JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE

Evidence submitted by Francis Bennion

1. Having been requested to submit evidence to the Joint Committee on Parliamentary Privilege, I offer the following remarks relating to certain aspects of what is called for by the wording of the Invitation. I begin with a brief account of my qualifications.

Biographical note

2. I began working with legislation in 1948 as an editor of ***Halsbury's Statutes*** and have been involved with it ever since. Practice at the Bar and as Parliamentary Counsel followed in 1953-1994, with interludes. At present (since 1984) I am a research associate of the University of Oxford Centre for Socio-Legal Studies and a member of the Law Faculty of the University. As a constitutional lawyer I have advised the governments of Pakistan, Ghana, Jamaica and Gibraltar. I drafted constitutions for Pakistan and Ghana, the latter being described in my textbook ***The Constitutional Law of Ghana*** (1962). I am the author of many articles dealing with the subject as well as two textbooks: ***Statute Law*** (3rd edn 1990) and ***Statutory Interpretation*** (3rd edn 1997). I founded two charitable bodies concerned with reform of the legislative process, the Statute Law Society (1968) and the Statute Law Trust (1992). I also founded the Statute Law Review.

Codification

3. The Invitation says 'what are the merits of having the necessary protections of the two Houses codified, either comprehensively or in part, in legislation or in a new set of Resolutions of each House?'

4. I begin with this question because the answer will govern my evidence on other points. There should be codification, but this should incorporate the changes which need to be made in the present rules of parliamentary privilege. It is first necessary to decide what those changes are. Then a code should be drawn up by a joint committee of the two Houses and afterwards submitted to each House in the form of Resolutions. It is desirable that so far as practicable the code should be the same for both Houses.

5. The code should not be achieved by legislation, except where this is necessary because a change of law is required (for example in relation to the Bill of Rights). The need to uphold the dignity and sovereignty of Parliament makes it essential to embody the code in Resolutions of the two Houses so far this can be done in consonance with the need for the code to be fully effective in law. This brings me to the question of comity between Parliament and the courts.

Comity

6. The term comity derives from the Latin ***comitatem***, courteousness. 'In some instances, erroneous association with [the Latin] ***comes*** 'companion' is to be suspected'.[1] The legal use of the term is mainly in the context of international law, as meaning 'The courteous and friendly understanding, by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and

[1] ***Oxford English Dictionary*** (2nd edn, 1989), definition of 'comity'.

interests'.[2] Similarly there is held to be a requirement of comity, meaning mutual respect, between courts and legislature as two branches of the constitution. 'From the constitutional viewpoint, I do not think it appropriate with a view to the comity between the different branches of Government, and their independence of each from the other, that the actual proceedings in Parliament should be the subject of discussion (and thereby inevitably criticism) in the courts both from the Bench and by counsel . . . [It] would be constitutionally most undesirable.'[3] 'Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature . . . It therefore behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so. Although it is not a matter for me, I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the courts.'[4]

7. That Parliament is so sensitive is indicated by the fact that the House of Commons has resolved that no matter awaiting or under adjudication by a court of law should be brought before it.[5] The House of Lords has a similar rule.[6] Nevertheless Parliament has the ultimate power to withdraw matters from the courts through legislation. 'In a case which may be described as a grey area a court, while giving full attention to the necessity for comity between the courts and Parliament, should not be astute to find a reason for ousting the jurisdiction of the court and for limiting or even defeating a proper claim by a party to litigation before it. If Parliament wishes to cover a particular area with privilege it has the ability to do so by passing an Act of Parliament giving itself the right to exclusive jurisdiction.'[7] In ***Pepper (Inspector of Taxes) v Hart***, discussed below, it seems that Lord Browne-Wilkinson did not distinguish comity from parliamentary privilege.[8]

8. I suggest that in certain matters, dealt with below, the courts have in recent times trespassed upon the province of Parliament and gone beyond what comity dictates. This needs to be recognised in the changes to be proposed by the Joint Committee.

Purpose of parliamentary privilege

9. The Invitation asks what is the purpose of parliamentary privilege. I would answer that its purpose is to safeguard the dignity, and assist in the effective working, of Parliament considered as the prime organ of the state's democratic government. Privilege extends to Parliament itself, and to the members and officers of each House. Infringing it constitutes contempt of Parliament and is punishable in various ways. The concept and its attributes are common to all democratic parliaments, because grounded in necessity.

Replacing the phrase

10. The Invitation asks if there is a more modern and better phrase to replace 'parliamentary privilege'. I suppose this question is posed because the word privilege may be thought by some to be obnoxious as smacking of specially favourable treatment not available to the generality of people. The flavour was caught in Hilaire Belloc's stanza on the result of a general election.

---

[2]***Ibid***. It is sometimes used in this connection as a synonym for private international law or conflict of laws.
[3]Lord Hailsham of St Marylebone LC, 1983 Hamlyn lectures. See also (1980) 405 HL Deb cols 303-4.
[4]***R v HM Treasury, ex p Smedley*** [1985] QB 657, ***per*** Donaldson MR at 666.
[5]Erskine May, ***The Law, Privileges, Proceedings and Usage of Parliament*** (21st edn, 1989), p 326.
[6]Ibid, p 437.
[7]***Rost v Edwards*** [1990] 2 QB 460, ***per*** Popplewell J at 478.
[8][1993] AC 593 at 640.

> The accursed power which stands on Privilege
> (And goes with Women, and Champagne, and Bridge)
> Broke - and Democracy resumed her reign:
> (Which goes with Bridge, and Women, and Champagne).[9]

11. An alternative word is 'immunity', so that one might speak of 'parliamentary immunity'. However this covers only part of the ground, since parliamentary privilege is a sword as well as a shield. I suggest there should be no change here. The term has a long history and is well understood. It is found in other jurisdictions. There are perfectly respectable uses of 'privilege', as in the phrase diplomatic privilege. This topic, as a question of reform, comes into the 'If it's not broke don't fix it' category.

Article 9 of Bill of Rights

12. The Invitation asks 'what are the issues arising out of Article 9 of the Bill of Rights (1688) and freedom of speech?'.[10] In relation to freedom of speech, parliamentary privilege is largely, if not entirely, codified in Article 9. This states: 'That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament'.[11]

13. Article 9 is badly drafted and ambiguous, since 'freedom' may qualify only 'speech' or it may also qualify 'debates and proceedings in parliament'. In other words is it merely the ***freedom*** of parliamentary debates and proceedings that ought not to be impeached or questioned or is it the debates and proceedings in their entirety?[12] The following possible propositions can be extracted from the words-

> (i). That the freedom of speech [anywhere] ought not to be impeached or questioned . . .
>
> (ii). That the freedom of speech in Parliament ought not to be impeached or questioned . . .
>
> (iii). That the freedom of debates or proceedings in Parliament ought not to be impeached or questioned . . .
>
> (iv). That debates or proceedings in Parliament ought not to be impeached or questioned . . .

14. Statement (i) is a proposition about freedom of speech generally. It is plausible, but we can see it is not a correct reading by considering the introductory words leading to Article 9 in the selective version given by Viscount Simonds in *In re Parliamentary Privilege Act 1770*[13]-

> '. . . after reciting that 'the late King James the Second by the assistance of divers evil Counsellors Judges and Ministers employed by him did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this Kingdom' by the divers means there set out, 'the Lords Spiritual and Temporal and Commons pursuant to their respective letters and elections being now assembled in a full and free representative of this nation . . . do in the first place (as their ancestors in like case have usually done) *for the vindicating and asserting their ancient rights and liberties* declare . . ."[14]

---

[9] *Epigrams: On a Great Election.*

[10] The short title 'Bill of Rights' was given by the Short Titles Act 1896 s 1 and Sch 1. Although the year 1688 is often appended, royal assent was actually given in December 1689.

[11] This is the wording and punctuation of Article 9 as set out in 9 Statutes at Large (1764 edn) 69.

[12] As to what are proceedings in Parliament for this purpose see below.

[13] [1958] AC 331 at 348.

[14] Emphasis added. On the word 'declare' here Lord Denning said 'Whatever may have been the

15. So Article 9 is intended to vindicate and assert the ancient rights and liberties of Parliament and no more. It is not concerned with what we should now call the human rights of the population generally.

16. Statement (ii) above is undoubtedly one of the intended meanings of Article 9. What concerns us is the distinction between statement (iii) (the narrow proposition) and statement (iv) (the wider proposition, which includes statement (iii)). Is it only the *freedom* of debates etc that must not be questioned? Or does the restriction apply generally, so that it is forbidden to speculate as to the meaning of a speech in Parliament or the intention underlying it?

17. Judicial authority up to the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart*[15] shows the wider proposition to be the correct one. Blackstone said 'whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'.[16] In *Stockdale v Hansard* Lord Denman said 'whatever is done within the walls of either assembly must pass without question in any other place', while Patterson J said 'whatever is done in either House should not be liable to examination elsewhere'.[17] In *Bradlaugh v Gossett* Lord Coleridge CJ said 'What is said or done within the walls of Parliament cannot be inquired into in a court of law'.[18] In 1958 Viscount Simonds said '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'.[19] In 1972 Browne J said 'what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House'.[20] In 1974 Lord Simon of Glaisdale said 'I have no doubt that the respondent . . . is seeking to impeach proceedings in Parliament, and that the issues raised . . . cannot be tried without questioning proceedings in Parliament'.[21] In 1983 Dunn LJ said that where Hansard was cited in a judicial review case '. . . the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them. This, in my judgment, would be contrary to article 9 of the Bill of Rights.'[22]

18. On 31 October 1980 the House of Commons passed a resolution giving general leave for reference to

---

privilege of Parliament before the ninth article, it is quite plain that thenceforward the extent of the privilege was to be found by reference to the statute and nothing else' (*Public Law* (1985) 80 at 89).

[15][1993] AC 593.

[16]*Commentaries* (17th edn, 1830) I p 163. Popplewell J said that the origin of this 'seems to have been Coke' (*Rost v Edwards* [1990] 2 QB 460 at 473).

[17](1839) 9 Ad & El 1 at 114, 209.

[18](1884) 12 QBD 271 at 275.

[19]*In re Parliamentary Privilege Act 1770* [1958] AC 331 at 350. In his dissent from the majority decision of the Judicial Committee of the Privy Council Lord Denning said: 'There were four celebrated occasions on which plaintiffs sought to impeach in the courts of law the speeches or proceedings in Parliament' (see *Public Law* (1985) 80 at 87, where the dissenting speech is set out).

[20]*Church of Scientology of California v Johnson Smith* [1972] 1 QB 522 at 529.

[21]*British Railways Board v Pickin* [1974] AC 765 at 799. This passage suggests that Lord Browne-Wilkinson was wrong when he said in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 638 that the reference to impeachment in art 9 'is limited to cases where a Member of Parliament is sought to be made liable'.

[22]*R v Secretary of State for Trade, ex p Anderson Strathclyde Plc* [1983] 2 All ER 233 at 239. In the Australian case of *R v Jackson* (1987) 8 NSWLR 116 at 120 Carruthers J expressed agreement with this reasoning.

be made to parliamentary materials in court, thus dispensing with the need for special leave which had previously prevailed. Its wording is as follows-

> That this House, while re-affirming the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued.[23]

19. It should be noted that this resolution gives leave only for *reference* to be made to debates. It does not authorise discussion or argument about what was said in debates. So the Clerk of the House of Commons wrote to the Attorney General, in connection with the proposal to refer to Hansard in *Pepper v Hart*, that the proposed use 'is beyond the meaning of the "reference" contemplated in the Resolution of October 1980'. He went on: 'If a court were minded in particular circumstances to permit the questioning of the proceedings of the House in the way proposed, it would be proper for the leave of the House to be sought first by way of petition so that, if leave were granted, no question would arise of the House regarding its privileges as having been breached'.[24]

20. In a 1990 case which concerned material not within the 1980 resolution set out above, Popplewell J, holding that the wider proposition was the correct one, said: '. . . if I were faced for the first time with interpreting the word 'questioned' in the Bill of Rights I confess that I might well have concluded that it involved some allegation of improper motive. But what is clear is that, given the views of the large number of judges (and, more particularly, their quality) who have interpreted the Bill of Rights, it is simply not open to this court to take that view.'[25]

21. So, subject to consideration of *Pepper v Hart* (which I will come to), we may remove the ambiguity by restating Article 9 in the following form: 'That the freedom of speech in parliament, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament'. Thus to question what is said in Parliament, eg by the sponsor of a Bill, in a court or place out of Parliament is to contravene Article 9. This seems to catch such an act as is now rendered permissible by the ruling in *Pepper v Hart*. To allow an advocate to cite in court, as an indication of the intended legal meaning of an Act, a statement made in Parliament by the minister sponsoring the Bill for the Act, surely must involve 'questioning' the ministerial statement in the court. This questioning will inevitably take place when the advocate explains to the court how the statement helps his case, when his opponent puts to the court a contrary view, and when the judge joins in the exchanges and ultimately gives his or her own verdict on the argument.

22. The House of Lords decided otherwise in *Pepper v Hart*, though only Lord Browne-Wilkinson gave full reasons for their view. Two others gave very brief reasons. Lord Griffiths said[26]: 'I agree that the use of Hansard as an aid to assist the court to give effect to the true intention of Parliament is not "questioning"

---

[23]Cited by Lord Browne-Wilkinson in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 624. In the House of Lords there has never been a requirement that the leave of the House be obtained for citation of Hansard reports in court. Indeed, although compiled since 1909 by officers of the House of Lords, Hansard is not formally a record of the House. The Clerk of the Records has nothing in his custody which he could produce to a court as the 'original' report of a debate.

[24]The letter is set out in Lord Browne-Wilkinson's speech in *Pepper v Hart* ([1993] AC 593 at 624).

[25]*Rost v Edwards* [1990] 2 QB 460 at 474-475. In *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337 Lord Browne-Wilkinson said that it was questionable whether *Rost v Edwards* was rightly decided.

[26][1993] AC 593 at 617.

within the meaning of article 9 of the Bill of Rights. I agree that the House is not inhibited by any Parliamentary privilege in deciding this appeal.' Lord Oliver of Aylmerton said[27]: 'I find myself quite unable to see how referring to the reports of Parliamentary debates in order to determine the meaning of the words which Parliament has employed could possible be construed as "questioning" or "impeaching" the freedom of speech or debate or proceedings in Parliament or as otherwise infringing the provisions of article 9 of the Bill of Rights'.[28] Lord Browne-Wilkinson[29] also rejected the view that Article 9 prevented the citation of Hansard for the purpose of construing statutes. He did not discuss the argument as to the narrower and wider interpretation, but assumed the narrower was correct. He did not discuss any of the authorities cited above, except *Church of Scientology of California v Johnson Smith* and *R v Secretary of State for Trade, ex p Anderson Strathclyde Plc*. Of the former he said of Browne J 'his remarks have to be understood in the context of the issues which arose in that case'.[30]The latter he held to be wrongly decided. The only gesture he made in the direction of the earlier authorities was to say 'No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the minister's statements or his reasoning'.[31]

23. The main ground for Lord Browne-Wilkinson's decision was that in judicial review cases 'Hansard has frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner'.[32] The other ground Lord Browne-Wilkinson relied on was that if the opposing argument were correct 'any comment in the media or elsewhere on what was said in Parliament would constitute "questioning" since all Members of Parliament must speak and act taking into account what political commentators and other (*sic*) will say'. This overlooks the limiting effect of the words 'any court or place' in Article 9.[33]

24. In the 1994 case of *Prebble v Television New Zealand Ltd* the Judicial Committee of the Privy Council held that Article 9 prevented a party or witness from alleging that words in Parliament were improperly spoken or that an Act was passed to achieve an improper purpose, but that it did not restrict a person who wished 'to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning'.[34] To *argue* about the meaning of words spoken in Parliament without making any such imputation falls into a middle category not dealt with by the *Prebble* decision as just described. Note however that elsewhere in his speech[35] Lord Browne-Wilkinson approved, as a correct statement of the legal meaning of Article 9, section 16(3) of the Parliamentary Privileges Act 1987, an Act of the Commonwealth of Australia. This states that it is not lawful to make statements etc for the purpose of 'drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of . . . proceedings in Parliament'. Lord Browne-Wilkinson also[36] cited approvingly the following statement by Blackstone: 'The whole of the law and custom of Parliament has its

---

[27]P 621.

[28]Without discussing the relative arguments, Lord Oliver thus adopts the narrower interpretation.

[29]P 638-640.

[30]In *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333 Lord Browne-Wilkinson resiled from his earlier view when he said that the decision of Browne J was approved in *Pepper v Hart*, adding that the case decided that 'it would be a breach of privilege to allow what was said in Parliament to be the subject matter of investigation or submission'.

[31]P 639.

[32]He instanced *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, but no objection appears to have been made to the citation of Hansard in that case. It is not usual to treat a case as authority for a point that was not raised in it.

[33]It is submitted that the *ejusdem generis* principle applies here to limit the word 'place' to places, such as tribunals, which are of the same genus as 'court'. It was so held in the Australian case of *R v Murphy* (1986) 64 ALR 498.

[34][1995] 1 AC 321, *per* Lord Browne-Wilkinson at 373.

[35]At 333.

[36]At 332.

original from this one maxim, "that whatsoever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".[37] These dicta of Lord Browne-Wilkinson differ from the view expressed by him in ***Pepper v Hart.***[38] If followed they would largely emasculate the rule in ***Pepper v Hart.*** A further point is that it smacks of breach of privilege to hold one House of Parliament bound by what is said in the other, as the rule in ***Pepper v Hart*** requires.

25. It is submitted therefore that codification should make it clear that the wider meaning, as given in statement (iv) above, applies.[39] It will have the effect of considerably reducing, if not altogether abolishing the effect of the decision in ***Pepper v Hart.***[40] This would be beneficial because it has been found in practice that the effect of the decision is deleterious. Not only do the long-standing objections apply, but it has been found to have an inhibiting effect on parliamentary debate. Ministers now frequently decline to express an opinion on the intended meaning of a Bill for fear it will be cited later under ***Pepper v Hart.***[41]

Proceedings in Parliament

26. The Invitation asks about the scope of the phrase 'proceedings in Parliament' as used in Article 9. There is no authoritative definition of this phrase. In a 1990 case Popplewell J said-

> '[The Solicitor General] submitted that it embraced the various forms of business in which either House takes action and the whole process by which either House reaches a decision in particular debate. He also submitted that it embraced things said or done by a Member of Parliament in the exercise of his function as a member in a committee of either House; and everything said or done in either House in the transaction of Parliamentary business, whether by a member of either House or by an officer of either House . . . courts have over the years enlarged the definition of 'proceedings' from the formal speeches in the House to other matters ...'[42]

27. In Australia the Parliamentary Privileges Act 1987 (Cth) s 16(2) defines 'proceedings in Parliament' 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.'

28. It is clear that a definition of this phrase should be provided. It should protect every aspect of the work

---

[37] 1 Bl Com (17th edn) 163.
[38] See above.
[39] This is also the view taken by Parliament in the wording of the Defamation Act 1996 s 13(1).
[40] The objections to that decision are given in my textbook *Statutory Interpretation* (3rd edn 1997) at pages 490-496.
[41] For an example see the proceedings on the Human Rights Bill, eg HL Deb 18 November 1997 col 476 and 24 November 1997 col 800. In the latter place Lord Irvine of Lairg LC said: 'One of the dangers of ***Pepper v Hart*** is that if one becomes drawn in that way, what one says can be too readily cited in the courts for a particular interpretation of the Bill. ***Pepper v Hart*** does not come free of risk'.
[42] ***Rost v Edwards*** [1990] 2 QB 460 at 477-478. See also ***In re Parliamentary Privilege Act 1770*** [1958] AC 331, from which it appears that actions taking place outside the precincts of the Palace of Westminster, eg the sending of a letter to a Minister by an MP, may be included.

of Parliament.

Defamation Act 1996 s 13

29. The Defamation Act 1996 s 13 permits an MP or peer to waive the privilege conferred by Article 9 of the Bill of Rights for the purpose of defamation proceedings. The section is based on a misconception, for the privilege is that of Parliament and (apart from the section) no individual member is able to waive it. This principle should continue to apply. Waiver by a single member leaves the privilege extant as respects all other members. This is anomalous, and like other anomalies may in time lead to difficulty. I recommend that section 13 be repealed.

27 January 1998.

[Published in Volume 3 of the Report of the Committee, HL Paper 43-III, 30 March 1999, pages 11-16.]