

THIRD ANNUAL LLOYD BARNETT LECTURE  
TO THE COUNCIL OF LEGAL EDUCATION  
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HYATT REGENCY HOTEL  
by Adrian D. Saunders

It is an excellent thing not to await a man's decease in order, publicly, to acknowledge and commend his life's work. So it is that I am deeply honoured to have been invited to deliver this lecture in tribute to the monumental contribution of Dr. The Hon. Lloyd Barnett OJ. Here is a man who has toiled, and who continues to work, long, hard, selflessly in the service of the law, jurisprudence and legal affairs of the Caribbean region and its people. Dr. Barnett and I recently sat together on a tribunal and I have to tell you that were it not for his amazing perspicacity, the tribunal (and I in particular, as its Chairman) could have been hopelessly embarrassed. But, that's another story.

I was told that I had been given 45 minutes for this lecture. I hope I shall not be that long. We all prefer presentations that are or can be delivered in neat, concise packages. In this regard I am reminded of a story that is told of the great writer, Ernest Hemingway, a writer who exalted economy – short words, short sentences, short stories, all of which were nevertheless infused with tremendous insights. Someone once foolishly dared him to tell a whole story in just 6 words. Hemingway did not disappoint. This was his story:

For sale: baby's shoes. Never worn

It takes a li'l while for the imagination to plumb the depths of that poignant tale thereby again proving that it is possible to be both brief and profound. I don't know about the depth but although I'll be a lot more than six words I will endeavour not to bore you for as long as 45 minutes.

I have often felt that the export to the former colonies and the reduction into a single constitutional document of what is regarded as the Westminster model of Parliamentary democracy have made the role of our judicial branches even more critical than it might otherwise have been. Our judges are called upon to demonstrate great discernment in interpreting our Constitutions and laws. In many instances the latter embrace or borrow from concepts, conventions and traditions that essentially have emerged out of the experiences of another civilization. These concepts fit snugly into the British polity and the British Constitution is built on and around them. When they are written into our fundamental law, the question arises as to how must our courts go about the task of interpreting them? Is it necessary for the judge to internalise the British experience in order better to understand what the words of the Constitution import? Or, does the judge make the best sense that can be made of the words through an appreciation of what their intrinsic meaning may convey in the context of Caribbean reality unshackled by the British experiences that may have given rise, in the first place, to the concepts the words represent in the UK? To what extent, if at all, must English common law determine or influence interpretation of what is now our constitutional instruments? How legitimate is it to draw upon other sources of law when we interpret these provisions? What are the principles of interpretation that must guide us as we seek to unravel the text of our Constitutions?

So far as our Bill of Rights is concerned, debates and battles have already been waged on this score. Our fundamental rights, in the early years after independence, were construed as common law codified. It used to be posited that to understand their scope and content one merely had to examine the common law on the subject. It has taken decades, after decisions like *DPP v Nasralla*<sup>1</sup> and *King v The Queen*<sup>2</sup>, to reach the consensus that the rights proclaimed in the Constitution are not necessarily to be equated even with an evolving common law.

This evening, I wish briefly to look at some aspects of the law on parliamentary privilege against the background of some of the questions I just posed. But don't for a minute

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<sup>1</sup> [1967] 2 A.C. 238

<sup>2</sup> [1969] 1 A.C. 304

expect me to provide answers to the questions. I consider it sufficient to throw them out to an audience as esteemed as this one hopefully to prompt you to assist in exploring answers to them.

I have deliberately singled out parliamentary privilege because this is an area whose origin and evolution are inextricably bound up with the manner in which the British constitutional balance emerged, that is to say, with the peculiar historical struggles in England between Crown and subjects. Here, I believe, is a prime area where our judiciary sometimes faces the practical challenges of grappling with our questions. What I would like to do then is briefly to look at the origin of privilege in the UK and, in particular, at Article 9 of the Bill of Rights of 1689. Then I aim to use the recent Vincentian case of *Toussaint v. The Attorney General*<sup>3</sup> as a focal point for a discussion on some aspects of privilege in the Commonwealth Caribbean. Finally, I will make some concluding remarks after a glance really at the approach to privilege of the Canadian and Indian Supreme Courts.

Parliamentary privilege, you will recall, arose in England out of the desire of the Crown for Parliament and its members to discharge their functions in an effective, unhindered manner. Parliamentarians, at the outset, were advisers to the monarch and so they were not to be impeded in the carrying out of their duties. They were therefore rendered immune from harassment, or arrest by creditors, while making their way to Parliament thus originating such individual immunities as freedom from molestation and from arrest.<sup>4</sup>

The Crown initially enforced these *privileges*, as they came to be called. Over time, however Parliament asserted its independence and laid claim to further rights, powers and immunities. The repeated assertion of these claims gained recognition by the courts. The Houses of Parliament assumed jurisdiction themselves over their enforcement. The

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<sup>3</sup> [2007] UKPC 48

<sup>4</sup> English Public Law, edited by David Feldman, Oxford University press, 2004, p. 130

privileges were regarded as peculiar to “The High Court of Parliament”<sup>5</sup> under the law and custom of Parliament. Any disregard of or attack on them became a *breach of privilege* and was punishable by Parliament itself.

The statutory cornerstone of parliamentary privilege in the UK is the Bill of Rights of 1689. This was an Act that was promulgated in the wake of “the Glorious Revolution”, the decisive victory of the English Parliament over the Crown. The people of England and their Parliament had decided that they would have no more of James II who had consistently ignored their wishes and sought to rule just as he pleased. James was hounded out of England and, the throne being declared “vacant”, it was offered to William and Mary ... on conditions. Acceptance of the Bill of Rights was one of these conditions.

The Glorious Revolution settled the fractious relationship between the Crown and Parliament. Parliament was acknowledged to be its own master, free from interference in its internal procedures. Common law and the royal prerogative were to be subordinated to legislation. The courts could no longer disregard an Act of Parliament as being contrary to such matters as the law of God or the law of nature or even to natural justice<sup>6</sup>. Parliament reigned and continues to reign supreme.

Although the Bill of Rights went a long way to ameliorating if not entirely eliminating the sources of friction between Parliament and the Crown there has nevertheless remained, in the UK, grey and potentially serious areas of possible conflict between parliament and the courts with respect to the privileges of Parliament. These areas of possible conflict have their roots in the historical efforts of Parliament to assert its independence against an absolute monarch.

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<sup>5</sup> The phrase “High Court of Parliament” harks back to the period when the bishops, the lords, and the knights and burgesses met in one body and exercised the function of a court of judicature. This body represented the judicial authority of the King in his Court of Parliament and it enacted laws and rendered judgments in private suits which, when approved by the king were recognized as valid. The privileges claimed by this body before it separated into the House of Commons and the House of Lords, including the privilege of punishing for contempt, continued to be enjoyed by the House of Commons. See: *Burdett v. Abbott* 4 East, 148.

<sup>6</sup> Prior to 1689 the courts sometimes disregarded or cast doubt on Acts of Parliament on such grounds. See: *Dr. Bonham's case* (1610) 8 Co Rep 114a @118; *Day v Savadge* (1614) Hob 85 @ 97; *R v. Love* (1653) 5 State Tr 825 @ 828.

Article 9 of the Bill of Rights brings into focus one of these areas of tension. That Article stated “*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*”. The meaning of “impeach” is not clear but possible meanings include hinder, challenge and censure<sup>7</sup>. The phrase “proceedings in Parliament” has however defied precise definition<sup>8</sup>, notwithstanding the fact that a determination of what is encompassed by it may be crucial to the question as to whether a particular matter is or is not clothed with parliamentary privilege. It is also still unclear as to whether it is for the courts or for the respective Houses of Parliament to give an authoritative determination of the meaning of the phrase “proceedings in parliament”. There has thus arisen in England a form of dualism where the law of privilege is concerned with uncertainty as to whether in a given matter Parliament or the Court is to have jurisdiction.

At first blush, one might be tempted to construe Article 9 as merely suggesting that freedom of speech in Parliament ought not to be questioned in court; in other words to construe the Article as intending to protect MPs from adverse legal consequences, whether of a civil or criminal nature, on account of anything said in Parliament. However, the common law has given a broader interpretation to Article 9. The privilege has been widened to mean that it is not simply that the freedom of *Members* to participate in debates or proceedings in Parliament ought not to be questioned but in addition, debates or proceedings in Parliament ought not, at all, to be impeached or questioned in the courts<sup>9</sup>. Parliament must have exclusive cognizance of its internal affairs.

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<sup>7</sup>See Report of the Joint Committee on Parliamentary Privilege at: <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>

<sup>8</sup> In *Rost v Edwards* [1990] 2 W.L.R. 1280, Popplewell J. stated that it was not possible to arrive at an exhaustive definition of the phrase. The phrase is however defined in Australia by the Parliamentary Act 1987 (Cth) s 16(2) as meaning “all words spoken and acts done in the course of, or for the purpose of or incidental to, the transacting of the business of a House or of a committee” and including: “(a) the giving of evidence before a House or a committee, and evidence so given; (b) the presentation or submission of a document to a House or a committee; (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.”

<sup>9</sup> See for example: *Methodist Church in the Caribbean v. Symonette* (2000) 59 W.I.R. 1 @ 13. See also the submission of 27 January 1998 by Francis Bennion to the Joint Committee on Parliamentary Privilege at <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/43ap09.htm>

Part of the explanation for the wider principle has been that Article 9 did not necessarily represent the full extent of the parliamentary privilege of freedom of speech recognized at common law. Parliamentary freedom of speech, after all, long pre-dates Article 9. The notion therefore is that the Article itself must be supplemented to fill the gap.<sup>10</sup>

At any rate, this wider interpretation of Article 9 has found expression in a long series of decisions<sup>11</sup> which have held that the privilege in question goes beyond affording protection to an individual Member for statements made in Parliament and that, in the words of Viscount Simonds, “there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament”<sup>12</sup>.

The Judicial Committee reiterated this as recently as 1995, in *Prebble v Television New Zealand*<sup>13</sup>. It was said then that the privilege set out in Article 9 does not only apply in circumstances where some legal consequence is being asserted against the maker of a statement in Parliament but that the institution of Parliament as a whole is not to have its proceedings questioned in the courts and a court will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges. An individual Member of Parliament therefore cannot waive the privilege as it is a privilege enjoyed by the legislature as a collective body.

This interpretation of Article 9 makes possible a collision between, on the one hand, the exercise of privilege and on the other hand, the role of the court in determining disputes brought before it. *Prebble* itself provides an example. In that case a Minister of Government sued a television company in New Zealand for libel. The issue before the court was whether the television company could adduce into evidence as part of their Defence the fact that the Minister had made misleading statements in the House. The

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<sup>10</sup> See for example, *Prebble v Television New Zealand Ltd.* [1995] 1 A.C. 321; *Hamilton v Al Fayed* [2001] 1 AC 395 and *Toussaint v The A.G.* Privy Council Appeal No. 28 of 2006, [2007] UKPC 48

<sup>11</sup> See for eg. *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & El. 1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; *Pickin v. British Railways Board* [1974] A.C. 765; *Church of Scientology of California v. Johnson-Smith* [1972] 1 Q.B. 522; *Pepper v. Hart* [1993] A.C. 593; *Hamilton v Al Fayed* [2001] 1 AC 395

<sup>12</sup> *In re Parliamentary Privilege Act 1770* [1958] AC 331 at 350

<sup>13</sup> [1995] 1 AC 321

Privy Council identified the three issues in play, firstly, the need to protect freedom of expression, secondly, the interests of justice in ensuring that all relevant evidence is available to the courts and finally, the need to ensure that the legislature can exercise its powers freely on behalf of its electors. Lord Browne-Wilkinson maintained that although the first two issues cannot be ignored, the last, the protection of parliamentary privilege, must prevail. Parties to litigation, by whomsoever commenced, could not 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, it was said, lie entirely within the jurisdiction of the House. The Television Company could not adduce the evidence.

It was observance of the wider principle of Article 9 that resulted in the rule, once regarded as inviolable, that statements and proceedings in the House cannot be used as evidence in court without leave of the House. In *Pepper v Hart*<sup>14</sup> however the House of Lords decided no longer to observe the rule where certain conditions existed.

It is not difficult to understand the wider principle of Article 9 in the context of parliamentary sovereignty and against the historical background of a House of Commons, assertive of its independence and anxious to ensure that its privileges were not determinable ultimately by the other House, i.e. the House of Lords. The question is how is the principle to be reconciled with a written Constitution that is supreme and that entrusts the judiciary with the task of guaranteeing the integrity of the Constitution itself and the rule of law? How far, if at all, can a Caribbean court go in questioning or impeaching something said in parliament if to do so is necessary in order to ensure conformity with the very Constitution that establishes Parliament? Are there circumstances in which privilege may successfully be prayed in aid as a defence to a claim made against the State that a fundamental constitutional right is being violated?

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<sup>14</sup> [1993] AC 593

Some of these questions came up for discussion in the Vincentian case of *Toussaint v. The Attorney General*<sup>15</sup>. In 1990, Randolph Toussaint, then Commissioner of Police, agreed to purchase a parcel of land in Canouan<sup>16</sup> from the Development Corporation, a statutory body wholly owned and controlled by the Government. Toussaint was sold the land at almost 50 cents EC per square foot. In 2001, after a change of Government, the new Attorney General wrote to him alleging that he had paid a paltry sum for the land in question and that he had been able so to do only because of the cozy relationship he enjoyed with the previous administration. A further \$88,755.45 was demanded of him. At the time Toussaint had already orally agreed to sell the land for \$270,000.00. He ignored the letter and the demand contained in it and the Government then acquired the land. The Government Gazette disclosed that the public purpose for which the land was acquired was the erection of a learning resource centre for the people of Canouan.

The annual parliamentary budget debate was held on the same day the Gazette was published. In his contribution to the budget debate in parliament, the Prime Minister spoke about the acquisition of the land. Although he read out the relevant extracts of the Gazette that alluded to the public purpose for which the acquisition was being made, it would appear that little mention was made by the PM of the necessity for or desirability of constructing the learning resource centre. Instead he referred to Toussaint as a “NDP activist, former friend and confidant” of the leadership of the party previously in office and he said that the land had been sold to Toussaint at such an under-value that it amounted to a “scandal”. He made other remarks that could conceivably suggest that the primary motive in the Government’s decision to acquire the land was to reverse what he characterised as an “injustice”.

Toussaint promptly instituted a constitutional motion challenging the legality of the acquisition. He alleged that his right to property and his right not to be discriminated against on the ground of his political opinions were being infringed. In support of these claims he naturally relied heavily on the Prime Minister’s remarks in Parliament to establish his contention that the declared public purpose of the acquisition was a sham;

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<sup>15</sup> [2007] UKPC 48

<sup>16</sup> A small island in the Grenadines

that what was happening here was sheer political spite and that his fundamental rights were being infringed.

The St. Vincent and the Grenadines Constitution confers authority on Parliament to make provisions relating to the powers, privileges and immunities of Parliament. The Constitution also specifically enshrines the privilege of free speech in the House of Assembly. It does so by declaring that no civil or criminal proceedings may be instituted against any member of the House for words spoken in parliament. In much the same terms, a pre-Independence Act, The Privileges Act, also protects speech in Parliament by declaring that no civil or criminal proceedings may be instituted against any member in respect of parliamentary speech. Section 16 of that Act renders evidence relating to parliamentary proceedings inadmissible in court without the permission of the Speaker while section 3 immunises the Speaker from the jurisdiction of the court.

The Speaker refused Toussaint's request for permission for the Prime Minister's statement in parliament to be given in evidence and, on the ground of parliamentary privilege, the Attorney General applied to strike out from the pleadings Toussaint's references to the Prime Minister's parliamentary remarks.

So here was a nice matrix of facts illustrating some of the problems that can arise between the courts and parliament.

We had here:

a litigant who, in order to pursue his fundamental rights in court, needed to make use of parliamentary speech;

a Constitution that authorised Parliament to establish its privileges;

an Act of Parliament:

- that declared the privilege of freedom of speech in parliament;
- that required the Speaker's permission before the litigant could adduce evidence of the relevant parliamentary speech, and

- that rendered immune from the jurisdiction of the court the Speaker's decision as to whether or not to grant permission

and a speaker who had capriciously refused to grant permission for the evidence to be adduced.

The Privy Council held that Toussaint must be permitted to adduce the evidence. It was noted that Ministerial statements to Parliament formed an important type of evidence in judicial review applications; that the Constitution grants a specific right of access in respect of constitutional violations and it is the duty of the courts to ensure that this access is available. The Judicial Committee held that, Section 16 of the Privileges Act, i.e. the section which required a litigant to obtain the Speaker's permission, must be read subject to the modification necessary to make the evidence admissible. Toussaint's attempts to vindicate his fundamental rights should not be thwarted by what the Privy Council referred to as, the "unexplained and unchallengeable exercise of a discretion by the Speaker".

I give that exact quote from Lord Mance because it appears to suggest that the discretion to grant or refuse permission was a personal and unfettered power of the Speaker who, in exercising the same, was wholly immune from the jurisdiction of the court. The implication seems to be that the Speaker's powers in this regard do not have to be exercised within clear limits and that the ouster clause contained in the Privileges Act is effective to preclude the court from reviewing whether the Speaker had exceeded permissible limits.

At any rate, the decision reached in *Toussaint* to have the evidence adduced must be applauded. To have held otherwise would have severely compromised the court's ability to enforce fundamental rights. What interests me about their Lordship's decision is that almost one quarter of it is devoted to an analysis of Article 9, with decisions on the same and how those decisions impact upon the facts of Toussaint's case. I would have thought that a resolution of the legal issues posed in *Toussaint's* case required simply an examination of the Constitution and the Act passed by the Vincentian legislature and a

determination as to whether and, if so, the extent to which the Act needed to be modified to bring it into conformity with the Constitution. Yet, a reading of the judgment suggests that what was in issue was not so much how the Privileges Act should be interpreted in light of the Constitution but instead, or at least additionally, how Article 9 and its wider principle should be applied to the Constitution and to the Privileges Act. It seemed to have been assumed that the provisions of the Constitution and of the relevant statute did not exhaust the scope and content of the privilege in question and that one therefore had to look to the common law for its treatment of the subject. The decision to allow the remarks of the Prime Minister to be given in evidence ultimately rested on the Article 9 principle that paid regard to the use to which those remarks were being put. The Privy Council did not appear to accede to any general principle that the court should have available to it such evidence as the litigant could deploy in order to adjudicate a complaint that his fundamental rights were being violated.

I am subject to correction but I believe it is fair to say that many Caribbean jurists and scholars do not generally interpret our constitutional and legislative provisions regarding the privilege of freedom of speech in parliament in this manner<sup>17</sup>. In other words they do not conceive of the extant provisions either as importing the wider principle of Article 9 or necessarily requiring to be supplemented with that principle. They regard the constitutional and statutory provisions as embracing only the narrow privilege of protecting individual Members from adverse legal consequences.

No less an authority than Dr. Lloyd Barnett himself, in his seminal work on the Constitution of Jamaica, states:

“Freedom of speech is an essential prerequisite of effective Parliamentary action. It is obviously necessary that the representatives of the people should feel reasonably free to discuss, criticize and draw to attention all matters affecting their constituents or the nation as a whole. Thus the Constitution declares:

“No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a

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<sup>17</sup> But see *Meerabux J in Musa v The Speaker of the House*, Action Nos. 455 and 456 of 1997 (Supreme court, Belize, 22 January, 1998), a decision which has been criticized by Rawlins, *Caribbean Law Bulletin*

report to, the House of which he is a member or to a committee thereof or to a joint committee of both Houses or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise”.

This formulation of the privilege appears to be narrower than that enjoyed by the British Parliament”<sup>18</sup>.

In the same vein, in the Court of Appeal’s decision in *Toussaint*, Rawlins, JA did not appear to consider that the statutory provisions in St. Vincent and the Grenadines embraced Article 9’s wider principle. As far as he was concerned,

“Section 4 ... [of The Privileges Act]... merely protects individual Members from civil and criminal proceedings for any utterances made in the House...[and] In this case, Mr. Toussaint is not seeking to use the statements that the Prime Minister made in the House in an action against him. Section 4 would have prohibited such an action.”

Chief Justice Williams of Barbados, in *C.O. Williams Construction v. Blackman*<sup>19</sup>, was prepared to take cognizance of the basis of Article 9’s wider principle, but it was also his opinion that the Barbados statutory provisions contain a restrictive formulation. In his judgment in that case, after reviewing the common law authorities, he stated:

“The privilege of Parliament in Barbados does not rest on art 9 of the Bill of Rights 1688, nor have the provisions of that article been incorporated in the Parliament (Privileges, Immunities and Powers) Act. But it seems to me that the basis of the privilege as indicated in the above cases – that Houses of parliament must have complete control over their own proceedings and their own members and a member must have a complete right of free speech in the House to which he belongs without fear that his motives or intentions or reasoning will be questioned

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<sup>18</sup> Barnett, *The Constitution of Jamaica*, p. 222

<sup>19</sup> (1989) 41 WIR 31

or held against him thereafter – is no less relevant and applicable in Barbados than it is in other parliamentary democracies.”.

A long time ago, in *Boodram v The Attorney General*<sup>20</sup>, Hamel-Smith J. (as he then was), adopted an approach similar to that of Justice Rawlins. The case was concerned with the Scott Drug Report that was laid in the Trinidad & Tobago Parliament. Boodram, alias Dole Chadee, was at the time awaiting trial on very serious offences. He was implicated as a “drug baron” in the Scott Report. The Report was widely commented upon in the Press. Boodram brought proceedings alleging that his constitutional right to a fair trial had been violated. The State argued that he could not rely on the Report as it was clothed with parliamentary privilege.

Hamel-Smith J. declared that parliamentary privileges are to be exercised *subject to* the provisions of the Constitution. He drew a distinction between a suit brought in private law against a Member of Parliament and one founded in public law against the State. In the former type of proceedings, the Member would be entitled to the immunity granted by section 55 of the Trinidad & Tobago Constitution<sup>21</sup> but the State could not take shelter under that immunity to protect itself from the claims of a citizen complaining about the infringement of his/her constitutional rights. Hamel-Smith J. concluded that:

“...as long as what is said in Parliament by a member does not infringe the provisions of the Constitution, that ... immunity is assured. If a motion is filed in Parliament or a house paper is laid by a member and the effect of either is to

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<sup>20</sup> Trinidad & Tobago High Court Action No. 6874 of 1987

<sup>21</sup> Section 55 states:

“(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Senate and House of Representatives, there shall be freedom of speech in the Senate and House of Representatives.

(2) No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or in which he has a right of audience under section 62 or a committee thereof or any joint committee or meeting

of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of this Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution.

(4) A person called to give any evidence before either House or any committee shall enjoy the same privileges and immunities as a member of either House.

constitute an infringement of a citizen's fundamental rights then that ... immunity is put in jeopardy...

A democracy which claims not only to have respect for the fundamental rights of its citizens, but which makes express provision in its Constitution to entrench and preserve those rights, should never appear to entertain the suggestion that members of Parliament are free to do what they like provided it is done within its walls. The oath taken by its members demands of them respect for the Constitution..."

Interestingly, the Canadian position is somewhat different. Canada's Supreme Court has held<sup>22</sup> that Canada's *Charter* generally does not apply to inherent parliamentary privileges<sup>23</sup>. Such privileges are not "subject to" the *Charter* as are ordinary laws. If a Canadian court assesses that an alleged infringement of the *Charter* has arisen from some action that falls within a sphere of matters necessary to the legislative assembly's proper functioning, then the court will regard such action as immune from *Charter* review. McClachlin, J (as she then was) has stated that "because parliamentary privilege enjoys constitutional status it is not "subject to" the *Charter*, as are ordinary laws. Both parliamentary privilege and the *Charter* constitute essential parts of the Constitution of Canada. Neither prevails over the other"<sup>24</sup>. For what it is worth, one must however bear in mind that the *Charter* does not enjoy, in Canadian constitutional law, the same status as our fundamental rights and freedoms provisions enjoy in our Constitutions.

The Indian view on these issues was very recently elaborated in the case of *Raja Ram Pal v. The Speaker*<sup>25</sup>. An Indian television channel had showed its viewers footage of eleven Indian MPs accepting money in exchange for asking questions in Parliament. The presiding officers of each House of Parliament carried out inquiries, a report was submitted and the members were expelled from parliament. The MPs challenged their expulsion in the Supreme Court. The Houses of Parliament asserted, out of court, that

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<sup>22</sup> *Donahoe v New Brunswick Broadcasting* (sub nom: *New Brunswick Broadcasting Co. v. Nova Scotia*) [1993] 1 S.C.R. 319

<sup>23</sup> For a discussion on this issue, see: Andrew Heard, "The Expulsion and Disqualification of Legislators: Parliamentary Privilege and the Charter of Rights" (1995) 18 *Dalhousie L.J.* 380.

<sup>24</sup> *Harvey v New Brunswick (Attorney General)* [1996] 2 S.C.R. 876

<sup>25</sup> (2007) 3 SCC 184

they had the exclusive right to take disciplinary action against the MPs and that in this regard they were *not* answerable to the judiciary. They refused to appear before the court. Article 105 of the Indian Constitution is similar to section 55 of the Trinidad & Tobago Constitution (i.e. the section that speaks to the powers and privileges of Parliament) and, like section 55, it contains a provision that states that, the freedom of speech apart, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of the Constitution and until so defined shall be those of the House of Commons of the UK Parliament at the time of commencement of the Constitution.

The expelled MPs contended in court that the power and privilege of expulsion was punitive in nature rather than remedial; that such a power was vested in the House of Commons as a result of its power to punish for contempt in its capacity as a High Court of Parliament; that this status was never accorded to the Houses of Parliament of India and that therefore their expulsion was unlawful. They also raised issues as to breaches of their fundamental rights under the Constitution. Simply put, the case brought to the fore in India the matter of the relationship between the courts and Parliament so far as privilege was concerned.

The Supreme Court's decision is a very extensive one and I know that I am not doing it justice when I summarize it by stating that, by a majority, the court held that: it did have jurisdiction to determine the content and scope of parliamentary privilege; that Parliament did have the power to expel the members, and that if, in a given case, an allegation is made by a citizen that he has been unconstitutionally deprived of his fundamental rights as a consequence of the exercise of privilege, the court had the right and duty to examine this issue notwithstanding the claim to privilege. However, the court went out of its way to note that, in carrying out any such examination, it should exercise great circumspection. The Supreme Court then went on carefully to elaborate some 21 principles that must guide courts in undertaking any such judicial review. I feel compelled to outline some of these principles:

- i. Parliament is a co-ordinate organ and its views deserve deference even while its acts are amenable to judicial scrutiny;
- ii. The constitutional system of government abhors absolutism. Since it is a cardinal principle of the Constitution that no one, no institution, howsoever lofty, can claim to be the sole judge of power derived under the Constitution, mere co-ordinate constitutional status, or even the status of an exalted constitutional functionary, does not disentitle the Court from exercising its jurisdiction of judicial review of action that has the character of a judicial or quasi-judicial decision;
- iii. The expediency and necessity of the exercise of privilege by the legislature are for the determination of the legislative authority and not for determination by the courts;
- iv. Judicial review of the manner of exercise of privilege does not mean that the legislature's jurisdiction is being usurped by the judiciary;
- v. Having regard to the importance of the functions discharged by the legislature under the Constitution and the majesty and grandeur of its task, there would always be an initial presumption that Parliament has regularly and reasonably exercised its powers and privileges and has not violated the law or Constitutional provisions. This is a presumption, however, that is rebuttable;
- vi. The fact that Parliament is an august body of co-ordinate constitutional status does not mean that there can be no judicially manageable standards to review the exercise of its power;
- vii. Because the area of powers, privileges and immunities of the

legislature are exceptional and extraordinary, its acts, particularly those relating to the exercise thereof, ought not to be tested on the traditional parameters of judicial review in the same manner as an ordinary administrative action would be tested. In reviewing any such acts the Court would confine itself to the acknowledged parameters of judicial review and within the judicially discoverable & manageable standards, but there is no foundation to the proposition that jurisdictional error cannot be attributed to a legislative body;

viii. The Judiciary is not prevented from scrutinizing the validity of action of the legislature that trespasses on the fundamental rights conferred on the citizen;

xi. It is not correct to assert that the exercise of privilege by a legislature cannot be decided against the touchstone of fundamental rights or constitutional provisions;

x. If a citizen, whether a non-member or a member of the Legislature, complains that his fundamental rights have been contravened, it is the duty of the Court to examine the merits of the said contention, especially when the impugned action entails civil consequences.

The other eleven principles I have neglected to mention are also worthy of great note and I have only omitted them in the interest of time.

## CONCLUSION

So, what are some broad concluding views? First of all, I agree entirely with Rose-Marie Antoine that the Caribbean judiciary has “an active role to play in re-interpreting the legal framework to build a more indigenous and just society”. While an appreciation of the common law is a helpful element in interpreting our written Constitutions, as Antoine also reminds us, the legal framework we have inherited from our historical past is not

only *not* of our making but we need to bear in mind that it was once used to legitimise slavery, colonialism and elitism<sup>26</sup>. I think we must be careful about the unquestioning adoption of common law principles that are, expressly or impliedly, premised on parliamentary supremacy when in fact our own legal system is based on constitutional supremacy. On the specific question of privilege, I like the manner in which the Indian Supreme Court went about its task in the *Raja Ram Pal* case. The judgment of that court sets forth, in my view, a clear, balanced, sensitive, nuanced approach that rejects the classic common law on privilege and boldly declares an independent position guided by the highest court in India. Similarly, the challenge before us is to have the confidence to interpret *our* Constitutions in a manner that advances *our* democracies and the rule of law in the Caribbean. Naturally, the best, if not the only, chance of successfully meeting this challenge lies in having our final appeals heard by a Caribbean court.

Secondly, and this is by no means an original thought, parliamentary privilege must ultimately rest on *necessity*. For our parliamentary democracies to function effectively and in order to maintain and enhance the authority and dignity of the legislature, it is necessary for that institution and its Members to be endowed with appropriate immunities or privileges. One can accept Lord Browne-Wilkinson's "basic concept" that members of the House and witnesses before committees should be able to:

“speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say.”<sup>27</sup>

However, the court must “ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceed the necessary scope of the category of privilege”<sup>28</sup> or that violates fundamental rights. Constitutional supremacy requires that, in appropriate cases, the judiciary should have the right and the duty ultimately to assess whether a particular

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<sup>26</sup> See Antoine, *op. cit.* Chapter 2

<sup>27</sup> *Prebble v. Television New Zealand* [1995] 1 AC 321 @ 334B-C

<sup>28</sup> See *Canada (House of Commons) v Vaid* [2005] 1 S.C.R. 667 @ para [29]

claim of privilege should or should not succeed. The reality of the Caribbean is that there is a tenuous separation between the executive and legislative branches of government. In some States, the membership of the Executive branch of government invariably constitutes a majority of the lower house. The judiciary must therefore be particularly astute to ensure that privilege is not used as a means of placing either of these branches or their officers above and beyond the reach of the law.

Thirdly, our Constitutions are not perfect documents that contain easily reconcilable provisions. One does sometimes encounter what may be regarded as contradictory imperatives. Ouster clauses sit right alongside provisions requiring strict adherence to the rule of law, a matter which the CCJ explored in *Boyce & Joseph*<sup>29</sup>. The Constitution authorizes Parliament to declare its privileges but on the other hand each citizen is accorded fundamental rights the enjoyment of which the court *must* protect subject to respect for the rights of others and for the public interest. It is naturally for the judiciary to mediate and reconcile these provisions. One way of doing so is to acknowledge that written Constitutions admit of a hierarchy of values at the apex of which is protection of the fundamental rights. The exercise or effect of parliamentary privilege may therefore be limited where the court is called upon to investigate or adjudicate upon possible breaches of fundamental rights<sup>30</sup>.

At the outset I had said that I would not be 45 minutes but it seems that I have gone one for close to that time. I hope you will forgive me. I thank you for your patience.

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<sup>29</sup> CCJ Appeal No. CV 2 of 2005

<sup>30</sup> See in this regard the observations of Lord Nicholls in *Methodist Church v. Symonette* (2000) 59 WIR 1 @ 14 H – J