

PARLIAMENT AND THE LAW - SOME RECENT DEVELOPMENTS*

DAVID MCGEE

Clerk of the House of Representatives

The largest source of new law generated each year is law enacted by Parliament. Judge-made law is of its nature episodic and ad hoc depending as it does on the chance of a legal dispute being pursued to a higher court and thus giving the judges an opportunity to declare or make law with significant precedential value in deciding the case. It is also limited in its potential scope for developing the law - of necessity this can only be incremental where judge-made law is concerned.

Parliamentary law, on the other hand, is law which parliamentarians promote and can use to deal with any subject they choose to attend to. It undergoes an extensive process of consultation and refinement and can deal with a subject in the broadest possible way. As Felix Frankfurter has said - legislatures make law wholesale, judges retail.¹ Parliamentary law - legislation - is differently expressed from judge-made law and potentially much more far-reaching.

But legislation needs to be interpreted and this does give the courts the last word on what parliamentary law means. Increasingly, in construing legislation, courts have had resort to material generated in the course of passing the legislation - speeches made on the bill, reports of select committees, explanatory notes printed along with the bill, etc.

So the parliamentary process has in the past decade or so come to assume a legal significance that it did not possess before, when courts were much more reluctant to refer to it for assistance in statutory interpretation.

But the parliamentary process is coming to have legal significance in a range of other situations quite apart from its use as source material in interpreting legislation. These legal significances can involve the legislature as a whole and actions that it is contemplating, or a group of members, such as a select committee, and action they have taken or propose to take. It can involve an individual member or, indeed, it may concern a legal dispute in which no member of Parliament is involved at all.

It is important to keep in mind a fundamental distinction in this area between the two distinct institutions, Parliament and the House of Representatives. Parliament consists of the Sovereign and the House acting jointly to enact legislation - Acts of Parliament. Enacting law is all that Parliament does. Because we no longer have a Second Chamber (having abolished the Legislative Council in 1951) we are sometimes inclined to think that Parliament and the House of Representatives are the same body, but they are not.

While Parliament only enacts law, the House of Representatives does many other things as well as contributing to the enactment of law by passing bills. It therefore generates much material in the process of making its

* This is an expanded version of a lecture delivered to the Public Law class at the University of Canterbury in August 1996.

1 Quoted in Mark Silverstein, *Constitutional Faiths* (1984), pp 142-43.

contribution to the Act and while doing those other things. This material is not itself law but it may be good evidence of what the law is.

Because we have no higher law or written constitution, law properly enacted by Parliament cannot be disallowed or invalidated by the courts. But as the House is not the same body as Parliament its actions, or actions that occur as part of its proceedings, are potentially open to legal control or examination. To give one topical example it is only necessary to refer to the litigation involving Hon Winston Peters MP, *Cushing v Peters*.² In that litigation Mr Peters is alleged to have defamed Selwyn Cushing in television interviews. But he did not actually name Mr Cushing as the person he was talking about during the interviews. Later, speaking in the House, Mr Peters did name Mr Cushing, confirming that he was the person about whom he had been talking in the television interview. Could Mr Cushing use Mr Peters' parliamentary statement to prove this? Immediately, an issue of some legal and constitutional importance arises of the extent to which and the purposes for which proceedings in the House can be used in a court of law to affect legal liabilities.

I. ARTICLE 9 OF THE BILL OF RIGHTS 1688

Although we have no higher law we do have a rather venerable statute that is fundamental to the answer to any question involving the extent to which the courts can examine parliamentary proceedings. This is the Bill of Rights 1688 which is an English statute that was confirmed as being in force in New Zealand by the Imperial Laws Application Act 1988.³ The Bill of Rights (which, despite its title, is an Act of Parliament) was enacted as part of a *modus vivendi* between the Crown and the Parliament in England. Its intent was to express the independence of the legislature and its members from the legal control of the executive. At the time of its enactment memories of the Civil War fought in the 1640s were still strong. Part of the reason for the war was dissatisfaction with the Crown's legal powers and dominance over Parliament. These issues remained unresolved after the restoration of the monarchy in 1660. The Bill of Rights gave legal expression to their resolution - henceforth the legislature was to be clearly sovereign over the executive. Most of the provisions of the Bill of Rights are directed to this.

This background has no contemporary relevance to New Zealand. Executive dominance of Parliament has been a matter of concern but that dominance has been party political, not legal. The recent change in the electoral system is in some part an attempt to remove the political dominance of the executive over Parliament exercised as it is through the party system. No longer will our elections throw up a single party with an overall majority in Parliament that it can rely on to bulldoze through the House any measures it wishes to enact. Whether or not MMP will bring total satisfaction with Parliament, it will undoubtedly weaken the executive's influence and control over the legislature.

2 District Court, Wellington, NP:1340/92, 17 June 1996, Judge J W Dalmer.

3 As the Hon Dr Michael Cullen MP (an historian) has pointed out, the Bill of Rights was actually enacted in 1689, not 1688. The convention of dating it as 1688 appears to have arisen out of confusion with the Declaration of Rights. This declaration was adopted by the Convention "Parliament" which met during the interregnum between the overthrow of James II and the accession of William and Mary. The Bill of Rights gives statutory effect to it. The Imperial Laws Application Act 1988 adopted 1688 as part of the title of the Bill of Rights so (whatever the historical position) 1688 is the correct legal citation in New Zealand.

But the Bill of Rights today is largely irrelevant to the political relations of the executive and the legislature. What the Bill of Rights - or, in particular, one of its provisions, Article 9 - is relevant to is the legal relationship between the legislature and the judiciary. Article 9 of the Bill of Rights prohibits a court (or for that matter any other body with attributes that may be likened to a court, such as a tribunal or Commission of Inquiry) calling into question or impeaching proceedings in Parliament. The Bill of Rights and judicial policy have combined to prevent what has happened or is happening within Parliament from having significance before a court. It has hitherto largely made parliamentary proceedings non-justiciable. In a sense Article 9 of the Bill of Rights (virtually included as an afterthought in 1689) has been the most successful example of a privative clause on the statute book. It is how this is changing that is interesting in terms of the influence of the House of Representatives on the law.

The Bill of Rights does still express a value and policy to which it is prudent to give effect. Because both the legislature and the judiciary possess law-making authority each acts responsibly if it respects the prerogatives and the role of the other so that their respective authorities are used co-operatively rather than antagonistically. On the House's side it and its members must always remember that they too are subject to the rule of law and that if Parliament has enacted laws that apply to the House these must be obeyed. But on the court's side there must be a proper recognition of the fact that appointment by free national elections does give the House a degree of legitimacy in its operations that can be claimed by no other body in the State and that a court should not be drawn into playing what might be seen as a partisan role in a dispute that ought to be settled through the political process.

Thus, the House has well-established rules of procedure designed to prevent it discussing a case that is before a court and to prevent a member reflecting adversely on the conduct of a judge. These are self-imposed restraints on the part of the House. For the courts, a proper observance and interpretation of the Bill of Rights is the main way in which they ensure that they do not trespass into areas that are more appropriately left for determination by elected legislators.

The Bill of Rights is central to our system of mutual restraints between the legislative and judicial branches of government and is becoming more important in this respect, not less so. There is an increasing propensity, encouraged by a change in judicial policy, to accord legal significance to parliamentary proceedings. This seems to me to be a perfectly acceptable shift in emphasis provided that in doing so due regard is paid to the rule of restraint enacted by the Bill of Rights. After all the Bill of Rights is not judge-made law, it is statute law of contemporary relevance (confirmed as recently as 1988) and binding on the courts.

The indications are that courts are fully cognisant of the Bill of Rights and that they have taken pains to observe the constraints on their processes that its existence implies.

Let us look at some of the legal questions that can arise that may involve a court hearing evidence about what has occurred in Parliament.

II. EXAMINING THE PARLIAMENTARY PROCESS IN A COURT

A good place to start is with legal provisions that impose a statutory procedure on the way in which Parliament enacts legislation - 'manner and form' provisions. The best example is the reserved provisions contained in

section 268 of the Electoral Act 1993. If an Act is passed in a way that does not follow the procedure set out in a manner and form provision its validity can be challenged, even in our system, the argument being that if the statutory procedure has not been followed the "Act" is not an Act at all. The considerations involved in reviewing an Act for a breach of a manner and form provision are not new. But can the House be directed prospectively - that is, before it has even passed the bill - as to the correct procedure to follow with a manner and form provision? And can the House be prevented from proceeding with consideration of a bill on the grounds that its consideration would breach a manner of form provision?

I do not intend to offer any simple response to these questions here, but they have been raised recently in litigation in the attempt by the Christian Democrat party to prevent the House from passing the Electoral Reform Bill 1995. The bill did contain an amendment to a reserved provision that it was argued could only be made by referendum and not by the House. The relief sought included the, ostensibly startling, suggestion that the major party leaders be directed by the court as to how they should use their votes in Parliament on the amendment and that the leaders should be required in turn to direct the members of their parties as to how they should cast their votes. An application for interim relief was struck out on the ground that the court should not intervene at that point, but that there may be circumstances in which it would be proper to intervene was left open.⁴

One of the problems with this case is that the nature of the relief sought was so extreme as to be a direct attack on the operation of the legislature. To some extent this discredits the idea of judicial intervention at all. But if counsel could be persuaded to confine the relief sought to something that takes proper cognisance of the elective principle (for example, by seeking a declaration rather than an injunction) would there not be a stronger case for a court to intervene in a case of manifest illegality? Certainly, as far as the House is concerned, the question must be faced of why the House, as a body under law, should be exempt from judicial control if it manifests an intention to act illegally (something which, it is submitted, it did not manifest in respect of the Electoral Reform Bill).

Another area that has been a cause of concern both within Parliament and before the courts concerns the use of proceedings in the House to support or rebut a cause of action that has itself no parliamentary connection. Obviously, no one can be held liable in legal proceedings for their parliamentary actions. But to what extent can parliamentary actions be used as evidence in legal proceedings? For the absolute protection conferred by the Bill of Rights is not a blanket ban on the use of parliamentary material in legal proceedings. If it were, many of the legal developments in respect of statutory interpretation, for example, would have been impossible. So the question resolves itself into considering the use to which the material is put and determining whether this use is one which is made impermissible under the Bill of Rights - does it "question or impeach" parliamentary proceedings? (It seems likely that the use of the words "question or impeach" is supererogatory as with much legal drafting of the time and that no distinction between the two terms was intended when the statute was passed and none should be given now.)

The leading case in which the principles for the use of parliamentary materials in such a context were expounded is *Prebble v Television New*

4 *Thomas v Bolger* (High Court, Wellington, CP289/95, 27 November 1995, Gallen J).

Zealand Limited decided in the Privy Council.⁵ In delivering judgment on behalf of the committee Lord Browne-Wilkinson said —

... 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

...

But, crucially insofar as such litigation as *Cushing v Peters* is concerned, the Privy Council went out of its way to emphasise that this rule does not exclude a court considering everything that happens in the House. This is apparent from Lord Browne-Wilkinson's formulation of the proposition quoted above which is concerned with the purpose for which the material is to be used, not its origin, but the committee stated this explicitly too. So, "there can be no objection to the use of *Hansard* to prove what was done and said in Parliament as a matter of history". In *Prebble* it was clear that the defendants did not wish to rely on parliamentary materials purely as a matter of history but as part of an alleged conspiracy (or the implementation of a conspiracy) to sell State assets at an undervalue. The pleadings, insofar as they did relate to these matters, had therefore to be struck out.

Cushing v Peters is about which side of the line the proposed use of *Hansard* in that case falls.

Article 9 of the Bill of Rights is concerned with protecting the integrity of the parliamentary process. It is not designed to advantage a particular litigant or class of litigants. It is a mistake to think of members of Parliament as in some way uniquely protected by Article 9. Whatever may have been the case in 1689, members of Parliament are not the only people who take part in parliamentary proceedings and Article 9 applies to "debates and proceedings in Parliament" not to individuals. In contemporary New Zealand far more witnesses take part in parliamentary proceedings through the process of select committee hearings than there are members. In 1995/96 something like 700 hours of oral evidence was heard from witnesses and over 3,000 written submissions were addressed to committees. The process of select committee hearings on all legislation is a defining feature of the way in which the New Zealand legislature works and a rule designed to protect that process is of critical public importance.

Furthermore, even when a member is involved in litigation the operation of the rule (being directed to process, not person) may not operate in the member's favour. Two British members of Parliament as plaintiffs have recently had their actions for defamation struck out in the interests of justice because the litigation was so closely intertwined with their parliamentary conduct that it would have been impossible for the defendants to defend themselves properly without breaching Article 9. This outcome has so disturbed the British Parliament that it has amended the law to allow persons to waive the application of Article 9 insofar as it applies to them.

Article 9 is obviously alive and of contemporary relevance. It is also a basic rule relevant to a consideration of any facet of the relationship between the courts and Parliament. But it does not, as has been pointed out above, raise an impenetrable barrier between the two that would seek artificially to prevent the courts taking account of what has occurred in Parliament.

5 [1994] 3 NZLR 1.

III. THE INFLUENCE OF LEGAL CONCEPTS ON PARLIAMENT

We have been dealing so far of with how parliamentary actions may have legal implications and effects but there are illustrations of how legal developments may flow the other way - into parliamentary procedures.

The fact that its proceedings may have legal significance is itself a matter with implications for the operations of the House and its members. Because neither the House nor its members are above the law they must take care to observe formal legal rules that apply to them, for failure to do so will (increasingly) entail legal consequences. This means that the House itself, in its procedures, must take note of the possible legal implications of what actions are being performed. Consequently the House's presiding officers are being called upon to extrapolate the House's proceedings and members' actions into the legal consequences of those proceedings and actions and its committees have given consideration to the relationship between the House's procedures and the law.

Two examples of how legal influences have flowed into parliamentary procedure are the "wine-box" issues and natural justice for select committee witnesses.

The term "wine-box" has assumed a particular significance in New Zealand political discourse. It is literally a reference to the receptacle in which, allegedly, certain documents relating to schemes to take advantage of the Cook Islands as a tax-haven were transported. In March 1994, Mr Winston Peters was given leave by the House to lay the contents of the wine-box on the table of the House. The documents (or some of them) were the subject of a court order prohibiting their publication. What effect did the tabling of the documents have on the court order?

One short answer to this is that it had none. The court order still subsisted and anyone acting contrary to it would be in contempt of court. But the tabling of the documents did affect the conditions under which publication of them might take place. First, Mr Peters' 'publication' of the documents to the House was, of course, absolutely protected from any liability for contempt of court because of Article 9. But to what extent could members or parliamentary officials transmit them to other persons free of liability and could those other persons then use them free of the restraining order?

This question was the subject of a statement in the House from the Speaker defining how the House would treat the documents in the light of the court order.⁶ The Speaker affirmed that the primary purpose of tabling a document is to convey it to other members and so copies would be made freely available to members on the strength of such circulation being a proceeding in Parliament protected by Article 9. But the House was not a vehicle for distributing documents to the world at large contrary to a court order and no special protection against proceedings for contempt existed beyond distribution to members. Members and the press were reminded that if they used the documents outside parliamentary proceedings (however they might have obtained them) they risked liability for contempt of court. Subsequently, following consideration of the matter by the Privileges Committee, the House formally ordered the publication of the documents as parliamentary documents so as to invoke a statutory protection for their use outside parliamentary proceedings, notwithstanding the court order.

⁶ *NZ Parliamentary Debates*, 1994, Vol 539, p 470 (17 March 1994).

The enactment of the New Zealand Bill of Rights Act 1990 has also had a direct effect on the House's procedures.

The Act applies to the "legislative branch of government". But how exactly? Well one obvious means is in respect of the rules of natural justice which the Act enjoins any public body which has the power to make decisions impinging on the interests of others, to follow. The House itself has accepted that this requirement applies to it (although without accepting that it can be coerced to follow any particular procedure).⁷ It has therefore accepted the obligation to give content to the rules of natural justice in a parliamentary context. Thus, 1996 saw the introduction of an elaborate series of rules guaranteeing the right to be heard when reputation is in issue and disqualifying members from participating in select committee proceedings in certain cases of bias. Other rules dealing with legal representation, a right to respond to allegations made in debate and better definitions of potential contempt situations can also be seen as a response to the need to ensure fairness and establish minimum rule of law standards applying to the parliamentary process.

It might be said that these developments are likely to have occurred independently apart from being a response to legal requirements. But that may or may not be true. The procedures are themselves legal concepts and it is impossible to divorce them from developments in legal thinking. It is lawyers who have forwarded thinking on natural justice and the rule of law. It is unlikely that a body of non-lawyers would have been concerned to adopt them without the stimulus of legal requirements. Certainly they would not have been absorbed so swiftly and comprehensively as were the 1996 reforms.

I believe that interaction between Parliament and the law through all facets of parliamentary proceedings (and not just statutes) is liable to become increasingly important in the future. The developments described above are merely the beginning of that process.

⁷ *Report of the Standing Orders Committee, 1995*, pp 79-80.