] (See Chapter 3.) Knowingly failing to make a return by the due date specified for a return is a contempt.[28] It is also a contempt for any member knowingly to provide false or misleading information in a return of pecuniary interests.[29] While the Auditor-General has a review and inquiry role in respect of returns of members' pecuniary interests and may inquire into whether a member has complied with his or her obligations to make a return,[30] a report from the Auditor-General is not an essential prerequisite to alleging a contempt in regard to the registration of pecuniary interests. However, it would be difficult to establish grounds for an allegation of contempt without invoking or attempting to invoke the Auditor-General's involvement first.

[illegible]

[17] S.O.400(a).
[18] *Ibid.*
[19] *Reports of select committees 1996*, p.654; *1999-2002, AJHR*, I.17A, pp.5-6.
[20] S.O.166(1).
[21] S.O.400(f).
[22] S.O.167.
[23] S.O.164(1) and Appendix B to the Standing Orders.
[24] S.O.400(a).

Bribery

Any member who receives or solicits a bribe to influence the member's conduct in respect of proceedings in the House or at a committee commits a contempt.[31] Because of the serious nature of such allegations, members are not permitted to bring them up incidentally in debate but must raise them in the proper way as matters of privilege.[32] Also, given the seriousness of an allegation of bribery, the standard of proof needed to make it out is of a very high order. This is reflected in the Speaker's consideration of any matter of privilege that is raised.[33]

Such allegations are rare. In 1872 it was alleged that a member had been offered money to use his parliamentary position to advance the interests of a railway manufacturer. The allegation was not proven.[34] In 1912 an allegation was made that a member had been paid to support Sir Joseph Ward's Government in a crucial vote in the House. Though this allegation was referred to a committee for investigation, no evidence to support it could be found and the matter was dropped.[35] In 2003 an allegation that a member had solicited funds for herself or for other persons close to her, such as her children, in return for her vote, was dismissed by the Speaker for lack of evidence.[36]

It is a contempt to offer or attempt to offer a bribe to a member as an inducement to act in a certain way in the House or in a committee.[37] Though allegations of attempted bribery have been made on several occasions, there has never been a case where the payment and receipt of a bribe has been disciplined as a breach of privilege in New Zealand.[38] The Speaker has warned that a contempt would be committed if a member was offered payment to resign his or her seat.[39]

To constitute a contempt, any bribe offered or received must relate to the member's conduct in respect of business before the House or a committee or business to be submitted to the House or a committee.[40] But attempting to bribe a member in any capacity at all, whether in relation to parliamentary business or not, is also a crime.[41]

Professional services connected with proceedings

It is a contempt for a member to accept fees for professional services rendered by the member in connection with proceedings in the House or at a committee.[42]

This contempt will be committed whether or not the member concerned participates in parliamentary proceedings on the matter for which the member has received fees. Nor need there be any suggestion of corruption on the part of the member. The House is concerned to ensure that a member's judgment may not be influenced by a professional interest (other than an interest as a member of Parliament) which may be in conflict with the member's public duties. Whether there is a conflict or not, the House will not tolerate the appearance of one. For this reason members should be careful to keep their official and private capacities quite separate in their business dealings.[43]

Where a newly elected member, who was also a practising solicitor, received payment for two local bills he had drafted (even though he had done the work before he entered Parliament), the House found him to have acted improperly and fined him a sum equal to his professional fees.[44] In another case, a comment (later withdrawn) that a member had been paid for things that a trust wished him to achieve in Parliament appeared to raise a serious question of contempt. Acceptance of a payment for parliamentary services to be

[31] S.O.400(i).
[32] 1934, Vol.128, p.641.
[33] 2003, Vol.606, p.3551.
[34] 1872, Vol.13, p.533-8, 553-4, 587-8, 745
2, Vo... 5.
[35] *Lovejoy*, p.144.
[36] 1998, Vol.574, p.14721.
[37] 1992, Vol.525, p.8612.
[38] ... '03.
00(j).

rendered would be a potential contempt. However, on inquiry it was found that there was no evidence in that case that the payment in question was made, other than in recognition of past services to the trust rendered before the member was elected to Parliament.[45]

Advocacy by members of matters in which they have been concerned professionally

Closely akin to receiving fees for professional services is advocacy in respect of business with which the member has been professionally concerned.

This type of contempt is based on a House of Commons resolution of 1858 that "it is contrary to the usage and derogatory to the dignity of this House that any of its members should bring forward, promote or advocate in this House any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward".[46] This is not taken to preclude members taking part in debates on matters (such as law suits) in which they have been professionally engaged.[47] A member was held to have acted contrary to its terms, even though the parliamentary action he took (presenting a petition) occurred five years after he had acted professionally in respect of the petition.[48]

Records and reports

The custody of the journals and of all petitions and papers presented to the House and other records belonging to the House is vested in the Clerk of the House. Such documents may not be taken from the House or its offices without an order of the House or permission of the Speaker.[49] To remove, without authority, any papers or records belonging to the House is a contempt.[50] Similarly, to falsify or alter any such paper or record will be treated as a contempt.[51]

It is also a contempt to publish a false or misleading account of proceedings before the House or a committee.[52]

A newspaper headline misrepresenting the purport of evidence given before a select committee was considered to be of such a "startling and inaccurate nature" that it would tend to lower the esteem in which the House was held and, therefore, amounted to a contempt.[53] (It stated that a witness had made a statistical claim that four members of Parliament were probably homosexuals, although this did not accurately convey the essence of the witness's evidence even as reported in the newspaper article.) In another case, a member complained that a newspaper article falsely accused him of attacking the integrity of the Speaker in a speech he had made in the House (which, if true, could in itself be treated as a contempt), but a motion to treat the article as a question of privilege was not proceeded with.[54]

But merely stating one's opinion of the effect of a committee's decision cannot amount to a contempt under this head (though if it was a serious reflection on the character of members of the committee it might constitute a contempt for that reason).[55] Only a statement that purports to be a factual description of parliamentary proceedings falls within this example of contempt.[56]

Disobedience to the rules or orders of the House

Any person who disobeys an order of the House directed to that person commits a contempt of the House.[57] Such an order would normally be a direction to attend the House

[45] "Report for the Prime Minister on Inquiry into Matters relating to Te Whanau o Waipereira Trust and Hon John Tamihere", Douglas White QC, 20 Dece...
Mem, p.1...
[46] S.O.400(d).
[47] S.O.400(e).
[48] S.O.40...
'68, I...

or a committee to give evidence, or to produce to the House or a committee documents thought to be in that person's possession. The power to treat disobedience to such an order as a contempt directly supports the House's power of inquiry.

Orders to attend or produce documents

It is unusual for the House itself to make an order to attend or produce documents. If a committee has the power to send for persons, papers and records it may itself direct that a person attend before it to give evidence or that the person produce papers and records in that person's possession that are relevant to a matter before it.[58] Only the Privileges Committee inherently has this power.[59] In respect of other committees the power must be specifically conferred on the committee by the House. The current practice is not to confer the power. In such cases the Speaker may order any person to attend or produce papers in lieu of an order of the committee.[60] (See Chapter 30.)

Any failure to comply with the order of a committee having power to send for persons, papers and records or with the order of the Speaker may be treated as a contempt.[61]

Refusing to answer a question

A witness who refuses to answer a question as ordered to do so by the House or a committee may be held to have committed a contempt.[62] Witnesses have been held in contempt for refusing to answer a question in the House[63] and before a select committee.[64] Where a witness before a select committee does object to answering a question, the committee must, in private, consider the ground of objection and the importance of the question to its proceedings before deciding to insist on a reply.[65]

Premature publication of select committee proceedings or report

It is a contempt to divulge the proceedings or report (including a draft report) of a select committee or a subcommittee contrary to the Standing Orders.[66] In general, the proceedings of a select committee or a subcommittee, other than during the hearing of evidence, are confidential until the committee reports to the House.[67] This rule is designed to promote the better functioning of the committee process and to affirm that the House is entitled to first advice of the conclusions of its committees.[68] Speakers have warned members and journalists from time to time about the need to respect this rule.[69] (See Chapters 23 and 24 for the rules on disclosure of select committee proceedings and reports.)

Strictly speaking, only members, officials, advisers and witnesses are in a position to divulge a committee's proceedings, for it is only they who are privy to those proceedings. However, other persons or organisations who disseminate information which has been improperly disclosed to them are also considered to have committed contempt if they do so, and have been punished by the House accordingly.

In principle, all evidence heard by select committees is heard at public meetings and all written evidence received is made available to the public. Only if the committee takes special steps to protect evidence it has received from public disclosure can any question of contempt arise. Members have been found to have committed contempts by divulging select committee proceedings when they informed other persons who then gave the proceedings further publicity;[70] by writing a newspaper article disclosing evidence

[58] S.O.197.
[59] S.O.391(2).
[60] S.O.198.
[61] [illegible] 00(r), (
[62] [illegible] s400(a).
[63] S.O.228(1).
[64] S.O.400(p).
[65] S.O.240(1).
[66] [illegible] .bl.562.
[67] [illegible] Hunt

given at a select committee hearing which was not open to the public, under the mistaken impression that it was open;[71] by revealing what had taken place at a select committee meeting during the course of a television interview;[72] and by revealing the contents of a select committee report before it had been presented to the House.[73] Members are liable to be held in contempt if they disclose in debate in the House proceedings which they are not authorised to repeat outside the committee.[74]

Members of the Parliamentary Press Gallery have been found to be in contempt in forwarding to their newspapers for publication confidential select committee evidence,[75] as have the newspapers which published such material[76] and a television channel in respect of a disclosure of select committee deliberations made during a programme.[77] In these cases, it was clear that the initial breach of confidence of the select committee proceedings was not made by these persons or parties but by some other person or persons, and in all of these cases the question of who initially divulged the proceedings to the journalists concerned has been raised, although it was not possible to establish who was to blame. It would have been possible in these circumstances for the House to hold the journalists or newspapers concerned guilty of contempt for refusing to divulge their sources, but, with one exception,[78] this has not been the way the House has proceeded. The House has invariably treated the publication of confidential select committee material by members or by other persons as a contempt in its own right, whether that material was obtained at first-hand or second-hand.

Interference and obstruction

The House regards as most serious any improper attempt to prevent, dissuade or inhibit anyone (member, officer, witness or petitioner) from participating fully in its proceedings. For the House to acquiesce in such conduct would be inimical to its effective functioning. It may be that an attempt to prevent participation may also be a crime (for example, a threat of assault), but it need not be, and in such cases the power of the House to punish for contempt may need to be invoked.

Members and officers

Interferences or obstructions of members or officers may be overt or covert; consisting of an assault, a threat or other form of intimidation or otherwise of an obstructing or molesting of a member or officer. In any case, if the action occurs in the discharge of the member's or officer's duties, it may be treated as a contempt.[79] One early complaint of a molestation of members was the sending of a spurious telegram to two Dunedin members which caused them to return south and needlessly absent themselves from the House.[80] The House took no action.

A ministerial adviser was found to have committed a contempt by molesting a member in the execution of his duty when he made an insulting remark to the member as the member was passing him in the Chamber on the way into a division lobby.[81] In another case a jocular remark directed by one member to another in the division lobby at which the latter took offence was held not to be a contempt.[82] The Speaker has warned members not to allow banter in the Chamber to get out of hand. If it tended towards verbal intimidation of members, it could ultimately constitute a contempt.[83] This is particularly

[71] 1974, JHR, p.525.
[72] 1976, Vol.404, p.812.
[73] 1999-2002, AJHR, I.17C
1895, V [illegible] 701-16
[74] 1903, Vol.125, pp.693-4.
[75] S.O.400(l), (m).
[76] [illegible] 1864 [illegible]

the case when a vote is in progress.[81] Members of the Parliamentary Press Gallery have been reminded not to impede the free access of members to the Chamber, and a protocol regulating approaches to members on their way to the Chamber has been drawn up as a result of complaints.[82]

A distinction must be drawn, however, between members or outside persons properly seeking to influence other members, and attempts to influence members' actions which are intimidatory and may be held to be contempts. All members, when they speak in debate, try to influence their fellow members; so do all lobbyists when they are advancing their interests.[83] Such conduct is perfectly proper. There is no contempt in respect of attempts to influence members, even by bringing pressure to bear on them (such as to withdraw support from them at the next election), unless there is a threat to do something which is improper in itself or which is of such an extraordinary or exaggerated nature that it goes beyond an attempt to influence the member and becomes an attempt to intimidate. So where a Bible-in-schools league accused a member of a breach of faith in failing to give total support to Bible reading in schools, and announced that a letter of his explaining his stance would be read at every league meeting held in Canterbury and equal prominence given to his vote against a bill then before the House on Bible reading, this was held to be a contempt as attempting to intimidate the member in his parliamentary conduct.[84]

If an article could have the effect of intimidating members in their parliamentary conduct, that is sufficient for a contempt to be made out. There does not need to have been any specific intention to threaten.[85]

Instituting legal proceedings against members or officers seeking to restrain them from carrying out their official duties could also constitute a contempt on this ground, provided that such proceedings related to actions that members had taken or intended to take as part of parliamentary proceedings (for example, seeking an injunction to prevent a member raising a matter in the House).[86] But in respect of their actions outside the House members are in the same position as any other citizen.[87]

Witnesses and others

A similar principle of protection from harassment operates in regard to witnesses. Any attempt to intimidate, prevent or hinder a witness from giving evidence in full to the House or a committee may be held to be a contempt.[88] Such intimidation or hindrance may take the same overt form as that relating to a member. It could also take a less overt form, such as the offering of a bribe to give false testimony, or the taking of legal action to prevent a witness from giving evidence at all or from producing all the evidence in the witness's possession.

Petitioners and counsel appearing before the House or a select committee are also entitled to be protected by the House from molestation or obstruction while discharging their duties. Such molestation or obstruction may be treated as contempt.[89]

Serving legal process in the precincts of Parliament

Persons come to Parliament buildings on sitting days to take part in or observe the transaction of parliamentary business. The House will hold the service or attempted service of legal process within the parliamentary precincts to be a contempt if this is done on any day on

[81] 1998, Vol.571, pp.11946-7.
[82] 2004, Vol.616, pp.12431-2; "Protocol for filming [illegible]"
[83] 1984-85, AJHR, I.6A, p.9.
[84] 1996-99, AJHR, I.15B, p.654; 2001, Vol.590, [illegible]2-3.

which the House or any committee of the House sits.[91] (The House or committee need not be actually sitting at the time service is effected; if such a sitting is held at any time on that day, a contempt is committed.) No contempt will be committed if the authority of the House or the Speaker to service of legal process is obtained beforehand. In practice, if a member is willing to accept service at Parliament House, the Speaker will give authority for process to be served. Service on a member in the Parliament buildings, even with the member's agreement, will be a contempt if the Speaker's authority is not obtained.[92]

The parliamentary precincts are those areas which are legislatively held for parliamentary purposes.[93] They include, as well as the Parliament buildings (the main building, library and executive wing), the Bowen House building.[94] Service of a subpoena on a Minister in his office in the Beehive (executive wing) has been held to be a contempt, as it was effected on a sitting day. It is well established that law firms make arrangements with the Crown Law Office for effecting service on Ministers.[95]

The limitation on serving or executing legal process within the precincts does not prevent police officers on duty within the Parliament buildings or grounds arresting persons who commit or are about to commit criminal offences, but a warrant for the arrest of a person should not be executed there without first obtaining the Speaker's permission.

Misconduct

Deliberate misleading of the House

It is a contempt deliberately to attempt to mislead the House or a committee, whether by way of a statement, in evidence or in a petition.[96] This example of contempt, while always potential, was given explicit recognition in 1963 when, following a political *cause célèbre* (the Profumo affair), the House of Commons resolved that a former member who had made a personal statement to the House which he subsequently acknowledged to be untrue had committed a contempt of the House.[97] It has been submitted that there is an established constitutional convention that Ministers should always tell the truth to Parliament as far as this is possible without harming national security.[100] Whether this type of contempt embodies a convention or not, regarding lying to the House as a serious transgression of parliamentary etiquette (quite apart from any moral considerations) has been said to be the only way for Parliament to keep a check on the executive.[101]

The contempt can be committed by anyone taking part in parliamentary proceedings. It consists of the conveying of information to the House or a committee that is inaccurate in a material particular and which the person conveying the information knew at the time was inaccurate or at least ought to have known was inaccurate.[102]

Members deliberately misleading the House

Most commonly allegations that there has been an attempt deliberately to mislead the House involve statements made by members in the House – whether by way of personal explanation, in the course of debate or in replying to a question.

There are three elements to be established when it is alleged that a member is in contempt by reason of a statement that the member has made: the statement must, in fact, have been misleading; it must be established that the member making the statement knew at the time the statement was made that it was incorrect; and, in making it, the

[91] S.O.400(c).
[92] (1991) 2 PLR 196 (Western Australian [illegible]
[93] 1990, AJHR, I.15
[94] "O.400" [illegible]

member must have intended to mislead the House. The standard of proof demanded is the civil standard of proof on a balance of probabilities but, given the serious nature of the allegations, proof of a very high order.[103] Recklessness in the use of words in debate, though reprehensible in itself, falls short of the standard required to hold a member responsible for deliberately misleading the House.[104] The misleading of the House must not be concerned with a matter of such little or no consequence that is too trivial to warrant the House dealing with it. A misunderstanding of this nature should be cleared up on a point of order.[105]

For a misleading of the House to be deliberate, there must be something in the nature of the incorrect statement that indicates an intention to mislead. Remarks made off the cuff in debate can rarely fall into this category, nor can matters about which the member can be aware only in an official capacity. But where the member can be assumed to have personal knowledge of the stated facts and made the statement in a situation of some formality (for example, by way of personal explanation), a presumption of an intention to mislead the House will more readily arise.[106]

As well as a deliberate misleading of the House arising from a remark in the House, it is conceivable that members could mislead the House by their actions: for example, from a deliberate misuse of a voting proxy, by delivering to the Clerk a totally different document from that which the member obtained leave of the House to table,[107] or by misrepresenting their authority to act on behalf of an absent member.[108]

Witnesses and petitioners deliberately misleading

Witnesses giving evidence to committees are under an obligation to be truthful, whether they are under oath or not. As with members, for a contempt to arise there must be some strong indication that there is an intention to mislead the committee. This can arise out of the nature of the evidence, if it can be presumed to be within the personal knowledge of the witness, or by the circumstances of its delivery, for example, if an answer is deferred and delivered in writing on a later occasion when it can be presumed to be a more considered reply than an immediate response.[109]

It is a contempt to present forged, falsified or fabricated documents to the House or a committee. The main form which such a contempt has taken in the United Kingdom is the affixing of forged or fictitious signatures to petitions. Any conspiracy to deceive the House or a committee in this regard will be held to be a contempt. There are no examples of these having occurred in New Zealand.

Correcting inaccurate information

It is not a contempt to make a genuine mistake and thereby give the House or a committee incorrect information. But it is incumbent on a member or any other person who has given misleading information on a parliamentary occasion to clear the matter up as soon as the error is appreciated. This applies even though the full correct information may not be available at the time that it is realised that an error has been made. Action to alert the House or committee should still be taken at that point with a full correction to follow later.[110]

In the case of a misleading statement in the House, for example, in reply to an oral question, a personal explanation is the invariable form that the correction takes.[111] Misleading information given by way of a reply to a written question is corrected by the

Minister delivering an amended reply to the Clerk. In the case of misleading information having been given to a committee, a written correction of the information should be given to the committee if a personal appearance before the committee cannot be arranged or if the committee agrees that it is not warranted.

Misconduct in the presence of the House or a committee

Any other misconduct in the presence of the House or a committee may be held to be a contempt.[112]

Such misconduct may take the form of an interruption or disturbance to the proceedings of the House or of one of its committees. When a group of persons in the public gallery rose at the commencement of business and recited the prayer which the Speaker was about to read, they were held to have committed a contempt.[113] But if the Speaker has given permission for a celebratory contribution to be made from the galleries, there can be no question of contempt.[114] Members who conduct themselves in a disorderly manner may themselves be punished for contempt, notwithstanding that the Standing Orders contain specific procedures for disciplining members for breaches of order.[115]

Punishing parliamentary contributions

The House may punish members or others on account of their contributions to the House's deliberations, for example, if they attempt to mislead the House or a committee and in respect of breaches of order. But it is a contempt for anyone outside the House to punish anyone for what they have done in the course of parliamentary proceedings (it may also be a crime and an unlawful act to do so too).

Anyone who assaults, threatens or disadvantages a member on account of the member's conduct in Parliament or any other person on account of evidence given by that person to the House or a committee commits a contempt.[116] For this contempt to be established it is essential that the action directed to the member or witness is on account of what they have done in parliamentary proceedings.[117] If it is not, it is not a matter for the House to be concerned with, whatever its legal effect outside the House.

On two occasions conduct complained of as a contempt has amounted to challenging a member to repeat outside the House, without protection of privilege, what the member had said in the House. The absolute protection against actions for defamation afforded members by the *Bill of Rights* 1688 is to enable them to speak out in the House in the public interest without fear of legal repercussions. The disadvantage which may befall an individual unjustly attacked in the House is held to be outweighed by the greater public good of permitting full, free and frank discussion in the House (though that person may apply to the Speaker to enter a response). Any misuse of the right of freedom of speech is for the House to deal with by its own internal disciplinary proceedings, and anything that tends to impair freedom of speech by unduly inhibiting members in its use is viewed seriously by the House. Challenges to repeat outside the House words spoken in debate, with the implication that what was said was untrue and a misuse of parliamentary privilege, fall into this category and can constitute a contempt. But each case must be considered on its own merits, and depends on the form of the challenge. In one case, the person who committed a contempt by challenging the member to repeat his statement outside the House explained his action at the bar of the House and apologised for his unwitting breach.[118] In another case, where a firm issuing the challenge published it in a

letter and in the form of an advertisement accompanied by a strong attack on the member, breaches were held to have been committed, again unwittingly.[119]

But in debate it is not automatically out of order, much less a breach of privilege, to invite a member to say outside the House what the member has just said in it. The cases involving a contempt are confined to the issuing of formal challenges to the freedom of speech enjoyed by members. Nevertheless, persistently challenging a member to repeat comments outside the House so as to imply that the member is not telling the truth may itself become disorderly.[120]

A classic case of molestation of a member because of action the member had taken in the House occurred in 1872 when, because a certain person wished to make the member pay for the way the member had voted in a division, the person applied (as he was legally entitled to do) to purchase pastoral land held on licence by the member. The consequence of this application to purchase was that the land had to be offered for auction with no preference for the licensee, thus putting the member to inconvenience and potential expense. The House found the person to have committed a contempt by making the application to purchase, and induced him to withdraw it.[121]

Two Prime Ministers have been the subject of complaint in the House in respect of remarks they made about the way members had voted. William Fox in 1869 wrote to a member who was a serving officer in the Army after the member had voted against the Government, saying that the member must either resign his seat or his command. A committee appointed to consider the matter found that no contempt had been committed and this was endorsed by the House, but the House went on to pass a resolution reiterating that every member of the House, without exception, was entitled to speak and vote in the House according to the member's conscience.[122] In 1896 Richard Seddon made a veiled remark that he would not forget how two West Coast members had voted (they had voted against the Government on the previous day). The remark was complained of, but after some discussion the House dropped the subject.[123]

Legal proceedings against witnesses

The House of Commons in 1818 passed a resolution declaring that witnesses were entitled to its protection in any legal proceedings brought against them in respect of testimony given by them to the House or a committee.[124] Legal proceedings in such circumstances also constitute a breach of privilege by infringing the freedom of speech guaranteed to persons taking part in proceedings in Parliament by the *Bill of Rights* 1688. Legislation also provides a legal indemnity for parliamentary witnesses who incriminate themselves while giving evidence on oath.[125]

Reflections

Speeches or writings which reflect on the character or conduct of the House, or of a member in the member's capacity as a member of the House, may be treated as a contempt.[126] This is seen as a longstop means for the House to protect itself and its members against attacks which would lower it in public esteem and thus compromise its ability to function effectively. But it is not a means of inhibiting legitimate political debate. It has been emphasised that for any statement to constitute a contempt as a reflection it would have to allege corruption or impropriety of some description. Hard-hitting and contentious statements to which members might well object fall within the boundaries of acceptable

Vol. 36
1992, Vol 531, p 12225

Vol 1 82.

political interchange.[127] It is also the case that as social mores change, the limits of acceptable comment change too. To accuse members of engaging in homosexual conduct when such conduct was not regarded as publicly acceptable (and indeed was still criminal) was regarded by the House at the time as a serious reflection on members. These days it is likely to be viewed very differently. All examples of comments reflecting on the House and members must be considered in this light; they are not indications that similar comments will contemporarily be regarded as contempts.

Reflections on the House

Speeches or writings which reflect on the character or proceedings of the House may be treated as contempts. The fact that the prohibition on publication of reports of its debates formerly applied by the House of Commons has never operated in New Zealand does not authorise reflections on members in their parliamentary capacity or on the propriety of the House's procedures.[128]

An article criticising the practice of pairing in the House was held to be a contempt as containing incorrect statements which falsely represented the proceedings of the House.[129] Reflections on members of the House in their capacity as members which do not identify the particular member or members who are the subject of attack may also be treated as contempts. Thus, where unnamed members of Parliament were accused of homosexuality and bisexuality, the person making the allegation (which she admitted was baseless) was found to have committed a contempt by tending to lessen the esteem in which the House was then held.[130]

Reflections on members

Speeches and writings reflecting upon the character or conduct of individual members in their parliamentary roles have been punished as contempts. To establish that a contempt has been committed on this ground, however, the words complained of must reflect on the member in the discharge of his or her duties in respect of some proceeding in the House or in a committee, and not merely arise out of the member's status as a public figure. It is not a contempt, for instance, if a member is attacked in respect of the discharge of his or her constituency duties, for although this is an integral part of being a member of Parliament, it is not an aspect of a member's work that is directly concerned with proceedings in the House. Similarly, most functions performed by Ministers are not performed as members of Parliament (other than introducing a bill and answering a question, for example) and do not involve any question of parliamentary privilege.[131] A reflection on the Speaker in his capacity as chairperson of the Parliamentary Service Commission was found to relate to his capacity as a member of Parliament because this is an *ex officio* position held by the person who is Speaker.[132]

To constitute a reflection on a member, it is not necessary that the words used against the member should amount to defamation as a matter of law.[133] Nor does the fact that a member may have good grounds for taking legal action for defamation preclude the member raising the reflection as a matter of privilege.[134]

A member is not bound to seek redress in the House only. If the remarks are defamatory, the member may bring an action for damages in the courts instead of or in addition to pursuing the matter of privilege[135] (though the fact that a member has taken action in the courts will be relevant for the House in considering what penalty to

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impose[136]). Any member may raise a reflection on a member as a matter of privilege, even though the reflection is on another member.[137]

Reflections on members in their parliamentary roles have been found where a member was accused of perjuring himself in an election petition case,[138] where a report which was submitted to the House accused a member of not having told the truth in some statements he had made to the House[139] and where a member was accused of being in the pocket of the tobacco industry.[140] The House also found that the Attorney-General had been libelled in his place in Parliament and a contempt was committed when a newspaper editorial accused him of bringing forward a bill to further his claims to certain property.[141] No contempt was found where two members were accused of hypocrisy over atomic bomb tests, because the reflections did not concern the conduct of the members as members but related to statements made by them outside the House.[142]

Reflections on the Speaker and other presiding officers

Some of the most serious reflections on members that can be made concern those against the character of the Speaker or any other presiding officer – in particular, accusations that presiding officers have shown partiality in discharging their duties. Reporting on a question of privilege concerning a reflection on the Speaker, the Privileges Committee has said, "[The] Speaker is in a special position. Being the embodiment of Parliament, reflections upon [the Speaker's] character or conduct directly attack the very institution of Parliament itself, and have been dealt with accordingly here and in England". The committee refused to consider the reasons "why" the attack which was before it on that occasion had been made, confining itself to a consideration of "whether" such an attack had been made.[143]

Reflections upon the Speaker have been censured on six occasions, five on which members attacked the character or conduct of the Speaker, and one on which newspapers did so: in 1967, when the Speaker was accused in a newspaper article of racial prejudice;[144] in 1975, when a member wrote a newspaper article criticising the matter in which the Speaker was presiding over the House;[145] in the following year, when a member in a radio interview advocated the replacement of the Speaker and accused the Speaker of weakness;[146] in 1982, when a member in a press statement criticised the Deputy Speaker's failure to call him to speak in a debate and stated that it was difficult to believe that the Deputy Speaker was not affected by his politics in the line he had taken;[147] in 1987, when a member in a press statement made reflections on the way in which the Speaker was pressding over the House;[148] and in 1998, when a member accused the Speaker (as chairperson of the Parliamentary Service Commission) of selectively releasing personal information to disadvantage a political party.[149]

Other contempts

The examples of contempts set out in the Standing Orders are not exhaustive. A number of other circumstances have arisen which it has been acknowledged could amount to a contempt even though these do not fit clearly into the listed examples. But in all cases the conduct could only amount to a contempt if it obstructed or impeded the House or members in the course of their functions and duties or if it had a tendency to do so.[150]

[136] 1984-85, AJHR, I.6A, p.10.
[137] 1912, Vol.161, p.672.
[138] 1911, Vol.158, pp.748-68.
[139] 1911, Vol.156, pp.884-98.
[140] 9, AJ[illegible]).723.
[141] [illegible]
[142] 1967, JHR, pp.144-5, 249-50.
[143] 1975, Vol.400, pp.3295-312.
[144] 1976, Vol.407, pp.3157-69.
[145] 1982, AJHR, I.6.
[146] , AJHR
[147] [illegible]

Abuse of the right of petition

In the United Kingdom, the submitting of a petition containing false or scandalous allegations against a person, the inducing of signatures to a petition by false representations and threatening to submit a petition against a member have been treated as contempts. There are no examples of abuses connected with the right to petition occurring in New Zealand and being treated as a contempt by the House of Representatives.

Advice to the House

There is no convention that the House will be advised of important policy announcements by Ministers.[151] But the circumstances in which prior publication outside the House of a matter to be submitted to the House can constitute a contempt has been considered on a few occasions.

If a document or statement (such as a departmental report) intended for first promulgation in the House is improperly obtained or intercepted and then published before its promulgation in the House, that may be regarded as a contempt.[152] But the Privileges Committee has recommended that the House not treat as a contempt the premature release of parliamentary papers presented to the House under statute.[153]

Where a Minister prematurely released the contents of a message to the House from the Governor-General containing the text of a bill His Excellency was transmitting to the House for introduction, it was held that a breach of privilege (contempt) had been committed.[154] (This method of introducing bills has been abolished.) On the other hand, it is no contempt for the Government to disclose in advance of any formal parliamentary steps the terms of a bill about to be introduced into the House. This may be a matter for criticism from members of the House who learn of a bill from the news media in advance of its introduction, but it is not a matter of privilege.[155] But where formal parliamentary steps have been taken in respect of a bill, such as notification to the Clerk that a bill is about to be introduced (or notice of intention to introduce having been given in respect of a member's or a local bill), to disclose or improperly abstract copies of such a bill after that time could be treated as a contempt.[156]

Miscellaneous

Other examples of acts that may have a tendency to obstruct or impede the House in carrying out its functions are: unauthorised use of the name of the House or its crest on an unofficial publication,[157] the placing of material in the bill boxes reserved for members in Parliament House without the Speaker's permission,[158] and improperly attempting to induce a member to resign from the House.[159]

LEGAL SIGNIFICANCE OF CONTEMPT

The power to punish for a contempt of the House is a power that inheres in the House. The power is exercisable only by the House itself. The courts do not punish for contempt of the House, nor do they enforce punishments meted out by the House. The fact that a contempt may have been or may be about to be committed does not give rise to a cause of action for which relief can be obtained from a court.[160] Contempt is an extra-judicial

[151] 2000, Vol.583, p.1659; 2002, Vol.603, p.1512.
[152] 1977, Vol.412, p.1587.
[153] 1987-90, AJHR, I.18B, para.21.
[154] 1955, Vol.307, pp.2532-9.
[155] Vol.77, [illegible]
[156] *Hansard Supplement*, 2001, Vol.48, p.1680.
[157] 1903, Vol.124, p.571.
[158] 1998, Vol.574, p.14721.
[159] [illegible] 17 WA" [illegible]

proceeding, though, as it is a power possessed by the House pursuant to law, its lawful exercise by the House will be recognised and, if need be, vindicated by the courts (for example, as a defence against legal liability that would otherwise arise).

But apart from the fact that the power to punish for contempt is of legal significance as justifying actions that might otherwise be unlawful, the power can be legally significant in some other ways.

The fact that compliance with a request for official information or personal information held about an individual, if satisfied, would constitute a contempt of the House is a good ground for refusing to provide that information.[161] One obvious circumstance in which these provisions reinforce the House's privileges is in respect of confidential select committee information which is in the hands of a Minister or a government department and which otherwise might be obtainable as official information. Indeed, as far as official information is concerned, the legislation goes further than making the commission of a contempt a good ground for refusal to produce such information. It recognises that a positive obligation to avoid committing contempt can arise, by also providing that nothing in the legislation authorises or permits the making available of official information that would constitute a contempt of the House.[162] In reviewing decisions to withhold official information on the ground of contempt, the Ombudsmen and the Privacy Commissioner may be required to make judgments in accordance with the legislation as to whether a contempt would be committed were the information to be made available.[163]

Similar provisions apply to protect the House against contempt arising in the course of meetings of local authorities and committees of district health boards. In each case it is a good ground for the exclusion of the public from their meetings that admission would be likely to result in disclosure of information which would constitute a contempt of the House.[164]

Even apart from these explicit legislative significances, the fact that an otherwise lawful or unexceptionable decision or action may constitute a contempt can, it is submitted, itself imbue that decision or action with legal significance and may be a governing factor in whether the action can legally be taken or what decision should actually be made. Thus the Human Rights Commission has accepted advice that it should not embark upon an inquiry where to do so would inevitably lead it into committing a contempt of the House (such an inquiry may also have been unlawful on other grounds too).[165] It may also be the case that the fact that a contempt will result would be recognised by the courts as legally justifying other legal positions that are taken, for example, resisting inspection of documents in the course of legal proceedings where they are subject to parliamentary confidentiality, unless the permission of the House or the relevant committee is obtained first.[166]

In such ways (an aspect of comity between the legislative and judicial branches of government) the fact that a contempt of the House has been or may be committed can be significant in determining legal outcomes, without contempt giving rise to a cause of action itself.

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[161] *Official Information Act 1982*, s.18(c)(ii); *Local Government Official Information and Meetings Act 1987*, s.13(c)(ii); *Privacy Act 1993*, s.29(1)(f).

[162] *Official Information Act 1982*, s.52(3); *Local Government Official Information and Meetings Act 1987*, s.64(3).

[163] See, for example, 2002, 99, A.3, pp.31-2.

[164] *Local Government Official Information and Meetings Act 1987*, s.48(1)(b)(ii); *New Zealand Public Health and Disability Act 2000*, Sch.4, cl.34(b).

[165] "No Commission of Inquiry", Human Rights Commission, 17 October 2001; Opinion of Dr G F Barton QC for Human Rights Commission, 20 September 2001, paras.33-40.

[166] See discussion, 1996-99, A.5HR, 1.16P, pp.12-4.

MATTERS OF PRIVILEGE RAISED WITHOUT NOTICE

In one circumstance where a matter of privilege occurs in the House, it can be raised without notice. This is where the conduct of strangers present gives rise to a matter of privilege, for example, as a result of misconduct on their part.[41] In these circumstances the Speaker has discretion to deal with the matter in such a way as the Speaker determines and any debate in progress may be interrupted for this purpose.[42]

MATTERS OF PRIVILEGE RAISED BY MEANS OF PETITIONS

A petition was the recognised means of seeking authority to use extracts from debates or other reports or proceedings of the House in court. (See Chapter 46.) This form of petition is now obsolete as the House has granted a general authority to refer to its proceedings before a court.[43]

A petition alleging that a contempt has been committed has been received and allocated to the Privileges Committee.[44]

PRIVILEGES COMMITTEE

The select committee at the centre of determining matters relating to the privileges of the House is known as the Privileges Committee.

The Privileges Committee is established by the House at the commencement of each Parliament. Its brief is to consider and report to the House on any matters referred to it relating to or concerning parliamentary privilege.[45] The committee does not have the power to initiate inquiries itself; it works solely on the basis of issues referred to it by the House.

The committee's membership often includes senior members such as the Prime Minister, the Leader of the Opposition and the Leader of the House. The member who raised a matter of privilege with the Speaker alleging a breach of privilege or contempt may not serve on the committee while it is considering that complaint.[46] This does not preclude a member who raised a matter of privilege not involving an allegation of breach of privilege or contempt from serving on the committee inquiring into the matter. It is usually (though not invariably) chaired by the Attorney-General.[47] Its reports to the House carry great weight. The Standing Orders Committee has recommended that the committee's membership should remain fixed throughout any particular inquiry so that only those members who have heard the evidence on a complaint should deliberate on it.[48]

Powers

The Privileges Committee possesses the same powers and is subject to most of the same procedural rules as other select committees. However, in addition it has conferred upon it the inherent power to send for persons, papers and records.[49] This means that the committee does not have to apply to the Speaker and secure the Speaker's agreement to that power being exercised, as other committees must do.

The committee hears evidence in public. However, the nature of the task it has to perform inevitably results in it proceeding in a manner somewhat different from other committees. The committee is exempt from the prohibition applying to other committees that they may not enquire into, and make findings in respect of, the private conduct of members.[50] Indeed, the nature of its tasks often call upon it to do just that. The committee is often concerned with allegations made against members and other persons that they have

[41] S.O.392(2).
[42] S.O.133(b).
[43] S.O.401.
[44] 1996-99, JHR, Schedule of petitions presented, p.1367.
[45] S.O.391(1).
[46] S.O.398.
[47] 1996-99, AJHR, I.15C, p.10; 1998, Vol.567, p.8364.
[48] 1979, AJHR, I.14, p.16.
[49] S.O.391(2).
[50] S.O.201.

breached privilege or committed a contempt or, if the allegation is not specifically directed against an individual or individuals, that a breach of privilege or a contempt has occurred and that, by implication, the perpetrator ought to be identified and punished. In these circumstances the committee is called upon to conduct an inquest and to make findings, often adverse findings, against members and others. Therefore, it endeavours to act and to conduct its proceedings in accordance with normal judicial principles, including ruling on the standard of proof required to establish whether a contempt has been committed.[51]

Persons appearing before the Privileges Committee have long been permitted to have the assistance of their own counsel if they wish, well before this was a requirement of the Standing Orders.[52] Indeed, it is the practice for the committee to ask witnesses appearing before it whether they wish to be assisted by counsel, so that the matter is raised by the committee and the witness does not, by default, forego the opportunity to be so assisted. Counsel has been permitted to cross-examine other witnesses appearing before the committee.[53]

Scope of inquiry

The nature of an inquiry by the Privileges Committee has been described as *sui generis*.[54] Its proceedings do not fall into any general category of inquiries.

Once a matter of privilege has been referred to it, it is for the Privileges Committee to decide how deeply to investigate the matter and how widely to pursue possible offenders. In particular, once it is seised of a question of privilege, it does not regard itself as being confined to considering only issues referred to by the Speaker in making the ruling. The committee is charged with investigating the facts and reporting to the House if, in its opinion, a breach of privilege or contempt has been committed or if some other matter referred to it affects the privileges of the House. In this regard it is not limited by the precise formulation of any allegation of breach of privilege or contempt made by the Speaker in ruling on the matter.[55] However, before broadening an investigation into a question of privilege beyond the scope initially suggested in the Speaker's ruling, the committee must give notice to any member thereby affected.[56]

Findings

In making a finding as to whether a breach of privilege or contempt has occurred, the committee is bound by the same rules of natural justice as is any other committee making findings with a potential to reflect on reputation, and must acquaint any person whose reputation may be seriously damaged with its provisional findings and give that person an opportunity to comment.[57] The Privileges Committee, in addition, has found it necessary to establish the standard of proof necessary for an adverse finding on a question of privilege. In general, the committee has accepted that the civil law standard of proof on a balance of probabilities is appropriate when it is making decisions on matters of fact or drawing inferences from matters of fact. But in making findings of breach of privilege or contempt, the committee must consider the totality of the evidence and then ask itself if it is satisfied on the basis of compelling evidence that a breach of privilege or contempt has occurred. Only if it is should it make such a finding.[58]

Report

The committee presents reports on the questions of privilege referred to it.

[51] 1980, AJHR, I.6, pp.7-8.
[52] See, for example, 1912, AJHR, I.7, p.3.
[53] 1980, AJHR, I.6, p.4.
[54] *Dentice v Hobarts Board* [1992] 1 NZLR 720 at 724.
[55] 1982, AJHR, I.6, p.8; 1996-99, AJHR, I.15A, pp.3-4.
[56] 1996-99, AJHR, I.15A, p.4.
[57] S.O.247(1).
[58] 1996-99, AJHR, I.15A, p.5.

The committee has not shown itself averse to commenting on aspects of procedure in the House and the administrative arrangements for providing services to members where these subjects have arisen during the course of its inquiries.[59] Although it is the House that finally decides if a breach of privilege or contempt has been committed and, if so, whether any punishment should be inflicted, the most important determinant of the final outcome of a complaint of breach of privilege or contempt is the finding of the Privileges Committee. For this reason the committee becomes actively involved in working out the ultimate solution to the complaint – for example, by corresponding with and discussing a suitable apology with persons it considers to be in contempt and recommending punishments to the House where necessary.

The committee does not confine itself to a factual report to the House on the subject of the complaint, which it is then up to the House to devise means of acting on. It aims to present comprehensive findings and recommendations that the House can deal with in one bite.

Consideration of report

A report from the Privileges Committee is set down for consideration as general business.[60] This ensures that it has a priority for consideration by the House that is not accorded to any other type of select committee report. Consideration of a report from the Privileges Committee is taken on the sitting day following its presentation, after questions and any urgent or general debate.[61]

The debate on the committee's report takes place on a motion moved by the chairperson of the Privileges Committee. This may be a motion to take note of the report (the normal motion on the consideration of any select committee report) but, if the report contains recommendations (as it often will), the chairperson's motion may instead reflect those recommendations.[62] The debate is not subject to any overall time limit prescribed by the Standing Orders. Each member may speak for up to 10 minutes.

OUTCOME OF QUESTION OF PRIVILEGE

There are a number of potential outcomes from a question of privilege without the matter necessarily involving a finding that a contempt of the House has been committed and that the House will punish the contempt. The House's privileges relate to its legal position generally and the House may need to consider these in other contexts than just contempt.

Thus the outcome of a question of privilege may be that the House decides to become involved in legal proceedings so as to protect its view of its privileges or so that consideration of the effect of its privileges on a matter before a court is not overlooked.[63] On the other hand, consideration of a question of privilege may be a means for the House to form a view about the status of a member or of proceedings before Parliament. Thus, on a question of privilege, the House has decided whether a person has been duly returned as a member of Parliament[64] and whether a member's seat has been vacated by resignation or other disqualification.[65]

Most questions of privilege, however, do relate to allegations of contempt by members or by persons outside the House. Consequently, a finding that a contempt has been committed raises the question of what the House should do in response – whether it should invoke its power to punish for contempt.

[59] 1982, AJHR, I.6, pp.7-9.
[60] S.O.251(1)(a).
[61] S.O.63(1).
[62] S.O.252.
[63] 1993-96, AJHR, I.15B; 1999-2002, AJHR, I.17A.
[64] PD 1856-58, pp.559-60.
[65] 1996-99, AJHR, I.15B; 2002-05, AJHR, I.17C.

PUNISHMENTS

If it finds that a contempt has occurred, the House must decide whether to take any action to punish individuals who have been identified as having transgressed against it, or whether the offence is not worth further notice. If the House does decide to take the matter further, there are a number of options open to it regarding the types of punishment it may inflict or the means it may employ to express its displeasure. As well as using these means to "punish" an offender for contempt, the House may also use them to enforce its privileges by coercing someone to do something it wishes to be done – such as committing that person into the custody of the Serjeant-at-Arms so that he or she may be brought to give evidence before a committee. When the House uses its powers in this way, it is not "punishing" anyone for past transgressions, it is merely ensuring that no transgression – such as a failure to testify after being required to do so by the House – can occur. If the person concerned escaped from the Serjeant's custody in these circumstances, then a contempt would have been committed and the person concerned would be liable to be punished for contempt. However, the House may use its powers to secure compliance with its orders before there has been any disobedience to them, as well as inflict punishment for a contempt that has already occurred. Distinguishing between punishing for disobedience and taking action to induce compliance can be difficult.[66] But it is not necessarily relevant to make this distinction for a House enjoying by statute the privileges possessed by the House of Commons in 1865.

The punishments which the House may decide to inflict must be seen against the background of the human rights and fundamental freedoms confirmed by the *New Zealand Bill of Rights Act* 1990. Those civil rights that would seem to be particularly relevant in respect of punishment for contempt are: protection against unreasonable search or seizure,[67] protection against arbitrary arrest or detention,[68] and minimum standards of conduct to be observed in respect of a person under arrest or in detention.[69] In seeking to project its will beyond the internal proceedings of the House, the House must ensure that it acts in a way that is consistent with these rights.

Imprisonment

The ultimate power possessed by the House to enforce or vindicate its privileges is the power to imprison. This power has been used by the House of Commons on literally hundreds of occasions. It has been claimed that there were a "little less than a thousand" commitments between 1547 and 1810.[70] Imprisonment has never been resorted to by the House of Representatives[71] (or by the Legislative Council, which also possessed the power to imprison), although a proposal was made and debated in the House in 1896 that the President of the Bank of New Zealand, who had refused to answer certain questions put to him by a select committee, be imprisoned. The proposal was defeated and a fine imposed on the president instead.[72] A further proposal – that he be committed into the custody of the Serjeant-at-Arms until the fine was paid – was dropped.[73]

The power of the House of Commons to imprison persons by committing them into the custody of the Serjeant-at-Arms or any other person was well recognised by 1 January 1865, the date on which the House of Representatives acquired privileges similar to those enjoyed by the Commons in the United Kingdom.[74] In 1893, when all common law

[66] *Egan v Willis* (1998) 195 CLR 424 at 455 (per Gaudron, Gummow and Hayne JJ).
[67] *New Zealand Bill of Rights Act* 1990, s.21.
[68] *Ibid.*, s.22.
[69] *Ibid.*, s.23.
[70] Wilkie, *The History of English Parliamentary Privilege*, p.137.
[71] *Linklaters*, p.172.
[72] 1896, Vol.93, pp.327-34.
[73] *Ibid.*, p.334.
[74] *Mayo*, pp.156-60.

crimes were abolished in New Zealand, it was specifically enacted that such abolition did not limit or affect the House's power to punish for contempt.[71]

The authority of the House to punish for contempt by imprisonment is not limited or affected by the courts' jurisdiction to grant a writ of habeas corpus in the case of an unlawful detention of any person.[76]

When Parliament is prorogued or dissolved, bringing the session to an end, any person then held in custody is automatically discharged.[77] The House cannot imprison a person beyond the session in which the committal was ordered.[78] This does not, however, prevent the House ordering that person's rearrest in the following session if it feels so inclined.[79]

Speaker's warrant

The commitment of any person into custody by order of the House is made under a warrant issued by the Speaker. There can be no arrest without warrant in New Zealand except with express statutory authority.[80] As there is no express statutory authority to arrest without warrant for breach of privilege or contempt, the Speaker's warrant is essential for a person to be taken into custody by order of the House.

There is no particular form that the Speaker's warrant must take. Warrants issued in other jurisdictions have merely stated that the person named in it has been found guilty of a contempt and is committed into custody for that reason, without stating the facts on which the finding of contempt is based.[81] On the other hand, the warrant may go on to set out, with some particularity, why the person is being arrested. The extent to which the courts are able to review warrants on the ground that they do not disclose any breach of a known privilege or that they are otherwise irregular has been judicially considered in a number of cases.

In the leading case on the committal by order of a legislature, the Australian High Court said that a court may examine the warrant if it specifies a ground of commitment in order to determine whether that ground is sufficient in law to amount to a breach of privilege, but if the ground appears to be consistent with a breach of an acknowledged privilege, that is conclusive. The court would not go behind the warrant even if it was stated in general terms.[82] On the other hand, the Indian Supreme Court (by majority) has advised that a general warrant committee for contempt could be inquired into to ascertain if there were grounds for that committal.[83] It may be too, that the civil right to be secure against unreasonable search and seizure[84] now imports a requirement for the Speaker's warrant to set out with sufficient particularity the grounds on which the arrest has been ordered. Failure to do so may itself be unreasonable and so vitiate the warrant.

Fine

Much doubt has been expressed about the power of the House to exact fines. This depends upon whether such a power was "held, enjoyed and exercised" by the House of Commons on 1 January 1865.[85] In fact, the House of Commons has not, since 1666, exercised the power it undoubtedly once had to fine, and the leading authority on the powers of the Commons does not explicitly claim this power as one currently enjoyed by that

[71] *See now Crimes Act* 1961, s.9(6), proviso.
[76] *Habeas Corpus Act* 2001, s.4(2).
[77] 1888, Vol.63, p.37.
[78] *Shri Jaswat Kumar Chand v Orissa Legislative Assembly* AIR 1973 Orissa 111.
[79] *Pandit MSM Sharma v Shri Sri Krishna Singh* AIR 1959 Supreme Court 395.
[80] *Crimes Act* 1961, s.315(1).
[81] *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560.
[82] *R v Richards; ex parte Fitzpatrick and Brown* (1955) 92 CLR 157 at 162.
[83] *Special Reference No 1 of 1964 (Keshav Singh's case)* AIR 1965 Supreme Court 745.
[84] *New Zealand Bill of Rights Act* 1990, s.21.
[85] *Legislature Act* 1908, s.242(1).

legislature.[86] Furthermore, in 1967 and in 1977 House of Commons' select committees recommended that legislation should be introduced to enable that House to impose fines,[87] thus implying that the power once held may have been lost.

The position in New Zealand is not as clear-cut as this may suggest. It has been argued that "exercised" must be understood in the sense of "exercisable", and that on 1 January 1865 the power to fine was exercisable by the House of Commons even though it had not actually been exercised for 199 years.[88] If a power is not used, it is not necessarily forfeited. The House of Commons allowed its power of impeachment to fall into disuse for 170 years between 1450 and 1620 before reviving it. There has not been a prosecution for impeachment since 1806 (though there was an attempt to invoke it in 1848) and the leading authority on the House of Commons regards it as having fallen into disuse or having become obsolete with the development of responsible government.[89] However, it has never been formally abolished and an attempt was made in 2004 to revive it.[90] The same is true of the power of the Commons to suspend its members. For nearly two centuries this form of punishment had not been imposed until the Speaker ruled in 1877 that it was still available to be used against a member.[91]

The contemporary edition of *Erskine May* in 1865 suggested that the Commons had the power to fine,[92] and it is against the position at that time that the House of Representatives' power to fine must be tested, whatever view of its powers the House of Commons takes today. Another indication of contemporary thinking on the subject was the section of the *New Zealand Constitution Act* 1852 (UK) that required the House to draw up standing rules and orders, but that enjoined it not to subject any person who was not a member of Parliament to any "pain, penalty or forfeiture",[93] words that could clearly encompass fines. The words of the *New Zealand Constitution Act* suggest that the House either had, or its draftsmen in 1852 believed that it had, power to fine its own members, and would, but for the express provision to the contrary, have had power to fine other persons too. Acting on this hint the House, by its Standing Orders, made provision for fines to be imposed on members for breaches of discipline. These remained in force until 1951 and were used to fine members on two occasions.[94]

That provision of the *New Zealand Constitution Act* was repealed in 1865 when the House acquired the wider powers of the House of Commons, and from that time on the House regarded itself as being free to fine strangers as well as members as a punishment for contempt. Strangers have been fined on four occasions: the President of the Bank of New Zealand was fined in 1896 for refusing to answer questions before a select committee relating to customers' accounts;[95] a member of the Parliamentary Press Gallery was fined in 1901 for publishing evidence given to a select committee before the committee had reported to the House;[96] a newspaper was fined in 1903 for publishing select committee papers before the committee had reported to the House; and its representative in the Press Gallery was fined for refusing to reveal the person from whom he had obtained the papers.[97]

In view of the conflicting opinions held on the existence of the power, it is doubtful whether the House today would ever seek to impose a fine.[98] A few years after the last of

[86] *May*, p.161.
[87] HC 34 (1966-67), para.197; HC 417 (1976-77), para.15.
[88] *Littlejohn*, pp.46-54.
[89] *May*, p.73.
[90] See, "A Case to Answer. A first report on the potential impeachment of the Prime Minister for High Crimes and Misdemeanours in relation to the invasion of Iraq.", produced for Adam Price MP, August 2004.
[91] *May*, p.164f.
[92] *Littlejohn*, pp.48-8.
[93] *New Zealand Constitution Act* 1852 (UK), s.52.
[94] 1877, Vol.26, pp.98-107; 1881, Vol.40, pp.232-44.
[95] 1896, Vol.93, p.336.
[96] 1901, JHR, p.154.
[97] 1903, Vol.123, pp.695-8.
[98] *Littlejohn*, p.190.

these fine cases, it was said by a Speaker that the House still had the power to fine,[99] but by 1929 a Standing Orders Committee was recommending that the power of the House to inflict fines and otherwise safeguard its privileges be supplemented by statute, thus suggesting that some doubts on this score had been expressed by that time.[100] Such a proposal has been repeated by a later Standing Orders Committee.[101] In Australia an express power to fine has been included in legislation.[102]

Censure

The House may consider that the conduct of a member or other person is deserving of its formal censure or rebuke, and may express its views accordingly. In the House of Commons the practice is for a formal reprimand or admonition to be made personally by the Speaker on behalf of the House, with the offender standing in his or her place in the Chamber, if he or she is a member, or at the bar of the House, if not. In New Zealand the Speaker has admonished a person at the bar of the House on a question of privilege,[103] but it has not generally been the practice for a rebuke to be administered in such a formal manner. The House, where it has felt that a member's conduct should be censured, has contented itself with coming to a formal resolution to that effect and leaving the matter at that. On at least two occasions members have been censured (on both occasions for criticising the Speaker) by the House adopting recommendations to censure them contained in Privileges Committee reports.[104] The House has also resolved to censure a member for remarks that he made without referring the matter first for inquiry by the Privileges Committee.[105]

Prosecution at law

Certain breaches of privilege or contempts may have wider significance than as breaches of parliamentary law; they may also be criminal offences. In fact, the House has quite often left actions that it could have treated as contempts to be dealt with by the courts in prosecutions for an offence. This has been the case with most disturbances in the public galleries that have resulted in arrests and charges of trespass or breach of the peace. The fact that a person has been charged with a criminal offence in respect of such an incident does not preclude the House taking its own proceedings against that person on the ground that the incident also constitutes a contempt, but usually the House has left matters of a criminal nature to be dealt with solely in the forum of a court.

Where a matter is raised as a question of privilege and, after considering it, the House concludes that a criminal offence may have been committed, it may (in addition, if it wishes, to punishing any contempt) direct that the offender be prosecuted in the courts for the offence. Such a prosecution is undertaken by the Attorney-General. In the only case in which such action was taken in New Zealand, the Attorney-General (who was the member who had been accused of improper conduct, so leading to the matter being raised in the first place) was directed by the House "to prosecute according to law for a libel on a member of this House in his place in Parliament".[106] The prosecution failed.

Impeachment

One of the powers possessed by the House of Commons in 1865 (though it had not been exercised since 1806) was the power to impeach. Impeachment was a prosecution by the House of Commons of a person (often a Minister who had fallen from favour) for "high crimes and misdemeanours". The trial took place before the House of Lords.

There is nothing in the *New Zealand Constitution Act* 1852 (UK) to suggest that this power had ever devolved on to the House of Representatives. Nor did the acquisition of the House of Commons' powers and privileges in 1865 alter this. The House of Commons' power was to accuse a person of high crimes and misdemeanours before the upper House, the House of Lords. It was not a power to convict a person. The Legislative Council in New Zealand did not enjoy any powers or privileges equivalent to those of the House of Lords; in fact, its privileges were also equated to those of the House of Commons.[107] In these circumstances there was no legislative chamber in New Zealand empowered to conduct a trial on impeachment. The proceeding could have no application in New Zealand. The abolition of all common law crimes in 1893[108] confirms the non-applicability of impeachment to New Zealand.

Suspension from the House

By its nature this is a punishment applicable only to members of the House.

The Standing Orders prescribe procedures whereby members may be suspended from the service of the House for breaches of order.[109] But the House may also suspend a member for contempt as a quite distinct exercise of its power of suspension from the summary procedure employed to deal with breaches of order.[110] The fact that the House utilises its procedures concerned with breaches of order does not mean that a member may not also be proceeded against for contempt if the member's conduct justifies it. But in those circumstances any earlier punishment inflicted by the House will be taken into account when considering what action to take over the contempt.[111]

Three members have been suspended from the service of the House for contempt after being found to have made remarks reflecting gravely on the conduct of Speakers in their capacity as Speaker. The Privileges Committee recommended that the members be suspended for varying periods, and those recommendations were adopted by the House.[112]

The rights forfeited by a member suspended under the disciplinary procedures of the Standing Orders are set out in the Standing Orders themselves.[113] (See Chapter 11.) These Standing Orders provisions do not apply in respect of a member suspended for contempt, but they may be taken to indicate, by analogy, the disabilities suffered by a suspended member. Such a member cannot enter the Chamber or voting lobbies, or any other part of the building from which the House specifically excludes the member. Nor can the member serve on or attend a meeting of a select committee or lodge questions or notices of motion.

Expulsion

One of the powers the House of Commons may employ in relation to its members is to expel them from membership of the House, with the result that the member's seat thereby becomes vacant. (Expulsion does not disqualify a member from being re-elected at the ensuing by-election.) There is no instance of expulsion occurring in New Zealand. Before the *Parliamentary Privileges Act* 1865 was passed, the House, on one occasion, refrained from proceeding with a motion to expel a member on the ground that it was

[99] 1911, Vol.158, p.898.
[100] 1929, AJHR, I.18.
[101] 1987-90, AJHR, I.18B, para.30.
[102] *Parliamentary Privileges Act* 1987 (Australia), s.7; Harris, *House of Representatives Practice*, p.748.
[103] 1872, Vol.13, p.201.
[104] 1975, AJHR, I.6, adopted 1975, JHR, pp.203-6; 1982, AJHR, I.6, adopted 1982, JHR, p.393-4.
[105] 2000, Vol.585, p.5459.
[106] 1877, JHR, pp.63-6.
[107] *Parliamentary Privileges Act* 1865, s.4.
[108] *Criminal Code Act* 1893, s.5 (now *Crimes Act* 1961, s.9).
[109] S.Os 83 to 91
[110] S.O.92.
[111] 1986-87, AJHR, I.15.
[112] 1978, JHR, pp.267-8, 655; 1987, Vol.480, pp.9169-82; 1998, Vol.583, pp.8358-81.
[113] S.O.91.

doubtful if the House possessed the power to expel.[114] With the acquisition of the House of Commons' privileges as at 1 January 1865, the legal situation changed. Even so, in 1877 the Speaker denied that the House had power to declare the seat of a member to be vacant: "the utmost extent to which the House can go, and this is very widely different from declaring a seat to be vacant, is to expel the member from its presence"[115] – that is, to suspend the member. The list set out in the *Electoral Act* 1993 of the events that cause a seat to become vacant does not include expulsion from the House.[116] However, this is not in itself a conclusive factor since the power to expel is seen as a self-protective power rather than a disqualification.[117]

In other jurisdictions with a link to the House of Commons' privileges it seems to be accepted that the power to expel a member still obtains by virtue of that link. Thus, in New South Wales it has been held that the legislature has inherent power to expel a member, this being seen as a self-protective power rather than a punishment.[118] The Australian House of Representatives has also expelled a member, though this power has now been expressly abolished by legislation.[119] The Canadian House of Commons still possesses the power to expel in reliance on an equivalent statutory link with the United Kingdom House of Commons' privileges. It may expel for any conduct it deems unbecoming for the character of a member. It has used the power on four occasions.[120] It has been held in Canada that the power to expel a member (both as a means of discipline and as a means to remove an unfit member from the legislature) is an undoubted privilege of the House.[121] Furthermore, the power of expulsion does not conflict with the electoral rights guaranteed under the Canadian equivalent of the *New Zealand Bill of Rights Act* since these are concerned with the qualification to be a member of Parliament rather than with the imposition of a restriction on a sitting member.[122] In India, expulsion in reliance on a similar link with the privileges of the House of Commons has been upheld as in the nature of a disciplinary control over members. The power could be used to expel for misconduct outside as well as inside the House.[123]

The Standing Orders Committee has recommended that any power to expel be abolished in New Zealand.[124]

Exclusion from the precincts

The Crown, as legal owner, permits the House to exercise control over the Parliament buildings and grounds. This control is vested in the Speaker.[125] But the House may, if it wishes, make orders relating to the presence of strangers in the galleries of the Chamber or anywhere else within the Parliament buildings. The power of the House to exclude strangers at any time from its presence (that is, from the galleries) is an aspect of its freedom of speech, and it has been held that control over access to the premises that it occupies is a necessary adjunct to the proper functioning of a legislature.[126]

In 1981, following an incident in the galleries at the beginning of a sitting, the House adopted a report from the Privileges Committee recommending that everyone who could be identified as having participated in the incident should be excluded from the precincts

[114] PD 1854-55, p.339.
[115] 1877, Vol.26, p.341.
[116] *Electoral Act* 1993, s.55(1).
[117] *Yeshwant Rao Meghawale v Madhya Pradesh Legislative Assembly* AIR 1967 Madhya Pradesh 95; *Ambatheguer v The Secretary, Tamil Nadu Legislative Assembly* AIR 1988 Madras 275.
[118] *Armstrong v Budd and Stevenson* (1969) 71 SR (NSW) 368 (doubted by McHugh J in *Egan v Willis* (1998) 195 CLR 424 at 479).
[119] Harris, *House of Representatives Practice*, pp.155 and 745.
[120] Marleau and Montpetit, *House of Commons Procedure and Practice*, pp.101 and 206.
[121] *Harvey v New Brunswick (Attorney-General)* (1996) 137 DLR (4th) 142.
[122] *MacLean v Attorney-General of Nova Scotia* (1987) 35 DLR (4th) 306.
[123] *Ambatheguer v The Secretary, Tamil Nadu Legislative Assembly* AIR 1988 Madras 275.
[124] 1987-90, AJHR, I.18B, para.31.
[125] *Parliamentary Service Act* 2000, ss.23 and 26.
[126] *Zündel v Boudria* [2000] 48 OR (3rd) 410.

of the House for 12 months.[127] The Speaker, in enforcing this order on behalf of the House, decided that the areas of the Parliament buildings from which the persons concerned were to be excluded were the public areas of the buildings and the areas used by members generally. The exclusion did not apply to rooms or suites allocated for the personal use of members or Ministers, or to the use of otherwise prohibited areas for transit in order to visit a member as an invited guest.

In another case, involving the director of a courier company refusing to answer questions before the Privileges Committee, the House ordered that courier companies with which he was associated be banned from making deliveries to the parliamentary complex.[128] The Speaker implemented this order by issuing instructions to that effect.[129]

Exclusion from the Parliamentary Press Gallery

Membership of the Parliamentary Press Gallery carries with it special responsibilities. Journalists who commit a contempt of the House are liable to have their memberships terminated or downgraded. One journalist had his status as a full member reduced to that of an associate member and his privilege of using Bellamy's withdrawn for disclosing confidential select committee materials.[130]

Apology

Most findings of contempt end with the offender tendering an apology, which the House accepts. In many cases the apology or expression of regret is tendered to the Privileges Committee during its investigation of the question of privilege. The absence of an expression of regret by an offender is a factor taken into account by the Privileges Committee in determining what action to recommend to the House.[131] In its report the committee acquaints the House with any apology or expression of regret and, if it thinks fit, recommends that the House accept the apology. If the House does so, the matter is then at an end.

In other cases there may have been no apology delivered to the Privileges Committee during its consideration of the matter. If the committee considers that an apology is called for, this view is included in its report for adoption by the House. The apology is then tendered by letter, usually to the Speaker, some time after the report has been received by the House. Failure to tender an apology when required to do so by the House could itself be treated as a contempt. The Speaker may read the letter of apology to the House, or may decide merely to present it to the House. Exceptionally, the House may order that the apology be tendered personally in the House. Thus, the House has ordered that a member attend in his place in the House and apologise for a contempt that he had committed.[132]

[127] 1981, Vol.442, pp.4315-6.
[128] 1992, Vol.528, pp.10626-31.
[129] Media release from the Speaker of the House of Representatives, 18 August 1992.
[130] 1984-85, JHR, 820-3.
[131] 1976, Vol.407, p.3157.
[132] 1998, Vol.567, pp.8358-81.

which provides that Members of Parliament are not liable, and may not be summoned, to serve as jurors in any Federal, State or Territory court.[109]

Certain employees of the Parliament are also exempted from attendance as jurors in Federal, State and Territory courts by regulations made under the Act.[110]

Exemption from attendance as a witness

Section 14 of the Parliamentary Privileges Act provides that Members shall not be required to attend before a court or tribunal on any day on which the House of which the Member is a member meets, on any day on which a committee of which he or she is a member meets or on any day within five days before or after such days. The exemption is also extended to employees of the House required to attend upon the House or a committee and applies on days on which the House or the committee upon which the officer is required to attend meets, or on days within five days before or after such days. Witnesses, that is, 'persons required to attend before a house or a committee on a day', shall not be required to attend before a court or tribunal on that day.

The Parliament claims the right of the service of its Members and employees in priority to a subpoena to attend as a witness in court '. . . upon the same principle as other personal privileges, viz. the paramount right of Parliament to the attendance and service of its Members'.[111] In the House of Representatives, when a Member has received a subpoena requiring his or her attendance in court on a day on which a Member could not be compelled to attend, it has been common for the Speaker to write to the court authorities asking that the Member be excused.

In 1966 the Treasurer was served with a subpoena requiring his attendance before the Supreme Court of Victoria. The Speaker wrote to the court drawing attention to the claims of the House concerning the attendance of Members. The judge ruled in accordance with the Speaker's representations, and excused the Treasurer from attendance.[112]

Subsection 15(2) of the *Evidence Act 1995* provides that a Member of a House of an Australian Parliament is not compellable to give evidence if this would prevent the Member from attending a sitting of his or her House, or a joint sitting, or a meeting of a committee of which he or she is a member.

ACTS CONSTITUTING BREACHES OF PRIVILEGE AND CONTEMPTS

By virtue of section 49 of the Constitution, the House has the ability to treat as a contempt:

> . . . any act or omission which obstructs or impedes . . . (it) . . . in the performance of its functions, or which obstructs or impedes any Member or officer . . . in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results . . . even though there is no precedent of the offence.[113]

Whilst the House thus has a degree of flexibility in this area, section 4 of the Parliamentary Privileges Act imposes a significant qualification:

109 *Jury Exemption Act 1965*, s. 4.
110 Jury Exemption Regulations, SR 186 of 1965.
111 *May*, 23rd edn, p. 125.
112 *Di Nardo v. Downer* (1966) Victorian Reports 351–2.
113 *May*, 23rd edn, p. 128.

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

This provision should be taken into account at all stages in the consideration of possible contempts. It is important also to recognise that the Act does not codify or enumerate acts or omissions that may be held to constitute contempts.[114]

Section 6 of the Act provides that words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a Member, thus abolishing a previous category of contempt. This provision does not apply to words spoken or acts done in the presence of a House or a committee. The Act also contains specific provisions dealing with the protection of witnesses (*see* p. 734) and the unauthorised disclosure of evidence (*see* p. 735).

In 1984 the Joint Select Committee on Parliamentary Privilege recommended the adoption, by resolution, of detailed guidelines which, whilst they would not prevent the House from pursuing a matter not covered by their provisions, would indicate matters that may be treated as contempts. Whilst draft guidelines were presented in the House in 1987,[115] action was not taken to adopt them. The committee also recommended the adoption of a policy of restraint in the exercise of the penal jurisdiction, proposing that each House should exercise its powers in this area only when satisfied that to do so was essential in order to provide reasonable protection for the House, its Members, its committees or its officers from such improper obstruction, or attempt at or threat of obstruction such as was causing, or likely to cause, substantial interference with their respective functions.[116] Although no explicit action was taken by the House to implement this recommendation, successive Speakers, in giving decisions on complaints raised, have had regard to the policy of restraint and have indicated support for it.[117]

The following paragraphs are confined mainly to a note of matters highlighted in *May* and a record of those matters which the House of Representatives has determined to be acts or conduct constituting breaches of privilege or contempt, some occurring before enactment of the Parliamentary Privileges Act. The experience of the House is limited and for guidance as to precedents of other acts found to constitute contempt by the House of Commons, reference is made to the experience of that as recorded in *May*.[118] In assessing the relevance to future cases of the precedents which do exist in the Commonwealth Parliament (and in the House of Commons), regard must be had to the provisions of the Parliamentary Privileges Act and, in particular, to section 4, which appears above. Appendix 25 contains a full listing of complaints raised in the House.

114 For judicial comment on s. 4 *see R. v. Theophanous* [2003] VSCA 70; *see also* Campbell, *Parliamentary Privilege* (2003), pp. 97–98, 211–2.
115 Proposed resolution incorporated in Hansard at H.R. Deb. (3.5.87) 2632. The Senate adopted a resolution to give effect to the recommendations on 25 February 1988.
116 PP 219 (1984) 83; H.R. Deb. (3.5.87) 2632–3.
117 E.g. H.R. Deb. (9.11.83) 2461; H.R. Deb. (29.4.86) 2698; H.R. Deb. (16.9.86) 750. The Senate has adopted resolutions on this matter, J 1987–89/520–1, 536.
118 *May*, 23rd edn, p. 128–132. It is stated at p. 128 'It is therefore impossible to list every act which might be considered to amount to a contempt'.

Misconduct

In the presence of the House or a committee

May states:

> Any disorderly, contumacious or disrespectful conduct in the presence of either House or a committee will constitute a contempt, which may be committed by strangers, parties or witnesses.[119]

The most frequent example of disorderly conduct on the part of strangers is the interruption or disturbance of the proceedings of the House by visitors in the galleries, generally seeking to publicise some political cause. In practice, disorderly conduct of this nature would not normally be pursued as a possible contempt but rather dealt with by other means (*see* Chapter on 'Parliament House and access to proceedings').

It should also be noted that section 15 of the Parliamentary Privileges Act provides:

> . . . for the avoidance of doubt, that, subject to the provisions of section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor (except as otherwise provided by that or any other law) in relation to:
>
> (a) any building in the Territory in which a House meets; and
>
> (b) any part of the precincts as defined by subsection (3) (1) of the *Parliamentary Precincts Act 1988*.

Section 11 of the *Parliamentary Precincts Act 1988* provides that the *Public Order (Protection of Persons and Property) Act 1971* applies to the precincts as if they were Commonwealth premises within the meaning of that Act.

Disobedience to the rules or orders of the House

Examples of this type of contempt include the refusal of a witness or other person to attend the House or a committee after having been summoned to attend and refusing to leave the House or a committee when directed to do so. 'To prevent, delay, obstruct or interfere with the execution of the orders of either House or its committees is also a contempt'.[120]

Curtin Case (1953): On 17 March 1953 the House resolved that contempt of its ruling and authority had taken place by a Member who had failed to observe an order for his exclusion from the Parliament building following his suspension from the House for using an unparliamentary expression. Following the resolution the Member made an apology to the House which the House resolved to accept and no further action was taken.[121]

Abuse of the right of petition

May states 'Any abuse of the right of petition may be treated as a contempt by either House'.[122] Precedents in this area include:

- frivolously, vexatiously or maliciously submitting a petition containing false, scandalous or groundless allegations against any person, whether a Member of such House or not, or contriving, promoting and prosecuting such a petition;
- inducing persons to sign petitions by false representations.[123]

119 *May*, 23rd edn, p. 128.
120 *May*, 23rd edn, p. 131.
121 VP 1951-53/809, 811.
122 *May*, 23rd edn, p. 131.
123 *May*, 23rd edn, p. 131 (footnote 8).

Forged or falsified documents

The presenting of a forged, falsified or fabricated document to either House or to a committee, with intent to deceive, has been treated as a contempt.[124]

In 1907 a committee of the House of Representatives reported that signatures to a petition were found to be forgeries and the House requested the Crown law authorities to take action with a view to criminal prosecution. The House was later advised, however, that prosecution for forgery would be unsuccessful.[125] In 1974 a letter published in a newspaper in the name of a Member was found by the Committee of Privileges to be a forgery and therefore appeared to constitute a criminal offence. As the author of the letter was unknown, no legal action could be taken.[126]

Conspiracy to deceive

To conspire to deceive either House or a committee of either House could be punished as a contempt. The abuse of the right of petition and forging or falsifying documents could be examples of this type of contempt.

Deliberately misleading the House

May states:

> The Commons may treat the making of a deliberately misleading statement as a contempt. In 1963 the House resolved that in making a personal statement which contained words which he later admitted not to be true, a former Member had been guilty of a grave contempt.[127] (*Profumo's Case*, CJ (1962–63) 246)

The circumstances surrounding the decision of the House of Commons in *Profumo's Case* are of importance because of the guidance provided in cases of alleged misrepresentation by Members. Mr Profumo had sought the opportunity of making a personal statement to the House of Commons to deny the truth of allegations currently being made against him. Later he was forced to admit that in making his personal statement of denial to the House, he had deliberately misled the House. As a consequence of his actions, he resigned from the House which subsequently agreed to a resolution declaring him guilty of a grave contempt.

Whilst claims that Members have deliberately misled the House have been raised as matters of privilege or contempt, the Speaker has not, to date, accepted such a claim.

On 16 September 1986 Speaker Child advised the House that she had appraised a statement to the House on 22 August by a Member, following her reference to remarks critical of her attributed to the Member. The Speaker, having examined the transcripts of the remarks in question, and comparing them to the Member's statement to the House, claimed that he had misled the House and this action, in her opinion, constituted a contempt of the House. The Member then addressed the House on the matter. The Chairman of Committees then moved a motion to the effect, inter alia, that the Member's statement to the House on 22 August 'being clearly at odds with his original comments, misled the House, and thus constitutes a contempt of the House . . .' After debate, and the Member having again withdrawn the remarks to which attention had been drawn, and having again

124 *May*, 23rd edn, p. 131 (footnote 8).
125 VP 1907–08/165, 267.
126 House of Representatives Committee of Privileges, *Report relating to a letter fraudulently written in the name of the honourable Member for Casey published in the Sun-News Pictorial on 6 December 1973*, PP 65 (1974); VP 1974/98.
127 *May*, 23rd edn, p. 132.

apologised, the motion was withdrawn, by leave[128] (*and see* Chapters on 'The Speaker, Deputy Speakers and officers' and 'Motions').

Corruption in the execution of their office as Members

Section 141.1 of the Criminal Code deals with the offences of bribery of Commonwealth public officials. It provides for penalties of 10 years imprisonment for both giving and receiving bribes, and Members of Parliament are encompassed by the term 'Commonwealth public official'.[129]

As well as being a crime, corruption in connection with the performance of a Member's duties as a Member could also be punished as a contempt.

May states:

> The acceptance by a Member of either House of a bribe to influence him in his conduct as a Member, or of any fee, compensation or reward in connection with the promotion of or opposition to any bill, resolution, matter or thing submitted or intended to be submitted to either House, or to a committee is a contempt.[130]

Section 45 of the Constitution also applies—*see* 'Qualifications and disqualifications' in Chapter on 'Members'.

Advocacy by Members

May records that in 1995 the House of Commons, adding to a 1947 resolution, resolved that

> no Member . . . shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, . . . advocate or initiate any cause or matter on behalf of any outside body or individual; or urge any Member of either House of Parliament, including Ministers, to do so, by means of any speech, Question, Motion, introduction of a bill, or amendment to a Motion or Bill.[131]

In Australia section 45 of the Constitution also applies—*see* 'Qualifications and disqualifications' in Chapter on 'Members'.

Obstructing Members and House employees in the discharge of their duty

To cause or effect the arrest of a Member in a civil cause during periods when the immunity conferred by the Parliamentary Privileges Act applies could be pursued as a contempt (*see* p. 724); so too could molestation of a Member while attending, coming to or going from the House.

In 1986 the Committee of Privileges considered a case in which the work of a Member's electorate office had been disrupted as a result of a considerable number of telephone calls received in response to false advertisements in a newspaper. The committee's report stated that the actions in question were to be deprecated; that in all the circumstances it did not believe that further action should be taken; but that harassment of a Member in the performance of his or her work by means of repeated or nuisance or orchestrated telephone calls could be judged a contempt.[132]

128 VP 1985–87/1089, 1090, 1101–2.

129 Formerly covered by s. 73A of the *Crimes Act 1914*. In June 2002 a person was convicted and imprisoned for a number of offences, including a breach of section 73A, committed when he had been a Member, although an appeal succeeded in respect of one charge (*R v. Theophanous*, County Court, Victoria). *And see* p. 717 for comments in subsection 16(3) of the Parliamentary Privileges Act.

130 *May*, 23rd edn, p. 132, *see also May*, p. 137.

131 *May*, 23rd edn, p. 97.

132 House of Representatives Committee of Privileges, *Disruption caused to the work of the electorate office of the honourable Member for Wentworth made in response to false advertisements in the Sydney Morning Herald of 20 September 1986*, PP 282 (1986) 5–6.

The Committee of Privileges has also considered the effect of industrial action which involved bans on the delivery of mail to, and the despatch of mail from, Members' electorate offices. It found that the actions had disrupted the work of electorate offices, and impeded the ability of constituents to communicate with Members, but that as the actions were not taken with any specific intention to infringe the law concerning the protection of Parliament an adverse finding should not be made.[133]

In 1995 the committee reported on a complaint following the execution, by officers of the Australian Federal Police, of a search warrant on the electorate office of a Member. The committee concluded that, although the work of the Member's electorate office had undoubtedly been disrupted, and that although the actions complained of amounted to interference in the free performance by the Member of his duties as a Member, the interference could not be regarded as improper interference as required by section 4 of the Act and so no contempt had been committed.[134]

The Parliamentary Privileges Act also confers, by section 14, immunity from arrest in civil causes of officers required to attend on a House or a committee for certain periods (*see* p. 725). The obstruction of House employees in the execution of their duty, or other people entrusted with the execution of its orders, or the molestation of those people on account of their having carried out their duties, could be found to be a contempt. To commence proceedings against such people for their conduct in obedience to the orders of the House could be pursued as a possible contempt.

Attempts by improper means to influence Members in the performance of their duties

The offer of a benefit or bribe

As well as being a criminal offence,[135] punishable by 10 years imprisonment, the offering of bribes to Members to influence them in their parliamentary conduct is equally a contempt.

Intimidation etc. of Members

To attempt to influence a Member in his or her conduct as a Member by threats, or to molest any Member on account of his or her conduct in the Parliament, is a contempt. So too is any conduct having a tendency to impair a Member's independence in the future performance of his or her duty, subject, since 1987, to the provisions of the Parliamentary Privileges Act.

'BANKSTOWN OBSERVER' (BROWNE/FITZPATRICK) CASE

On 8 June 1955 the Committee of Privileges reported to the House that it had found:

- That Messrs Fitzpatrick and Browne were guilty of a serious breach of privilege by publishing articles intended to influence and intimidate a Member (Mr Morgan), in his conduct in the House, and in deliberately attempting to impute corrupt conduct as a Member against him, for the express purpose of discrediting and silencing him. The committee recommended that the House should take appropriate action.

133 PP (122) 1994.

134 PP 336 (1995); *and see* p. 713 re the status of Members' records.

135 *Criminal Code Act 1995*, s. 141.1.

- That there was no evidence of improper conduct by the Member in his capacity as a Member of the House.
- That some of the references to the Parliament and the Committee of Privileges contained in the newspaper articles constituted a contempt of the Parliament. However, the committee considered the House would best consult its own dignity by taking no action in this regard.[136]

The committee's inquiry and report followed a complaint made by a Member (Mr Morgan) on 3 May 1955 that an article published on 28 April 1955 in a weekly newspaper known as the *Bankstown Observer*, circulating in his electorate, had impugned his personal honour as a Member of Parliament and was a direct attack on his integrity and conduct as a Member of the House.[137]

The committee's report and findings were considered by the House on 9 June 1955 and a motion moved by the Prime Minister 'That the House agrees with the Committee in its Report' was agreed to without division. On a further motion of the Prime Minister it was resolved that Messrs Browne and Fitzpatrick be notified that at 10 a.m. the following day the House would hear them at the Bar before proceeding to decide what action it would take in respect of their breaches of privilege.[138]

On being brought to the Bar of the House the following morning[139] Mr Fitzpatrick sought permission for his counsel to act on his behalf. The request was refused by the Speaker and Mr Fitzpatrick apologised to the House for his actions and withdrew. Mr Browne was then brought to the Bar and addressed the House at some length without apologising and withdrew.

Following a suspension of 51 minutes, the House resumed and the Prime Minister moved motions in respect of Messrs Fitzpatrick and Browne to the effect that, being guilty of a serious breach of privilege, they should be imprisoned for three months and that the Speaker should issue warrants accordingly. The Leader of the Opposition moved, as an amendment, that both motions be amended to read:

> That this House is of opinion that the appropriate action to be taken in these cases is the imposition of substantial fines and that the amount of such fines and the procedure of enforcing them be determined by the House forthwith.

Following considerable debate, the amendment was defeated, on division, and the motions of the Prime Minister agreed to, on division.

The action taken by the legal representatives of Messrs Browne and Fitzpatrick to apply to the High Court for writs of habeas corpus and their subsequent petition to the Judicial Committee of the Privy Council for special leave to appeal against the decision of the High Court is referred to earlier (*see* p. 709).

CASE INVOLVING HON. G. G. D. SCHOLES, MP

In 1990 the Committee of Privileges reported on actions taken by a solicitor in respect of the Hon. G. G. D. Scholes, MP. Mr Scholes had distributed certain information within his electorate, and had subsequently received a letter from a solicitor acting on behalf of a client affected by the information. The letter, inter alia, asked that Mr Scholes refrain from

136 H of R 2 (1954–55) 7. For a full account of this case see J. A. Pettifer, 'The case of the *Bankstown Observer*', *The Table* XXIV, 1955, pp. 83–92.
137 VP 1954–55/184; H.R. Deb. (3.5.55) 552–3.
138 VP 1954–55/287.
139 For proceedings on this day see VP 1954–55/269–71; H.R. Deb. (10.6.55) 1625–65.

making such statements in the future, and stated that if assurances sought were not forthcoming, the solicitor would advise his client to initiate proceedings. Mr Scholes argued that the threat would inhibit him in carrying out his duties as a Member, but the committee found that there was not sufficient evidence to lead it to a conclusion that the statement should be found to constitute an attempt by improper means to influence Mr Scholes in respect of his participation in proceedings in Parliament.[140]

CASES INVOLVING LETTERS WRITTEN BY MEMBERS

In the *Nugent Case* (1992) and the *Sciacca Case* (1994) the Committee of Privileges considered complaints about actions or threatened actions to sue Members on account of statements made in letters to Ministers. The substance of the Members' complaints was that they had been subject to improper interference in the performance of their duties as Members. In the case of Mr Nugent, the committee found that the terms of the letter containing the threat and the circumstances of its receipt had a tendency to impair Mr Nugent's independence in the performance of his duties, although it did not find that a contempt had been committed.[141] The House subsequently resolved that the persons responsible should be required to apologise[142] and they did so.[143] In the case of Mr Sciacca, the committee found that although Mr Sciacca had felt constrained, there was no evidence of an attempt to interfere improperly in the performance of his duties and a finding of contempt should not be made.[144]

CASE INVOLVING MR KATTER, MP

In this case the committee was required to consider a complaint that action to sue a person who had sworn a statutory declaration and given it to a Member (who had used it in the course of proceedings in the House) amounted to improper interference in the performance of the Member's duties. The committee concluded that no evidence had been produced which would establish that the actions complained of amounted to or were intended or likely to amount to improper interference in the free performance by Mr Katter of his duties as a Member. Accordingly, it found that a contempt had not been committed.[145]

BROWN CASE (U.K.)

In 1947 the House of Commons Committee of Privileges inquired into a complaint that certain actions of the Executive Committee of a union were calculated, improperly, to influence a Member (Mr Brown) in the exercise of his parliamentary duties. The Member had for many years been employed by the union. Upon his election to Parliament, the union entered into a contractual relationship with him that, whilst remaining a Member, he would hold an appointment with the union and would continue to receive a salary and certain other advantages, although his contract entitled him 'to engage in his political activities with complete freedom'. The Member complained that the effect of a sequence of events was such as to bring pressure on him to alter his conduct as a Member and to change the free expression of his views under the threat that, if he did not do so, his position as an official of the union would be terminated or rendered intolerable. The Committee of Privileges found that, in the particular circumstances, the action of the union did not in fact

140 PP 428 (1990) 7.
141 PP 118 (1992).
142 VP 1990–92/1487, 1540, 1551.
143 VP 1990–92/1633.
144 PP 78 (1994).
145 PP 407 (1994). (See also p. 713).

affect the Member in the discharge of his parliamentary duties. However, in its report [illegible] committee stated:

> Your Committee think that the true nature of the privilege involved in the present case can be [illegible] as follows:
>
> It is a breach of privilege to take or threaten action which is not merely calculated to affect a Member's course of action in Parliament, but is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward.[146]

Chairman of the Sydney Stock Exchange case (1935)

The House resolved on 28 March 1935 that a letter written by the Chairman of the Sydney Stock Exchange, allegedly making a threat and reflecting on the motives and actions of a Member, did not amount to a breach of privilege but was, in effect, an exercise of the right of an individual to defend himself. The House considered, however, that the Chairman was in error in addressing a letter to the Speaker instead of direct to the Member concerned.[147]

Offences against witnesses

Standing order 256 states that:

> Any witness giving evidence to the House or one of its committees is entitled to the protection of the House in relation to his or her evidence.

As well as being able to be punished as a statutory offence (*see below*), intimidation, punishment, harassment of or discrimination against witnesses or prospective witnesses may be punished as a contempt and, technically, there is no prohibition on a person being punished for such a contempt as well as being prosecuted under the Parliamentary Privileges Act. *May* states:

> Any conduct calculated to deter prospective witnesses from giving evidence before either House or a committee is a contempt.[148]
>
> Both Houses will treat the bringing of legal proceedings against any person on account of any evidence which he may have given in the course of any proceedings in the House or before one of its committees as a contempt.[149]

Section 12 of the Parliamentary Privileges Act provides that a person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving such evidence. Further, under the Act a person shall not inflict any penalty or injury upon or deprive of any benefit, another person on account of the giving or proposed giving of any evidence or any evidence given or to be given, before a House or a committee. These penalties, in each case, are $5 000 for natural persons and $25 000 for corporations. These provisions do not prevent the imposition of a penalty in respect of an offence against an Act establishing a committee.[150]

Breach of the immunity of persons required to attend before the House or a committee from arrest in civil causes (and from compulsory attendance before a court or a tribunal as

146. House of Commons Committee of Privileges, *Report*, HC 118 (1947) xii.
147. VP 1934–37/249–50.
148. *May*, 23rd edn, p. 150.
149. *May*, 23rd edn, p. 151.
150. *Parliamentary Privileges Act 1987*, s. 12(3).

witness) on days when they are required by the House or committee could be regarded as contempt.[151]

Berthelsen Case (1980) and other cases

A matter of alleged discrimination against and intimidation of a witness who had given evidence to a parliamentary subcommittee was referred to the Committee of Privileges in 1980.[152] Although the committee was not satisfied, on the evidence, that a breach of privilege had been proved against any person, it found that the witness had been disadvantaged in his career prospects in the public service. The House, on the recommendation of the committee, and being of the opinion that the report be given full consideration early in the 32nd Parliament, resolved that the Public Service Board be requested to do all within its power to restore the career prospects of the witness and ensure that no further disadvantage was suffered as a result of the case. A document from the Public Service Board informing the House of action taken in respect of Mr Berthelsen was presented on 24 February 1981.[153]

On three other occasions the Committee of Privileges has considered allegations that witnesses had been discriminated against or penalised on account of their participation in committee inquiries, but in no case did the committee find that a contempt had been committed.[154] The Senate Committee of Privileges has also reported on a number of complaints of this nature.[155] (*And see* Chapter on 'Parliamentary committees').

Acts tending indirectly to obstruct Members in the discharge of their duty

Reflections on Members

Following a recommendation of the Joint Select Committee on Parliamentary Privilege, the Commonwealth Parliament, in 1987 with the enactment of the Parliamentary Privileges Act, 'abolished' the previous category of contempt constituted by reflections on Parliament, a House or a Member. Section 6 of the Act provides:

> Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

However, this provision does not apply to words spoken or acts done in the presence of a House or a committee. This qualification would enable a House or a committee to take action if, for instance, a member of the public made insulting or offensive remarks during a sitting or meeting. Under the Act words or acts could also be pursued if, for example, they constituted intimidation. The section is confined to preventing the punishment of defamatory or critical remarks 'by reason only that they are defamatory or critical'.

Premature publication or disclosure of committee proceedings, evidence and reports

Standing order 242 provides (in part) that:

151. Section 14 of the Parliamentary Privileges Act provides that persons required to attend before a House or a committee, shall not be required to attend before a court or a tribunal, or be arrested or detained as a civil cause, on that day.
152. House of Representatives Committee of Privileges, *Report relating to the alleged discrimination and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him to a subcommittee of the Joint Committee on Foreign Affairs and Defence*, PP 158 (1980); VP 1978–80/1372, 1375, 1417, 1422, 1672–3.
153. VP 1981–83/80.
154. PP 455 (1991); PP 136 (1994); PP (208) 2001.
155. E.g. PP 461 (1989); PP 258 (1991); PP 235 (1992); PP 85 (1993). *And see Odgers*.

(b) A committee's or subcommittee's evidence, documents, proceedings and reports may not be disclosed or published to a person (other than a member of the committee or parliamentary employee assigned to the committee) unless they have been:

(i) reported to the House; or

(ii) authorised by the House, the committee or the subcommittee.

The standing order further provides that a committee may resolve to publish press releases, discussion or other papers or preliminary findings. It also provides that a committee may resolve to divulge evidence, documents, proceedings or reports on a confidential basis to persons for comment.[156] In addition, the standing order allows a committee to resolve to authorise Members to give public briefings on matters related to an inquiry. The committee must determine the limits of the authorisation.[157] A Member must not disclose proceedings, evidence or documents not specifically authorised.

Most evidence taken by parliamentary committees is taken in public and publication of the evidence is expressly authorised. However, the publication or disclosure of evidence taken in private, of private deliberations and of draft reports of a committee before their presentation to the House, have been pursued as matters of contempt (*and see* Chapter on 'Parliamentary committees').

A Member wishing to raise a complaint in this area must raise it in the House at the first appropriate opportunity. The Member is not required to go into the detail of the matter, but must identify the committee and the nature of the concern. If it has not already done so, the committee in question must then consider the matter—in particular it must consider whether the matter has caused or is likely to cause substantial interference with its work, with the committee system or with the functioning of the House. The committee must also take whatever steps it can to ascertain the source(s) of the disclosure(s). The committee must inform the House of the results of its consideration and, if it finds that substantial interference has occurred, it must explain why it has reached that conclusion.[158] The issue is then considered by the Speaker, who determines whether or not to allow precedence to a motion on the matter. Should a committee conclude that substantial interference has not occurred the House should be informed accordingly.[159]

On a number of occasions the House has referred issues of the unauthorised disclosure of committee evidence, reports or proceedings to the Committee of Privileges. Appendix 25 contains a list of such references and a precis of the committee's findings in each case. The committee's reports indicate the difficulty of reaching a satisfactory outcome in such inquiries. The committee has expressed the view that complaints in this area should not be given precedence unless the Speaker is of the opinion that there is sufficient evidence to enable the source(s) of disclosure to be identified or that there are such special circumstances (for example, the protection of sources or witnesses) as would warrant reference to the committee.[160]

Specific statutory provisions have been included in the Parliamentary Privileges Act. Section 13 of the Act provides that:

156 S.O. 242(c)

157 S.O. 242(d)

158 These requirements were first applied in 1990, but were set out more comprehensively in a statement by Speaker McLeay in 1992—H.R. Deb. (17.9.92) 1889–90; H.R. Deb. (7.5.92) 2661–2; VP 1990–92/ 187, 1489; for precedents *see*, for example, H.R. Deb. (18.8.95), 2087–8; H.R. Deb. (27.10.93) 3654; H.R. Deb. (8.11.95) 10630–1; H.R. Deb. (24.3.99) 4288–9; H.R. Deb. (9.11.2000) 22655–7.

159 H.R. Deb. (7.5.92) 2661–2. For precedents *see* e.g. H.R. Deb. (23.11.93) 3401–2; H.R. Deb. (5.5.94) 365; H.R. Deb. (2.10.97) 9594–[illegible] A detailed statement has been made on such an occasion—H.R. Deb. (29.6.94) 2292–3.

160 PP 26 (1995) 7.

A person shall not, without the authority of a House or a committee, publish or disclose—

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence,

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalties under the section are $5 000 in the case of a natural person and $25 000 in the case of a corporation. Technically, a breach could be pursued both as a contempt and a statutory offence, but this is unlikely in most circumstances.

See also Chapter on 'Parliamentary committees'.

Other offences

May states:

> Other acts besides words spoken or writings published reflecting upon either House or its proceedings which, though they do not tend directly to obstruct or impede either House in the performance of its functions, yet have a tendency to produce this result indirectly by bringing such House into odium, contempt or ridicule or by lowering its authority may constitute contempts.[161]

An instance of this type of contempt is disorderly conduct within the precincts of either House while such House is sitting or during committee proceedings, although, as indicated earlier in this chapter, such conduct is usually dealt with by other means. In the assessment of any complaint in this area, regard would need to be had to the provisions of section 4 of the Parliamentary Privileges Act.

May also cites in this category of contempt 'serving or executing civil or criminal process within the precincts of either House while the House is sitting without obtaining the leave of the House'.[162] Parliament House is not considered to be an appropriate place in which to serve such documents and, for example, service, or attempted service, on a Member on a sitting day, or on a day on which a Member was to participate in a committee meeting, could be complained of as a contempt.

On 6 October 1922 a complaint was made in the House of Representatives that a summons had been served upon a Member, Mr Blakeley, in the precincts of the House while the House was sitting.[163] The Attorney-General expressed the opinion that it was not desirable to proceed further in the case but that 'those entrusted with the service of process of the Court should take steps to have summonses served in the ordinary way, as it is not a desirable practice that service should, under any circumstances, be made within the precincts of this House while the House is sitting'.

Interference with the administration of the Parliament

On 24 October 1919 the Speaker drew to the attention of the House a matter concerning the Economies Royal Commission 'as it affected the privileges of Parliament'. The Royal Commission proposed to investigate expenditure in connection with parliamentary services and the Speaker said that as it had no authority from the Parliament to interfere in any way with the various services of Parliament, it was his duty to call attention to the proposed serious encroachment on the rights and privileges of Parliament by a tribunal to inquire into

161 *May*, 23rd edn, p. 142.

162 *May*, 23rd edn, p. 142.

163 VP 1922/190, 201; H.R. Deb. (6.10.22) 3337–8; H.R. Deb. (11.10.22) 3555.

matters over which the legislature had absolute and sole control. The Government gave an assurance that no privileges of the Parliament would be in any way infringed by the operation of the Royal Commission.[164]

PENAL JURISDICTION OF THE HOUSE

Power and source

By section 49 of the Constitution the House of Representatives acquired the powers, privileges and immunities of the House of Commons as at 1 January 1901, until the Parliament otherwise declared. In the absence of such a declaration of those powers, privileges and immunities until 1987 with the enactment of the Parliamentary Privileges Act, they remained those of the House of Commons as at 1 January 1901.

The High Court judgment in the case of Browne and Fitzpatrick (*see* p. 731) left no doubt that the House of Representatives possessed all of the powers, privileges and immunities of the Commons, and the Parliamentary Privileges Act provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and the committees and Members of each House, as in force under section 49 before the commencement of the Act, continue.

The power of the House to punish by means of imposing a fine on persons found to have committed a breach of privilege or a contempt was problematic, but the issue was resolved by the provisions of section 7 of the Parliamentary Privileges Act (*see* p. 740).

The means by which the Houses may enforce the observance of their privileges and immunities, and punish people found guilty of contempt, include:

- commitment to prison (*see* p. 739);
- imposition of a fine (*see* p. 740);
- (public) reprimand or admonishment (*see* p. 740);
- exclusion from the precincts (*see* p. 741); or
- requirement for an apology—publicly, if appropriate (*see* p. 742).

In a case in which an offence may be adjudged a breach of privilege or a contempt but also an offence at law, or in which penalties available to the House are considered inadequate, or for some other reason, the House may choose not to exercise its power of punishment. Alternatively, it is a recognised right of a House to request government law officers to prosecute an alleged offender and it would also be possible to initiate a private prosecution. Section 10 of the *Parliamentary Precincts Act 1988* provides that the functions of the Director of Public Prosecutions in respect of offences committed in the precincts shall be performed in accordance with general arrangements agreed between the Presiding Officers and the Director of Public Prosecutions.

There is no case of the House directing or requesting the law officers to prosecute, per se.[165] In 1907 a committee of the House reported that signatures to a petition were found to be forgeries and the House 'requested' the Crown law authorities to take action with a view to criminal prosecution. The House was later advised, however, that prosecution for forgery would be unsuccessful.[166] In 1974 a letter published in a newspaper in the name of a Member was found by the Committee of Privileges to be a forgery and therefore appeared to constitute a criminal offence. As the author of the letter was unknown no legal action could be taken.[167]

Although the House may consider that a breach of privilege or a contempt has been committed it may take no further action[168] or it may decide, having regard to the circumstances of the case, to 'consult its own dignity' by taking no punitive action[169] (*and see Browne/Fitzpatrick Case*, p. 731).

Another course of action adopted by the House of Representatives in respect of enforcing its privileges was by resolution requesting that remedial action be taken by the Public Service Board to restore the career prospects of a public service witness who was found by the Committee of Privileges to have been disadvantaged as a result of his involvement with a parliamentary subcommittee.[170]

Commitment

Section 7 of the Parliamentary Privileges Act provides that the House may impose a penalty of imprisonment for a period not exceeding six months for an offence against it. Such a penalty is not affected by prorogation or dissolution. Before the enactment of this provision, the House, under section 49 of the Constitution, possessed the same power in this area as the House of Commons in 1901; the Commons was considered to be without the power to imprison for a period beyond the session, although apart from this constraint there were no other limits in terms of the length of committal.[171]

On the only occasion when the House of Representatives has exercised its power of commitment (*see* p. 731), Messrs Browne and Fitzpatrick, in 1955, were committed for three months. No prorogation or dissolution of the Parliament intervened during the period of their imprisonment and they served the full period of their commitment.

Form of warrant

Section 9 of the Parliamentary Privileges Act states:

> Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

In the House of Commons warrants for commitment issued by the Speaker on the order of the House have sometimes been expressed in general terms to the effect that the person is committed for a 'high contempt' or a breach of privilege. On other occasions, particular facts constituting the contempt have been stated. If the form of the warrant is general, it has been held that it is not competent for the courts to inquire further into the matter. If the particular facts have been stated on the warrant, the courts have taken divergent views as to their duty of inquiry.

The High Court decision in the *Browne/Fitzpatrick Case* (1955) stated:

164 VP 1917–19/587; *see also* Ch. on 'Parliament House and access to proceedings'.

165 It is of interest to note that in 1922 the Attorney-General, having promised to do so, examined and advised the House concerning the service of a summons on a Member in the precincts of Parliament House, VP 1922/190, 201.

166 VP 1907–08/165, 267.

167 *'Sun News Pictorial' Case* (1973), PP 65 (1974); VP 1974/98.

168 *'South Australian Worker' Case* (1921), VP 1929–31/613; *'Sunday Sun' Case* (1933), VP 1932–34/753.

169 *See 'Sun' Case* (1951), VP 1951–53/171; *'Daily Telegraph' Case* (1971), VP 1970–72/901–2. For other examples *see Unus Case* (1971), PP 40(1971), VP 1970–72/667; *'Sunday Observer' Case* (1978) 'actions of editor not worthy of occupying the time of the House', PP 120 (1978), VP 1978–80/147–8.

170 *Berthelsen Case* (1980), PP 158 (1980), VP 1978–80/1672–3.

171 *May*, 23rd edn, pp. 160–1.

If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and [the] objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with cases by which it was finally established, namely, the *Case of the Sheriff of Middlesex*.[172]

Because particulars of the matters determined to constitute the offence must, by virtue of section 9 of the Parliamentary Privileges Act, be set out in the resolution imposing the penalty and the warrant committing the person, the effect of the case law that has been established is therefore that a court may review a decision to impose a penalty of imprisonment to determine whether the conduct or action in question was capable of constituting an offence.[173]

Subsection 7(4) of the Act enables the House to delegate to the Speaker the authority to have a person released from prison when the House is not sitting. Such authority could, for example, be used if a person was committed following a refusal to give information to a committee but then, after being committed, agreed to provide the information sought.

Imposition of a fine

The House, under section 7 of the Parliamentary Privileges Act, may impose a fine not exceeding $5 000 in the case of a natural person, and not exceeding $25 000 in the case of a corporation. Subsection 7(6) provides that such fines are debts due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by the House for that purpose. A fine and imprisonment may not be imposed for the same offence.

For many years there had been substantial doubt as to whether the Houses had the power to impose fines, the issue turning, because of the provisions of section 49 of the Constitution, on whether the House of Commons had such power in 1901. This was because the House of Commons had not imposed fines on persons found guilty of breach of privilege or contempt since 1666. The matter was finally resolved by the insertion of a provision conferring the power to fine in the Parliamentary Privileges Act. At the time of publication neither House had exercised this power.

Reprimand or admonishment

Another acknowledged form of penalty available to the Houses is that of public reprimand or admonishment at the Bar of the House or Senate by the Speaker or President, as the case may be. Any reprimand or admonishment is in the name and with the authority of the House concerned. The House has not used the procedure of requiring the attendance of a privilege offender at the Bar of the House to receive a reprimand by the Speaker.

In the *BMC Case* (1965) the Committee of Privileges found that an advertisement[174] which appeared in the *Canberra Times* and other newspapers on 18 August 1965 represented a breach of privilege. The committee also found that the ultimate responsibility for publication of the advertisement lay with ten named individuals, and that the publication

172 *R v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 162; (*and see* p. 709).
173 Parliamentary Privileges Bill 1987—explanatory memorandum.
174 The advertisement contained a reproduction of a photograph of the Leader of the Opposition addressing the House and was used for the purpose of advertising products of the British Motor Corporation (Aust) Pty Ltd.

was done without malice towards the House or any Member, or intent to libel any Member, and appeared through negligence and lack of appreciation of what was involved.[175]

The committee made no recommendation to the House as to what action it might take in respect of the offenders. A number of apologies by those involved were received or printed prior to the presentation of the committee's report to the House.[176]

On 23 September 1965, on the motion of the Prime Minister, the House agreed that the advertisement involved a breach of privilege, that it was defamatory of the Leader of the Opposition and, while it accepted that it was published without malice and apologies had been made, the House recorded its 'censure of the advertisement and its reprimand to those concerned in its publication'. The House further resolved that 'those newspapers who published the advertisement should publish this resolution in full'. The resolution was transmitted to the named offenders.[177]

In 1971 two people found guilty of a breach of privilege were called to the Bar of the Senate and were reprimanded by the Deputy President. The background to this case was that on 4 May 1971 articles published in the *Sunday Australian* and the *Sunday Review* newspapers allegedly contained certain findings and recommendations of a Senate select committee which had not been reported to the Senate.[178]

The committee reported to the Senate that the publication constituted a breach of the privileges of the Senate and that the editor and publisher of each of the newspapers were the people responsible and culpable in the breach of privilege. On the recommendation of the committee, the two editors were required to attend before the Senate, where they were reprimanded by the Deputy President.[179]

Exclusion of persons from precincts

In respect of persons working in or using the facilities of the Parliament, including those of the parliamentary press gallery, a person's pass may be withdrawn, thereby depriving the person or the person's organisation of access to the Parliament building. Control of access to such facilities is under the authority of the Presiding Officers (*and see* Chapter on 'The Speaker, Deputy Speakers and officers').

In 1912 a notice of motion proposing the exclusion of representatives of the *Age* newspaper from the press gallery for statements concerning a Member was withdrawn following an apology.[180] Later that year the House agreed, without debate, to a motion, concerning misrepresentation of Members in newspapers. The motion proposed that if the House accepted a statement by a Member to the effect that an article was erroneous, misleading or injurious, representatives of the newspaper concerned should be excluded from the premises until the newspaper published the Member's explanation.[181]

In June 1942 the President as 'custodian of the rights and privileges of the Senate' demanded an apology from certain newspaper representatives for the publication of an article reflecting on the Senate. When no apology was forthcoming, action was taken to

175 PP 210 (1964–66) 7.
176 PP 210 (1964–66) 18–19.
177 VP 1964–66/586.
178 *J* 1970–72/555.
179 Senate Committee of Privileges, *Report upon articles in the Sunday Australian and the Sunday Review of 2 May 1971*, PP 163 (1971) 3; *J* 1970–72/606, 612.
180 VP 1912/91.
181 VP 1912/505.

exclude the persons from the precincts of the Senate, after which similar action was [illegible] by the Speaker in respect of the precincts of the House.[182]

Apology

Before the current provisions concerning defamatory contempts were enacted [illegible] were precedents in the House of Representatives for the publication of a suitable [illegible] from offenders in a class of cases involving reflections on the House or its Members [illegible] speech, action or writing being considered an acceptable action. While not inflicting punishment, in its strict sense, the House considered this course sufficient vindication [illegible] authority.[183]

On a number of occasions under the previous provisions comments published [illegible] newspapers, or other publications, have been regarded by the House as reflections on [illegible] and its Members and those responsible have been adjudged guilty of contempt.[184] An apology may also be considered appropriate in relation to other categories of contempt.

In 1992 the Committee of Privileges reported that the terms of a letter threatening [illegible] action against a Member (following a letter the Member had written to a Minister) and the circumstances of its receipt had had a tendency to impair the Member's performance of [illegible] duties. Although the committee did not make a finding that a contempt had been committed, the House resolved that the persons responsible should be required to apologise, and [illegible] did so, a letter of apology being received and reported by the Speaker.[185]

PUNISHMENT OF MEMBERS

In respect of Members whom the House determines have committed contempts, [illegible] House's power to punish includes commitment or reprimand but has a further dimension, namely, suspension for a period from the service of the House. In some cases an apology by the Member concerned may forestall further action.

Action taken by the House to discipline its Members for offensive actions or words in the House[186] may be regarded as based on the concept of privilege, but in practice these offences are dealt with as matters of order (offences and penalties under the standing orders) rather than as matters of privilege or contempt.[187]

Apology

A Member has apologised for remarks reflecting on the Chairman of Committees which were published in a newspaper, and in view of the apology a motion that he be suspended from the service of the House was withdrawn.[188] When (before the enactment of the

182 S. Deb. (2.6.42) 1806, 1818–19; S. Deb. (3.6.42) 1897; H. R. Deb. (3–6.6.42) 2187. Press passes may be withdrawn for other reasons: see Ch. on 'Parliament House and access to proceedings'.

183 On 17 March 1953 the House resolved 'that contempt of its ruling and authority' had taken place by a Member who remained in the precincts when he had earlier been excluded from the building (*Carnie Case*). The Member having apologised, the House resolved to accept the apology and no further action was taken, VP 1951–53/809, 811.

184 For details see the 1st, 2nd and 3rd editions and Appendix 25.

185 PP 118 (1992); VP 1990–92/1487, 1540, 1551, 1633.

186 VP 1913/151–3; VP 1914–17/181; see also VP 1929–31/913, VP 1945–46/63.

187 Notwithstanding the right of Members to freedom of speech the report of the Committee of Privileges relating to remarks made in the House (H.R. Deb. (26.5.55) 1000) by a Member (together with other matters) found that the remarks of the Member were not a matter of privilege but one of order. The committee stated that all words in the House are privileged, but the House is able to place restraint on the conduct of Members including their offensive accusations against other Members. *'Argus' Case* (1955) (report not printed). *See also* VP 1983–84/435–6, 490–2 re censure of a Member *and see* 'Motions of [illegible] confidence or censure' in Ch., on 'Motions'.

188 The matter was raised as a matter of privilege, VP 1945–46/63; *see also* H.R. Deb. (9.3.29) 856–65.

Parliamentary Privileges Act) a Member reflected on the Speaker outside the House, a motion was moved that the comments constituted a breach of the privileges of the House. The motion was withdrawn by leave when the Member again withdrew the remarks and apologised.[189]

Suspension

In the *McGrath Case* (1913) a Member was suspended from the service of the House for a statement made outside the House which reflected on the Speaker. The Member was suspended '. . . for the remainder of the Session unless he sooner unreservedly retracts the words uttered by him at Ballarat . . . and reflecting on the Speaker, and apologises to the House'. However, in the next Parliament the House resolved to expunge the resolution of suspension from the journals of the House 'as being subversive of the right of an honourable Member to freely address his constituents'.[190]

In the *Tuckey Case* (1987) a Member was suspended for seven sitting days, including the day of suspension, following remarks critical of the Speaker made outside the House.[191]

In the *Aldred Case* (1989) a Member was suspended for two sitting days. The Committee of Privileges had found that the Member had offended against the rules of the House in making certain statements about another Member which the committee concluded should have been put forward in a substantive motion. The House adopted the report and called on the Member to withdraw the allegation and apologise. He declined to do so and was suspended for two sitting days.[192]

Former power of expulsion

The only occasion the House has exercised the power of expulsion was in the *Mahon Case* (1920) when a Member was expelled for 'seditious and disloyal utterances' made outside the House making him, in the judgment of the House, 'guilty of conduct unfitting him to remain a Member'.[193]

Since the enactment of the Parliamentary Privileges Act neither House has had the power to expel a Member from its membership.[194]

MANNER OF DEALING WITH PRIVILEGE AND CONTEMPT

Raising of matter

A Member may raise a matter of privilege at any time during a sitting. The Member raising a matter must be prepared to move without notice, immediately or subsequently, a motion declaring that a contempt or breach of privilege has been committed, or referring the matter to the Committee of Privileges.[195]

When a Member raises a matter of privilege the Speaker may reserve the matter for further consideration, or may give the matter precedence and invite the Member to move

189 VP 1985–87/1088, 1090, 1101–2.

190 VP 1913/151–3; VP 1914–17/181.

191 VP 1985–87/1467–8.

192 PP 498 (1989); VP 1987–89/1685–8.

193 VP 1920–21/423, 425, 431–3, *and see* Ch. on 'Members'.

194 *Parliamentary Privileges Act 1987*, s. 8. *See also* Campbell, *Parliamentary Privilege* (2003), pp. 213–221.

195 S.O. 51(a).