



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RIGHT HON. THE LORD BURNETT OF MALDON

PARLIAMENTARY PRIVILEGE – LIBERTY AND DUE LIMITATION

21ST COMMONWEALTH LAW CONFERENCE 2019

LIVINGSTONE, ZAMBIA, APRIL 9TH 2019

(1) Introduction

1. It is a particular pleasure for me to return to Zambia and to Africa, where many of my formative years as a child were spent in newly independent Commonwealth nations, and to be given the opportunity to give the opening talk at the 21st Commonwealth Law Conference. The theme of the conference is “The Rule of Law in Retreat? Challenges for the Modern Commonwealth”. That conference theme asks a question which has at its heart a concern which I hope is not borne out by the experience of most lawyers, academics and judges represented in Livingstone. But it exposes the constant need for vigilance.
2. The Commonwealth is a family of nations unlike any other in the world that prospers as a result of mutual friendship and respect and also because it is founded on shared values. Later in the week there is an opportunity to discuss The Latimer House Principles, which underpin the basic structures of governance to which all Commonwealth countries adhere. At their heart is the rule of law, the independence of the judiciary and the separation of powers. The last relies upon mutual respect amongst the three constitutional branches of the government: the legislature, the executive and the judiciary. At the Commonwealth Magistrates and Judges Association conference in Brisbane in September last year I spoke of the interdependence of those three branches and the dependence of each on the others. All need to work together and

each needs to avoid encroaching on areas which the constitutional settlement of the country in question assigns exclusively to another. In a very short passage, I mentioned parliamentary privilege and the potential for its misuse, or even abuse.¹ That glancing reference provoked a good deal of interest and so I hope that I might be forgiven for returning to the issue, this time rather more extensively.

3. The term “Parliamentary Privilege” is itself misleading because it conveys the impression that in some way legislators are placed above the law, when its essence is to protect them from interference by the executive or from anyone seeking to use the courts to inhibit their activities within Parliament as parliamentarians by using the courts either pre-emptively or through action impugning what they have said and done in Parliament. The privilege, which was secured in the late seventeenth century in both England and Scotland, has underpinned the constitutional settlement of the United Kingdom and enables Parliament to fulfil its constitutional role effectively. Parliamentary privilege has found a voice throughout the Commonwealth, was adopted in the United States, and has its analogue in states with functioning constitutions across the globe. Erskine May, the definitive work on parliamentary practice and procedure in the United Kingdom, a work which in our current turbulent political times has attracted a new wide readership, describes it as:

“. . . the sum of certain rights enjoyed by each House [of Parliament] 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.”²

¹ <https://www.judiciary.uk/wp-content/uploads/2018/09/lcj-speech-brisbane-lecture-20180910.pdf>

² M. Jack (ed), *Erskine May – Parliamentary Practice* (24th edition, Lexis Nexis) at 203.

The various rights that constitute the privilege stem from the much older common law principle that the High Court of Parliament had exclusive cognisance of its own proceedings.³ In effect, the private law applicable only to Parliament and over which only it, as a court, had jurisdiction.

4. The importance of this privilege, and particularly the part which protects freedom of speech in Parliament, cannot be overstated. It is essential that legislators are able to carry out their role without fear of arrest or fear that what they say in Parliament may be subject to executive action or proceedings in the courts. Just as judges must be protected by immunity from suit and by security of tenure, to ensure that they too can properly discharge their constitutional functions without fear of improper pressure, so too must legislators. They require protections to enable them to engage in robust debate, to canvass issues and press points that may be unpalatable to governments, to Heads of State, and to other powerful people or interest groups without fear of reprisal. Democracy depends upon such protection. The privilege extends to those who give evidence to Parliament through its committees. Parliamentary privilege has rightly been described as a “fundamental liberty”⁴ and as a principle of the “highest constitutional importance”.⁵
5. The most comprehensive explanation of the privilege with which this talk is concerned is found in the judgment of Lord Browne-Wilkinson for the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321. A parliamentarian in New Zealand sued the TV company for libel in connection with allegations regarding the sale of state-owned assets whilst he was a minister. In its defence the TV company relied upon statements made by the minister and

³ W. Blackstone, *Commentaries on the Laws of England* (1765), 58 – 59.

⁴ *A v The United Kingdom* [2002] ECHR 35373/97.

⁵ Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 at 638.

others in Parliament. It alleged they were calculated to mislead or were improperly motivated and were evidence of a conspiracy, including by improperly introducing legislation. The Privy Council recognised that to preclude reliance on things said in Parliament in defence of libel proceedings brought by a member of the House could undermine the right of the public and the press to criticise the actions of parliamentarians and thus to establish the truth of criticisms. But there were three conflicting, powerful policy issues in play. First, the need to allow the legislature to exercise its powers freely; secondly, freedom of speech of others; and thirdly, the interests of justice in ensuring that all relevant evidence can be placed before a court. Lord Browne-Wilkinson resolved the conflict by saying:

“Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail.”

This conclusion, explained fully in the passages that follow in the judgment, represents the high degree of comity and respect for the separation of powers that the courts accord to Parliament and parliamentarians.⁶ Of note, however, was the qualification that in an extreme case, in which a party would be disabled from defending a claim brought by a legislator, the action might have to be stayed in the interests of justice. It is also of note that the Privileges Committee of the House of Representatives in New Zealand considered the question of waiver, but held that the House had no power to do so.

6. In the United Kingdom the privilege is enshrined in statute, as it was and is in New Zealand. The interpretation of statute is a judicial function. The scope of the privilege has been considered by the courts on many occasions. Its breadth has not been without critics. It was described in evidence to the Joint Committee of the House of Commons and House of Lords on Parliamentary Privilege in 2013 as, to a certain extent, running contrary to the rule of law.⁷

⁶ 336E to 337G.

⁷ See A. Tucker’s evidence cited in Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, Report of Session 2013-2014 (HL Paper 30; HC 100) (3 July 2013) at 8.

It is also not without risk of abuse. The danger where a fundamental principle or safeguard is subject to abuse or misuse is harm to the constitution, its operation, and the rule of law. As Lord Dunedin put it in *Adam v Ward* in 1917, while the protection provided by the privilege exists “for motives of high public policy”, particularly where freedom of speech was concerned in order to protect freedom of discussion in Parliament, it was not to be turned into “an abominable instrument of oppression”.⁸ Recent events in the United Kingdom, to which I shall turn a little later, brought forth a torrent of criticism from academic and other commentators who considered the naming in Parliament of the beneficiary of an interim injunction, two days after the grant of that injunction and pending a speedy trial to resolve the underlying legal issues, as a straightforward attack on the rule of law with no coherent justification.⁹

7. In today’s talk I will consider the risk of abuse, and the potential that such abuse has to undermine the rule of law. It is a risk that requires all three constitutional branches of government to be mindful of the separation of powers and the interdependence of powers. Mutual respect and comity between the three, mindful of the different constitutional roles each performs, is essential.¹⁰ But first, I will sketch how the privilege arose, and specifically how freedom of speech came to be an established aspect of it. I will look at its development, as well as its relationship with the courts.

⁸ [1917] AC 309 at 324.

⁹ e.g. Jelena Gligorijevic breaching injunctions in Parliament: an unconstitutional abuse of Parliamentary Privilege, UK Const. L, Blog 29 October 2018; P Wragg, Parliamentary Privilege and the rule of law: Comms L 2018, 23(4), 175-177; R. Craig, The Peter Hain case: The effect of Article IX, UK Const. L. Blog 31 October 2018; Alex Bailin QC, The Times, 30 October 2018.

¹⁰ *R (Jackson) v Her Majesty's Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at [125], “*In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality . . . is maintained to a large degree by the mutual respect which each institution has for the other.*”

(2) Development of the privilege

8. I start with the development of the privilege, particularly that relating to freedom of speech in Parliament. Erskine May informs us that it first appears to have arisen in the Tudor period.¹¹ At that time the House of Commons seemed to have “an undefined right of freedom of speech”; but it was a matter of tradition, what we would call today a constitutional convention. It was not a right or privilege of Parliament.¹² Sir Thomas More, at the time Speaker of the House of Commons, appears to have been the first Speaker to try to claim the freedom of speech as a privilege. There is no record of any exchange between Sir Thomas and Henry VIII on the topic although it is unlikely that he would have viewed such a claim with any enthusiasm.
9. By 1563, though, the Parliament of Elizabeth I was claiming freedom of speech as an ancient right. This was an early attempt to bestow legitimacy on a novel development through an appeal to tradition. Elizabeth’s reaction is again not recorded. There is however a clear indication of how it was received. In 1593, Sir Edward Coke, at the time Lord Keeper and in due course one of our greatest judges, gave the Sovereign’s view of the claim of privilege. He put it this way,

“Her Majesty granteth you liberal but not licentious speech, liberty therefore but with 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.”¹³

It was not then a privilege, ancient or modern. Nor did it cover all speech in Parliament. It was a liberty with limits. The threat implicit should those limits be exceeded was clear.

¹¹ Erskine May at 206ff.

¹² Ibid at 207.

¹³ Cited in Erskine May at 207.

10. While parliamentarians continued to press the belief that freedom of speech was a privilege, unsurprisingly the Stuart monarchs were firmly of the view that it was a matter of grace and not of right; a point particularly emphasised by James I when he stressed it was a matter granted by his ancestor by “grace and permission”¹⁴. When Charles I had two Members of Parliament arrested in 1629 for committing seditious libel for words spoken in debate in the House of Commons, the clash of understanding was apparent and destabilising.¹⁵ The consequence of this was a continued struggle between King and Parliament, which reached its climax in 1642, when Charles infamously entered the House of Commons with an armed escort. He attempted to arrest five members who had been prominent in a move to transfer control of the armed forces away from the Crown. When the King demanded that the Speaker of the Commons identify the five members to him, the Speaker famously rebuffed the King by responding, “I have neither eyes to see, nor tongue to speak but as this House is pleased to direct me”. It is reported that as the King left the Chamber cries of “privilege! privilege!” rose up behind him.¹⁶
11. Civil war soon followed but the issue remained unresolved following the Restoration of Charles II in 1660. It was not a clash with Parliament but religious conflict which led to the constitutional settlement, which still broadly underpins the governance on the United Kingdom, on the accession of William and Mary in 1689. The question was finally resolved by the Bill of Rights 1689 which provided the definitive answer. Article IX provided that “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 freedom was a privilege, not a matter of grace, enshrined in that statute which is still in force. The Crowns of England and Scotland

¹⁴ Ibid at 208.

¹⁵ See *R v Eliot, Holles and Valentine* (1629) 3 St Tr 293-336; also see *R (Chaytor) (Rev 2)* [2010] UKSC 52, [2011] AC 684 at [28]ff.

¹⁶ D. Blunt, *Parliamentary Sovereignty and Parliamentary Privilege*, (2015) at 4
<<https://www.parliament.nsw.gov.au/lc/articles/Documents/parliamentary-sovereignty-and-parliamentary-priv/Parliamentary%20Sovereignty%20and%20Parliamentary%20Privilege.pdf>>.

had sat on the same head since the accession of James VI of Scotland as James I of England in 1603, but the union of England and Scotland was still some way off in 1689. In Scotland the Claim of Right Act 1689 secured freedom of speech to the members of the Scottish Parliament.

12. By giving statutory force to the privilege, Parliament and the sovereign did two things. The statute bound the King; and it provided a limit on what was justiciable. It limited the court's jurisdiction. This protected MPs in two ways. First, it placed a limit on what the King could do directly. He could not lawfully take action against Members of Parliament or Peers in respect of what they said in debate in Parliament. Kings – or governments – could not arrest or prosecute legislators for the words they had spoken. Secondly, future Kings – or governments – could not indirectly seek to restrict parliamentary debate by threatening or bringing legal actions, whether for seditious libel (while it remained on the statute book) or for defamation generally. Nor could others take action on account of what was said in Parliament. Moreover, legislators could not be proceeded against for contempt of court arising from what they said in debates.

13. This shield protecting legislators was essential then and is essential now. For a parliamentary system of government to function effectively, legislators must be able to represent their constituents properly. They can only do that if they can speak freely in Parliament. Only in that way can it be, as Burke and Churchill put it, a “deliberative assembly of one nation”¹⁷ where each member's first duty “is to do what he thinks in his faithful and disinterested judgement is right and necessary for the honour and safety”¹⁸ of the country as a whole.

¹⁷ Edmund Burke's Speech to the Electors of Bristol, 3 Nov. 1774 cited in House of Commons, Select Committee on the Modernisation of the House, *Modernisation of the House of Commons - First Report*, (2007) at [9] <<https://publications.parliament.uk/pa/cm200607/cmselect/cmmodern/337/33706.htm>>.

¹⁸ W. Churchill, *Duties of a Member of Parliament*, Parliamentary Affairs, Volume 8, (1954-55), 302 cited in *ibid*.

14. A Parliament that fears action through the courts for what is said in Parliament, whether by the executive, private bodies or individuals, is one that cannot discharge this duty.¹⁹ It would not be able to carry out its representative function effectively. It would not be able to develop and enact legislation effectively. And it would not be able to scrutinise the government and hold it to account.²⁰ A Parliament that feared the consequences of its debates would be one unable to carry out its constitutional functions. Parliamentary privilege enables parliamentarians to debate matters of importance. It enables them to conduct Parliamentary inquiries effectively. It enables them to criticise discreditable conduct without fear. In other words, it enables them to do what is necessary for the proper discharge of their functions as Members of the legislature, and through them, for Parliament to carry out its constitutional role. As Lord Browne-Wilkinson put it in *Pepper v Hart*

“ . . . the plain meaning of Article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to discuss.”²¹

15. Where matters fall within the scope of privilege it is for Parliament to determine its application. It determines, and only it determines, what steps to take when privilege is misused and abused. Stephens J acknowledged in 1884 in *Bradlaugh v Gosset*, that it was solely a matter for Parliament in its exclusive jurisdiction to govern the operation of matters within the scope of the privilege. It is thus for Parliament to determine what steps, for instance, should be taken where a legislator exercising freedom of speech in Parliament says something that would otherwise be a contempt of court, defamatory or in breach of an injunction. More strongly than that though,

¹⁹ O. Gay & H. Tomlinson, *Privilege and Freedom of Speech* in A. Horne et al (eds), *Parliament and the Law*, (Hart, 2013).

²⁰ D. Blunt, *ibid* at 2.

²¹ *Pepper v Hart* [1993] AC 593 at 638.

even if something were to be said in contravention of criminal statute, that too would be a matter solely for Parliament to consider.²²

16. The reason for this is obvious. If Parliament were not the sole judge of the application of its law, it would undermine the very purpose of the privilege. If Members of Parliament could be subject to proceedings in courts, or other places out of Parliament, to determine whether they were protected by freedom of speech in a particular case, it would leave them at risk of the very types of proceedings that article IX was intended to shield them from. Parliament's exclusive jurisdiction is therefore an important aspect of the privilege itself.

17. The importance of parliamentary privilege, and particularly that of freedom of speech, may have its origins in Westminster but has been adopted elsewhere since the end of the 18th century. The revolutionaries in the soon-to-be United States of America recognised its fundamental importance when they incorporated it into article 1(6) of the United States Constitution. They did so by replicating, with minor modification, the wording of article IX of the Bill of Rights. Its importance has been recognised as being compatible with the European Convention on Human Rights²³ although the potential for conflict with the Convention in the event of abuse is clear. It is enshrined in constitutions across the Commonwealth. For example, in Australia through section 49 of the Commonwealth of Australia Constitution Act 1900 and the Parliamentary Privileges Act 1987, and various state provisions.²⁴ In Canada it is inherent in its written constitution.²⁵ In India it is contained in section 105(2) of the Indian Constitution. In Zambia, of course, it is provided for in chapter 12, part 3 of the National Assembly (Powers and Privileges) Act. The list could go on. From

²² Erskine May *ibid* at 227.

²³ *A v United Kingdom* (2002) 36 EHRR 917, discussed in Erskine May at 222 and 301.

²⁴ D. Blunt *ibid* at 7ff.

²⁵ See McLachlin J in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 1993 CanLII 153 (SCC).

the Commonwealth's perspective more broadly, the fundamental importance of the freedom of speech of parliamentarians was acknowledged in article III(i) of The Latimer House Principles on the Three Branches of Government in July 2008, when article IX of the Bill of Rights was reaffirmed.²⁶

(3) Privilege and the Courts

18. We have seen that parliamentary privilege is a fundamental and well-established principle of constitutional and democratic government. It may be absolute in its effect and it may be for Parliament itself to police, but it is one constitutional principle amongst others. It must be looked at in the context of both the rule of law and the separation of powers. These two further constitutional principles bring into sharp relief its, and Parliament's, relationship with the courts.

19. The first point is well-known, and well-established. While it is for Parliament to determine its concrete application, the contours of privilege are for the courts to determine. The extent and scope of parliamentary privilege is a matter for judicial interpretation. While this was most recently recognised by the Supreme Court of the United Kingdom in *R (Chaytor)* in 2010²⁷ and *Warsama v Foreign & Commonwealth Office* in 2018,²⁸ it is longstanding. This may require the courts to tread a fine line. Only last month the Supreme Court of Ireland concluded that in certain very limited circumstances the conduct of parliamentary committees could be reviewed in the courts.²⁹

²⁶ See <<http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>>.

²⁷ [2010] UKSC 52, [2011] AC 684 at [14] – [16].

²⁸ [2018] EWHC 1461 (QB).

²⁹ *Kerins v McGuinness and O'Brien v Clerk of Dail Eireann* [2019] IESC 11 and 12.

20. The *Chaytor* case illustrates this well. The issue was whether matters concerning claims by a number of parliamentarians for parliamentary expenses could form the subject of criminal prosecutions. Prosecutions were brought by the independent prosecuting authority, the Crown Prosecution Service. The defendant parliamentarians argued that such expenses claims were subject to parliamentary privilege and thus outwith the court's jurisdiction. Having set out the development of the relationship between the courts and Parliament concerning privilege, and that it was for the courts to determine whether something fell within the scope of privilege, the Supreme Court identified the key issue. Lord Phillips of Worth Matravers PSC explained that the question rested on whether scrutinising the expenses claims in criminal proceedings would have an adverse impact on the core or essential business of Parliament and whether it would inhibit debate or freedom of speech. He concluded that such scrutiny would not "inhibit any of the varied activities in which Members of Parliament indulge that bear in one way or another on their parliamentary duties. The only thing that it would inhibit would be the making of dishonest claims."³⁰

21. The essential point: a court determining whether something falls within the scope of privilege depends on whether it goes to the "core or essential business" of Parliament. That goes to the heart of the privilege itself, and of article IX. It is to protect Parliament so that it can carry out its functions. Determining such questions requires courts to be sensitive to the rule of law. It requires them to be sensitive to the separation of powers. The former because if they give too wide an interpretation of what falls within the ambit of privilege they could provide the basis for parliamentarians to engage in criminality with impunity. It could form the basis for parliamentary corruption going unrestrained and undeterred. Too narrow an interpretation could equally undermine the rule of law as it could place undue restrictions on what parliamentarians can properly say and do, thus placing them at the mercy of legal action by the

³⁰ [2010] UKSC 52, [2011] AC 684 at [48].

executive or vested interests. So care needs to be taken to ensure that the privilege is not interpreted in ways that could undermine the rule of law. Of course, in the event that courts interpret privilege in ways that, as the Joint Committee on Parliamentary Privilege put it in 2013, “are wrong or damaging”, then Parliament “has the power to change the law”.³¹ That is the proper way to proceed where Parliament believes the courts are applying or interpreting the law in ways that it considers wrong.

22. The separation of powers requires the courts, when determining such questions, to be alive to the different constitutional roles of each branch of government. It equally requires them to consider the need for comity between the three branches. The importance of this was noted in 1974 by Lord Reid in *Pickin v British Railways Board*.³² The issue there was whether a court could go behind a private Act of Parliament to ascertain whether it had been enacted properly.³³ The Court of Appeal said that it could. It considered that to do so would be to act in support of Parliament. The House of Lords took a different view. It was not for the courts to consider the validity of Acts of Parliament. To do so would be to cross the boundary set by article IX. Equally, if courts were to investigate how Parliament had conducted its own processes there would be potential for conflict between courts and Parliament. Such conflict was exactly of the sort that article IX was intended to ensure could not arise. Such proceedings carry with them the potential, at least in a country without a codified constitution that provides the courts with the jurisdiction to engage in constitutional review of legislation, for the parliamentary process to be frustrated by court action.

³¹ House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, (Report, 2013-2014) (HL Paper 30; HC 100) at [32].

³² [1974] AC 765.

³³ For a discussion see Erskine May *ibid* at 295.

(4) Privilege and the rule of law

23. Comity, arising from the separation of powers, and the rule of law do not simply place an onus on the courts to respect the boundaries, and to police the boundaries of privilege with care. They also place an onus on a legislature and its members individually, together with the executive, to act compatibly with the rule of law. Comity is to be exercised by all three branches. Just as the executive respects decisions of the courts (and the courts accord respect to the executive acting lawfully within its sphere of activity) so too should the legislature respect decisions of the courts. This is not simply a question of comity. It is an application of the constitutional principle of the rule of law.

24. The *sub judice* rule provides an example of Parliament showing comity to the courts. These are long-standing rules of both Houses of Parliament in the United Kingdom that ensure that when an issue is before the courts – and therefore subject to the due administration of justice – it should not be discussed in Parliament. It is a self-denying ordinance, the aim of which is to ensure that Parliament does not use its powers under the shield of privilege to undermine the rule of law. Equally it promotes, and gives effect to, comity between Parliament and the courts. It enables the courts to carry out their constitutional role; and it preserves for Parliament its right to comment on judicial proceedings once they are no longer live. So, while protecting the courts and Parliament, it also protects the rule of law by enabling both branches to carry out their roles effectively and without interference. It preserves the rights of all to take full advantage of the judicial process. The Joint Committee on Parliamentary Privilege explained the rule as existing

“to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts

from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matter it pleases.”³⁴

25. The Joint Committee went on to make a further important observation about the balance to be struck between Parliament and the courts. It said this,

“The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.”³⁵

26. While the *sub judice* rule can be set aside, exceptionally, by the Speaker of the House of Commons, discretion and care is of paramount importance.³⁶ And it is right to record that Speakers have invariably acted with the utmost scrupulousness in striking the balance and thus, as the Joint Committee noted, ensuring that the two branches do not cross the boundary between each other’s constitutional function.³⁷

27. Given the Joint Committee’s conclusions, it is obvious that breaches of the *sub judice* rule, by a Member of either House of Parliament, raise serious issues. As another Committee, in this case the Neuberger Committee, concluded in 2010 “breaches of those rules risk undermining

³⁴ Joint Committee report at [191].

³⁵ Ibid at 192.

³⁶ Erskine May ibid at 441.

³⁷ Joint Committee report at [226].

the fabric of our constitution and our commitment to the rule of law”.³⁸ So too does the calculated decision of a legislator to defy an order of a court.

28. Let me illustrate how.

29. Open justice is the default position, but there are countless examples of cases where, for one reason or another, a court determines that a party or witness should be protected by anonymity. They range from the commonplace to the difficult and even controversial. Commonplace examples include the decision to protect the identity of children caught up in proceedings, even in criminal courts, albeit that the court can rule that anonymity should not apply in given circumstances. Then there are cases where the safety of someone involved in proceedings might be compromised by identification and anonymity is granted after full argument and the consideration of much evidence.³⁹ Courts are often asked to rule on questions of privacy and confidentiality and in doing so strike balances, taking account of evidence and argument and competing interests. In the commercial sphere it can be necessary to protect trade secrets and in cases which rely upon intelligence material the same is true. The examples could be multiplied.

30. There is also anonymity conferred by statute. For example, in the United Kingdom legislation protects those who claim to have been the victim of a sexual offence⁴⁰ or the secrets of the jury room.⁴¹ The scope for violating the law through the use of parliamentary privilege in such cases is also clear. Whilst unimaginable in the United Kingdom, and I hope elsewhere in the Commonwealth, it is not difficult to envisage members of the executive who are also legislators abusing parliamentary privilege to the detriment of political opponents or others.

³⁸ Report of the Committee on Super-Injunctions (the Neuberger Committee) 2010 at [5.4].

³⁹ e.g. *R v Saville Inquiry* [2000] 1 WLR 1855; *Saville v Widgery Soldiers* [2002] 1 WLR 1249.

⁴⁰ Sections 1 and 2 of the Sexual Offences (Amendment) Act 1992.

⁴¹ Section 20D of the Juries Act 1974.

31. My immediate concern is with the rare instances since the 1970s when parliamentarians have spoken in Parliament in ways that have failed to respect the principle of comity and have not left the courts free to administer justice. It is not unfair to observe that for approaching 300 years it did not appear to occur to any member of either House that it was appropriate to use the freedom of speech in Parliament to undermine an order of a court. But amongst the examples in the 70s was the naming in Parliament of a witness who had been given anonymity in criminal proceedings. The grant of anonymity was controversial but, to my mind, that provides no good basis for a legislator single-handedly to override the decision of a court.⁴² Another notorious example occurred in 1996. There was an injunction in place protecting the identity of a disabled child. The father was a former cabinet minister, the mother his former secretary. The circumstances of their affair had erupted into the public domain when the child was born in 1983. In evidence to the Joint Committee, the then Master of the Rolls, Sir Thomas Bingham, said that where such orders had been made properly by the courts, Parliament would want to support the courts; a point the Committee agreed with.⁴³ And comity and the rule of law support that view.

32. Serious as each of these incidents were, they were rarities. In the last ten years, however, there have been five breaches. The first can be discounted as inadvertent.⁴⁴ But in 2011 the subjects of two separate interim injunctions were named in both the House of Commons and the House of Lords. Most recently, a peer named the subject of an interim injunction in the House of Lords, the incident to which I referred to earlier.

⁴² *AG v Levens Magazine* [1979] AC 440.

⁴³ Joint Committee Report at [208].

⁴⁴ The Trafigura injunction issue, see Neuberger Report at [5.10] ff.

33. In each of the most recent cases, the court order – at the interim stage of proceedings – was compromised by intervention from a parliamentarian. They did so notwithstanding the *sub judice* rule. There was no question of the parliamentarians concerned canvassing the view of the Speaker or Lord Speaker in advance. Breach of the rules by which Parliament operates is a matter for each house. So too is the question whether an additional rule is required covering circumstances where the matter in hand is not technically *sub judice*, in other words where the case is concluded. That was a matter of some debate following the interventions in 2011.⁴⁵
34. It is a matter of concern that parliamentarians have taken this approach in active litigation. In the most recent instances, the underlying legal issues have been ones of public and parliamentary concern. In 2011 the substantive issue was so-called super-injunctions and the use of interim injunctions in cases where the media wished to publish stories about the alleged sexual impropriety of public figures. The most recent case concerned what are known as non-disclosure agreements concerning alleged sexual harassment in the course of employment.
35. In the most recent case the Court of Appeal had concluded that an interim injunction was necessary to prevent the identity of the respondent being revealed, together with the details of allegations of impropriety, to enable the question whether the non-disclosure agreement should prevail to be determined in a speedy trial. Lord Pannick QC has suggested that the Standing Orders of both Houses should be amended to provide that a parliamentarian may not disclose information he or she knows to be protected by a court order without first seeking and then complying with a ruling by the relevant Speaker.⁴⁶ The Speaker of the House of Commons has a similar role if a Member of Parliament wishes to discuss proceedings which

⁴⁵ Lord Lisvane KCB DL, *The Courts and Parliament*, [2016] PL 272 at 276.

⁴⁶ The Times 8 November 2018. He was echoing the proposal made by Lord Lisvane to the Joint Committee on Privacy and Injunctions (Report HL 253 and HL 1443) six years earlier.

are *sub judice*. Whether to follow Lord Pannick's suggestion is a matter for each House of Parliament.

36. I do not for a moment doubt the genuine belief of the parliamentarians in question that they were acting in what they thought was the public interest. Yet in effect to nullify the order of a court on the basis of an individual view, however genuinely felt, is not compatible with the rule of law. It results in the parliamentarian concerned constituting himself a one-person court of final appeal. The freedom of speech in Parliament was guaranteed to protect parliamentarians in the exercise of their functions, rather than to enable the open defiance of court orders. Parliamentary privilege guarantees "freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges", as Lord Phillips put it in *Chaytor*. In the United Kingdom we live in a society where the roots of the rule of law have grown very deep indeed. The instances of abuse of parliamentary privilege happily are rare. Yet the scope for abuse, not only in the context of the defiance of court orders, is great indeed in the absence of appropriate self-restraint or effective rules determined and enforced by Parliament itself.

37. The constitutional right to freedom of speech carries with it the obligation to exercise that right responsibly. The Speaker of the House of Commons said this on 27 May 2010 following his re-election:

"On receiving royal approbation ...I made the traditional claim to Her Majesty for all the House's ancient and undoubted rights and privileges, particularly to freedom of speech in debate. That is at the very heart of what we do here for our constituents, and it allows us to conduct our debates without fear of outside interference, but it is freedom which we need to exercise responsibly in the public interest, and taking into account the interests of others outside this House. I would encourage any Member to research carefully and to take advice before exercising this freedom in sensitive or individual cases."

38. Following the incident in October last year, Lord Fowler, the Lord Speaker, made a short statement in which he referred to a number of common and shared features which underpin our democracy. He continued:

“Two of the most important are the freedom for members of the legislature to speak freely, without repercussion and respect by the legislature for the independence of the courts and the rule of law. As we know, this is not the case everywhere in the world. The relationship between the two should not be one of conflict but mutual respect. As parliamentarians we should be keen to respect the proper business of the courts, just as we expect the courts to respect the authority of Parliament. In particular, we should be careful that in exercising our undoubted right to free speech in Parliament we do not set ourselves in conflict with the courts or seek to supplant them.”

39. If I may respectfully say so, the Lord Speaker’s summary of the constitutional position is pitch perfect and echoes the practical approach of the Speaker of the House of Commons. It would be most unfortunate if the combined wisdom in their advice goes unheeded. The balance struck between each of the three branches of government is such that each must respect and support the other. The rule of law depends upon it.

40. As this week’s conference develops I trust we will emerge confident that the rule of law is not in retreat. But as our societies face new challenges, the principles of mutual respect will need constantly to be reinforced. The Commonwealth is well placed to do so, given how well established our shared values are and how well embedded the rule of law has become in our respective constitutional settlements.