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Parliamentary Privilege vs. Constitutional Supremacy

Bérenger v Jeewoolal [1999] 2 MR 172

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Bérenger v Jeewoolal

1. INTRODUCTION

The case of *Bérenger v Jeewoolal*[1] was heard by the Supreme Court of Mauritius in 1998. It provides an interesting insight into the operation of the doctrine of parliamentary privilege within a legal system governed by a written Constitution. It is also an illustration of the development of a distinct area of Commonwealth jurisprudence dealing with constitutional matters.

Mauritius was originally part of the British Commonwealth before gaining independence in 1968. Like many British colonies, the newly independent Government accepted a shift away from the British tradition of a flexible unwritten constitution, and a written Constitution was put in place with the status of supreme law. In Mauritius, as in a number of other former British territories, this has led to some conflict with the traditional common law constitutional rules, particularly the doctrine of absolute parliamentary privilege.

This paper will centre on the approach of the Supreme Court of Mauritius to this conflict, clearly outlined in *Bérenger* by Chief Justice Pillay. This approach has its origins both in Mauritian case law and in similar decisions in other Commonwealth countries. Comparison will be made with the traditional common law position and with

different approaches that have developed elsewhere in the Commonwealth. The formal and substantive elements of the reasoning will be discussed and the underlying policy foundations of Pillay CJ's limited alteration of the Common Law will be discussed.

2. *BÉRENGER V JEEWOOLAL*

2.1 The Facts

Bérenger (the appellant) was the Leader of the Opposition in the National Assembly of Mauritius. Jeewoolal (the respondent) was the Speaker of the National Assembly. During a sitting of the National Assembly, Bérenger attempted to raise a point of order against a decision of Jeewoolal, who had let a member of the government speak on a privilege matter contrary to Standing Order 74(1). Jeewoolal refused to rule on the point of order. While Bérenger attempted to raise the point again members of his party shouted "shame" at Jeewoolal. Jeewoolal ejected one of them. Bérenger called out "shame, shame on you" and led a walk out of his party.[2]

Once Bérenger had left, Jeewoolal put a motion to the Assembly that Bérenger be suspended. The motion was passed. A week later, Bérenger again attended the Assembly. He attempted to bring a point of order during a speech by the Prime Minister. He was stopped by Jeewoolal and asked to withdraw from the Assembly. He refused and was removed by force from the house without explanation.[3]

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[1] *Bérenger v Jeewoolal* [1999] 2 MR 172 (Supreme Court of Mauritius)
[2] *Bérenger*, above, 172-173.

2.2 The Claims

Bérenger claimed that he was not notified of his suspension or of the reasons for his ejection from the house. He also claimed that Jeewoolal's decision prevented his sitting in the National Assembly was illegal, was in breach of the Standing Orders and prevented him from fulfilling his "constitutional duties" as Leader of the Opposition.[4] He sought a motion declaring the Speaker's decision to prevent him attending to be "illegal, null and void, ultra vires, in breach of the Standing Orders and Rules of the National Assembly 1995 and ... a gross abuse of power".[5] He also asked for a motion declaring him to not be suspended and for any other motions the court deemed appropriate. He had earlier obtained injunctive relief to allow him to sit in the National Assembly pending the determination of the main action.[6]

Jeewoolal responded with five objections to the claims. These are outlined on page 175 of the judgment and can be summarised easily. He argued that: the claim should be against the National Assembly not the Speaker; that the Court has no jurisdiction as it concerned the internal proceedings of the National Assembly; that to consider the application would breach the principle of separation of powers; that it was statutorily prevented[7] and that even if the court did have jurisdiction there had been no breach of the Standing Orders.[8]

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[3] *Bérenger*, above, 173.
[4] *Bérenger*, above, 173-174.
[5] *Bérenger*, above, 172.
[6] *Bérenger v Jeewoolal* [1999] MR 57.
[7] The relevant statutory provision is the National Assembly (Privilege, Immunities and Powers) Act 1953 s.3.
[8] *Bérenger v Jeewoolal* [1999] 2 MR 172, 175.

The Attorney-General was asked to intervene by the judges "in order to enlighten this Court" and was represented by the Parliamentary Counsel in the hearing.[9] Despite the extensive statements of claim and response, the Court found that the case could be decided with reference to just three of the respondent's counter-claims: that the court had no jurisdiction to intervene in the internal matters of Parliament; that it breached the separation of powers; and that it was statutorily prevented.

2.3 The Court's Reasoning

The Court for the case comprised three members of the Supreme Court of Mauritius: Pillay CJ, Yeung Sik Yuen SPJ and Matadeen J. Chief Justice Pillay delivered the judgment of the Court. The Court's judgment takes the unusual step of following the usual summary of facts and party's arguments by stating "what this application is not concerned with".[10] Pillay CJ then proceeds to outline seven areas that the application is not concerned with. This is an attempt by the court to narrow the argument to the specific point at issue.

He asserts that the application does not concern: the constitutionality of the Standing Orders in question, an alleged infringement of the applicant's constitutional rights, an alleged breach of freedom of speech, a request for constitutional determination of the appellant's membership, any question that the appellant is not the Leader of the

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[9] *Bérenger*, above, 174.
[10] *Bérenger*, above, 175.

Opposition, any allegation of unconstitutionality of the suspension or any breach at all of the appellants constitutional rights.[11] He also comments that[12]

> ...learned counsel for the applicant, himself, ... candidly admitted that the basis of his clients application is that the applicant was suspended without any motion to that effect having been made beforehand by any member of the Assembly, in breach of Standing Order 49(1).

The appellant/applicant was therefore asking the court to interfere in the proceedings of Parliament due to a breach by the Speaker of a Standing Order, where no breach of the Constitution has occurred.

Having clearly stated the application the court answers it immediately in the negative. Pillay CJ comments that given that: [13]

> the National Assembly has the constitutional authority to suspend any of its members to maintain the orderly conduct of its proceedings and that the applicant has no constitutional peg on which to hang his complaint ... we consider that the role of the court stops here.

Having come to the conclusion that it has no jurisdiction, the Court proceeds to provide evidence to substantiate its finding. In order to provide evidence for its stand it uses two main sources, the Common Law of Great Britain and cases argued in similar Commonwealth countries on the extent of parliamentary privilege. From these it

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[11] *Bérenger*, above, 175-177.
[12] *Bérenger*, above, 177.
[13] *Bérenger*, above, 178.

reaches the conclusion that "All the authorities from Commonwealth countries support our stand, whether or not they have a written constitution".[14]

2.4 The Common Law position in the United Kingdom

The court starts its consideration of the nature of parliamentary privilege by elaborating the classical common law position. The basis of the common law position is found in Article 9 of the Bill Of Rights of 1688, which states "(T)hat the Freedom of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement".[15] This provision was intended to remedy a particular problem facing Parliament namely "the assertion by the King's Court of a right to hold a Member of Parliament criminally or legally liable for what is said and done in Parliament".[16] However, as the case law has developed it has become clear, as Lord Browne-Wilkinson comments, that "there is a long line of authority ... of which Article 9 is merely one manifestation, viz, that the Courts and the Parliament are astute to recognise their respective constitutional roles".[17] Parliament legislates while the court adjudicates and each is independent of the other.

2.4.1 *Bradlaugh v Gossett*[18]

The classic British common law case concerning the right of Parliament to discipline one of its members is the 19th century case of *Bradlaugh v Gossett*. This case is quoted

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[14] *Bérenger*, above, 178.
[15] The Bill of Rights 1688, art 9, United Kingdom.
[16] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, 8 (PC).
[17] *Prebble*, above, 8.
[18] *Bradlaugh v Gossett*, [1884] 12 QBD 271.

extensively on pages 179-180 of *Bérenger*. In this case Bradlaugh, a duly elected member of the House of Commons for Northampton, was prevented from taking his oath of office and was excluded from the parliament buildings unless he would agree not to take the oath. He took a claim to the Court of the Queens Bench to have the order declared void.[19]

The court unanimously rejected his claim, citing the cases of *Burdett v Abbott* and *Stockdale v Hansard* to support the proposition that "what is said or done within the walls of parliament cannot be inquired into within a court of law".[20] Part of the reluctance of the court seemed to flow from the possibility that if the Court could intervene it "might in many supposable cases end in the privileges of the Commons being decided by the Lords".[21] Both Judges were keen to believe that the reasons for the Commons preventing the oath were reasonable. However, Lord Coleridge went as far as to comment that even if Bradlaugh was being unjustly prevented from taking an oath that he was legally entitled to "it is not a matter into which this Court can examine, if injustice has been done, it is injustice for which the Courts of law afford no remedy".[22] The Court did accept that there was a role for the Court in determining whether parliament did indeed have a privilege, but as soon as a privilege was established the Court could have no power to inquire into its exercise. This was especially true of privileges exercised within the walls of parliament.

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[19] *Bradlaugh*, above, 271-272.
[20] *Bradlaugh*, above, 275.
[21] *Bradlaugh*, above, 275.
[22] *Bradlaugh*, above, 277.

The Court's decision in *Bradlaugh* remains good law in the United Kingdom. It was endorsed by the House of Lords in the case of *British Railways Board v Pickin* where Lord Wilberforce commented that "the remedy for a Parliamentary wrong, if one has been committed, must be sought from Parliament and cannot be gained from the courts".[23] The rule in *Bradlaugh* was adopted by the Privy Council as the law in New Zealand in the case of *Prebble v Television New Zealand*.[24]

2.5 Constitutional Considerations

The Supreme Court of Mauritius accepts that the Common Law position is that there is a total bar on the Court inquiring into any aspect of the exercise of parliamentary privilege. However, this is not the end of the matter in the Mauritian context. Unlike the United Kingdom and New Zealand, Mauritius has a written Constitution that has status as supreme law. This means that "the principle (of parliamentary privilege) must of course be read within the context of the constitution".[25] To allow Parliament unfettered jurisdiction to resolve matters relating to its internal proceedings would possibly allow Parliament to act in breach of the constitution.

The danger in allowing parliament complete control of internal proceedings is acknowledged by the Supreme Court. Pillay CJ in a concise summary states that: [26]

> the classical position that the Courts of the Commonwealth have adopted is that they can determine the existence of a parliamentary privilege, in our case that of suspension, but will

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[23] *British Railways Board v Pickin* [1974] AC 765, 793 (HL).
[24] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1.
[25] *Bérenger v Jeewoolal* [1999] 2 MR 172, 179.

not inquire into the exercise of that privilege, unless it results in a breach of the Constitution itself, in countries like Mauritius that have a written Constitution.

The Court takes the common law position and adapts it to the different legal framework found in Mauritius. Although it changes the common law approach, Pillay CJ is careful to only alter the position to the extent necessary to protect constitutional right. This position is based on a number of cases, one of which is from Mauritius, with the remainder coming from other similar Commonwealth jurisdictions, in particular Tonga, Papua New Guinea and Jersey. These countries have similar constitutional structures and the decisions of their courts have been reported in the Law Reports of the Commonwealth series.

2.5.1 *Fotofili and Others v Siale* [27]

The first case used by the Supreme Court to justify intervention on the grounds of a breach of the Constitution is the Tongan case of *Fotofili*. In this case a member of the Tongan Legislative Assembly (Siale) challenged the payment of parliamentary allowances that he believed some members were not entitled to. The members accused argued that it was a matter of parliamentary privilege and the court did not have any jurisdiction.[28]

In the process of deciding whether the Privy Council (in respect of Tonga) had jurisdiction, Sir Clinton Roper made a number of important statements concerning the

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[26] *Bérenger*, above, 179.
[27] *Fotofili and Others v Siale*, [1988] LRC 102. (PC - Tonga).
[28] *Fotofili*, above, 104.

impact of a written Constitution on the common law doctrine of parliamentary privilege. He came to the conclusion that [29]

> if on the true construction of the Constitution, some event or circumstance is made the condition of the authentic will of the legislature, or otherwise the validity of the supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court.

While this comment applies to the passage of a Bill through Parliament, it is equally applicable to a parliamentary disciplinary measure that contravenes a constitutional protection. In effect it goes further as it allows the court to examine whether a law passed is actually the valid will of the legislature if a breach of the Constitution has occurred during its procurement. This is very different to the position in *Pickin* where the House of Lords refused to inquire into an Act procured by fraud.[30] This is acknowledged by Sir Clinton Roper who commented that "(t)he position is then that the Assembly of Tonga, and indeed any parliamentary body based on a written Constitution, does not have the privilege of supremacy over the Courts enjoyed in the United Kingdom".[31]

2.5.2 *Attorney-General v Ramgoolam* [32]

The second case used to justify limited intervention by the Court is an earlier Mauritius case *Attorney General v Ramgoolam*. However in this case, the Court was actually acting with specific authority to intervene in the internal proceedings of parliament via

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[29] *Fotofili*, above, 104.
[30] *British Railways Board v Pickin* [1974] AC 765, 793 (HL).
[31] *Fotofili*, above, 106.
[32] *Attorney-General v Ramgoolam* [1993] MR 81 (Supreme Court of Mauritius).

article 37(1) of the Constitution of Mauritius. This article allowed the legislature to apply to the Supreme Court to declare a seat in National Assembly vacant. In this case the application was based on article 35(1)(e), which allowed the seat to be declared vacant if a member had been absent without leave of the Speaker for a period of more than three months.[33]

The facts are quite different to *Bérenger* as this was an application where "the Constitution has conferred on the Supreme Court a fundamental jurisdiction concerning Constitutional matters unknown to the Courts in the United Kingdom".[34] Pillay CJ notes this when he comments that in this case the Court had "a clear mandate" under the Constitution.[35]

As the jurisdiction of the Court was clear under the Constitution, the Supreme Court in *Ramgoolam* could have stopped at this point. It did not. The court decided to make a number of obiter comments on the wider powers of the court to review the internal proceedings of Parliament. It considered that the doctrine of parliamentary privilege was[36]

> ...bound to be relative in countries like ours in the new Commonwealth. We have adopted written Constitutions with entrenched provisions conferring on the judiciary, among a wide variety of other jurisdictional powers, the overall control of constitutionality, whether with regards to the functions performed by the legislature or the executive.

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[33] *Ramgoolam*, above, 82.
[34] *Ramgoolam*, above, 82-83.
[35] *Bérenger v Jeewoolal* [1999] 2 MR 172, 180.
[36] *Ramgoolam*, above, 84.

The tone of the Court is clearly assertive in stating its power to ensure compliance with the Constitution. Some of this may stem from the facts of the case where political machinations by one party had resulted in an attempt to have an opposition MP removed via some underhand tactics.

2.5.3 *Maha v Kipo* [37]

The third case used by the Court to support its position is another Commonwealth case, this time from Papua New Guinea. This case is particularly pertinent as the facts are similar in some respects to the facts in *Bérenger*. The Supreme Court of Papua New Guinea was asked to make a ruling on a breach of Standing Orders made in a meeting to elect the Premier of a Province. The Court came to the firm conclusion that it could not do so.[38] Woods J ruled that[39]

> (T)he Court can inquire into the constitutional provisions such as the initial matters of the way that the Assembly was convened and by whom but when it gets to the actual operations of the Standing Orders this Court cannot investigate the actual compliance or not with the Standing Orders as these are matters for the Assembly.

Interestingly, the Court did not consider the situation that would occur if there was a breach of a member's constitutional right as well as a breach of a Standing Order, although the judgment indicates that if a constitutional issue was raised the court would assume jurisdiction.

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[37] *Maha v Kipo* [1996] 2 LRC 328 (Supreme Court of Papua New Guinea).

Using this approach the Court declared one of the meetings held to be unconstitutional due to a failure to follow the constitutional guidelines; but declined to investigate any breach of Standing Orders. It held that the Court "cannot investigate, comment or criticise the conduct of that meeting, governed as it was by the Standing Orders".[40] The policing of the Standing Orders is a matter for Parliament not the Courts. This same principle is noted in *Bérenger* by Pillay CJ, who points out that Standing Order 49(8) of the Mauritius National Assembly provides a means for members to proceed against other members, even when there has been no actual breach of a Standing Order.[41] Such actions are to be policed by Parliament not the Courts, in the absence of any constitutional issues.

2.5.4 *Syvret v Baillache* [42]

The final significant case relied upon by Pillay CJ in his judgment is the Jersey case of *Syvret v Baillache*. This is also a case with some similarities to the facts of *Bérenger*. This case was taken by a Jersey Senator against the Bailiff and Deputy Bailiff of the States of Jersey (the legislature). The Senator had been suspended after refusing to withdraw unsubstantiated allegations of abuse of power against another Senator. He was suspended until he would withdraw the comment and apologise.[43] He "applied for judicial review of the rulings claiming that they had been made ultra vires, contrary to natural justice and in bad faith".[44]

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[38] *Maha*, above, 329-330.
[39] *Maha*, above, 331.
[40] *Maha*, above, 331.
[41] *Bérenger v Jeewoolal* [1999] 2 MR 172, 182.
[42] *Syvret v Baillache* [1999] LRC 645 (Royal Court - Samedi Division).
[43] *Syvret*, above, 654-656.
[44] *Bérenger*, above, 184.

This case provides an interesting comparison with *Bérenger* as Jersey lacks a written constitution. This means that the court has a more limited role in adjudicating disputes involving parliamentary privilege. This was immediately noted by the Commissioner, who commented that "in my judgment *if* I am satisfied that the matters complained of *do* relate to the internal regulation of the States, I cannot interfere and must decline jurisdiction".[45] He accepts the approach of *Bradlaugh* that while a court may inquire into the existence of a privilege, once it has determined that one exists, it may not inquire into its exercise. Interestingly, he specifically finds that "this principle in my judgment applies not only to the United Kingdom Parliament but to *any* legislative assembly. Even when such an Assembly is exclusively established by statute…".[46] He supports this statement with reference to *Fotofili* and *Maha*.

The conclusion reached by the Commissioner is the same as that in both *Maha* and *Bérenger*. He decided that "it is not for the Court to consider whether such Standing Orders were properly interpreted or applied, or whether such historic privileges or inherent powers have been properly exercised".[47] In addition to this conclusion, two other interesting points are raised by this case and its treatment by Pillay CJ in *Bérenger*. The first is the use by both the Commissioner and Pillay CJ of the judgment of the Canadian Supreme Court in *Speaker of the House of Assembly v Canadian Broadcasting Corporation*.[48] This important case will be considered in detail below as an alternative approach to the decision of the Court in *Bérenger*.

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[45] *Syvret*, above, 658.
[46] *Syvret*, above, 668.
[47] *Syvret*, above, 670.
[48] *Speaker of the House of Assembly v Canadian Broadcasting Commission* (1993) 100 DLR (4th) 213 (Supreme Court of Canada).

The second important point is the adoption by Pillay CJ of the policy reasons cited by the Commissioner in *Syvret*.[49] Pillay CJ quotes extensively from *Syvret*, adopting with approval the six policy grounds for non-intervention used in the judgment. The six reasons can be neatly summarised:

1. The legislature is the central organ of democratic government and should be completely independent.
2. Allowing appeals to the Court would prevent the function of the legislature by embroiling members in constant legal proceedings.
3. Both the judiciary and the legislature need to be completely independent so as to command respect.
4. Judicial abstention from supervision of parliamentary proceedings will ensure parliamentary abstention from judicial proceedings.
5. A legislature can provide its own remedies for injustice.
6. An affected member has the ultimate right to appeal to his or her electorate.[50]

These policy grounds are accepted by Pillay CJ and used to support limited intervention in parliamentary proceedings, only where there is a breach of the Constitution. The emphasis is clearly on the necessity for parliamentary independence in all but the most serious situations.

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[49] *Bérenger v Jeewoolal* [1999] 2 MR 172, 184-185.
[50] *Syvret*, above, 683.

2.5.5 The National Assembly (Privileges, Immunities and Powers) Act

The final reason cited in the judgment of Pillay CJ to justify judicial non-intervention is S.3 of the National Assembly (Privileges, Immunities and Powers) Act. This section states that "(N)o civil or criminal proceedings may be instituted against the Speaker or any member for words spoken before ... the Assembly or any committee, or by reason of an matter ... brought by him in the Assembly".[51] He comments that S.3[52]

> ...gives statutory effect to the general principle, indicated already, that the National Assembly has privilege over its internal proceedings and, in particular, the privilege of maintaining order in the Assembly and makes it abundantly clear that no action shall lie against the respondent or any member of the Assembly, for that matter, in respect of what is said and done by him within the walls of the National Assembly in the protection of its privileges.

Having dealt with this final point Pillay CJ upholds three of the objections of the defendant: the Court lacks jurisdiction; the claim is statutorily barred; and the claim breaches the doctrine of separation of powers found in the Constitution. The other two objections of the respondent were not addressed.

2.6 Pacific Cases

The cases used in the judgement of Pillay CJ to justify his findings are only a selection of the decisions that have occurred recently in Commonwealth countries. For example, in the Pacific Islands over the past decade there have been a number of cases that have

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[51] National Assembly (Privilege, Immunities and Powers) Act 1953 s.3.
[52] *Bérenger*, above, 185-186.

taken a similar approach to that of the Supreme Court of Mauritius. Unlike the cases referred to by Pillay CJ, these cases have a lower profile and have not been reported in major law reports such as the Law Reports of the Commonwealth. These cases further illustrate the evolution of a Commonwealth approach to this issue.

2.6.1 *Danny Phillip v The Speaker of the National Assembly*[53] (Solomon Islands)

This case heard by the High Court of the Solomon Islands also concerns a challenge to a Speaker's ruling on a Standing Order. The applicant had submitted a motion of no confidence to the Speaker. A Minister raised a point of order under Standing Order 36(3) claiming that such a motion could not be put as the issue had been raised at the previous meeting. The Speaker quashed the applicant's motion. The applicant appealed to the court arguing that the Speaker's ruling on the Standing Order was ultra vires as it breached the Constitution; he asked that the motion be reinstated.[54]

Ward CJ approached the matter from the perspective that "the privileges of parliament in the United Kingdom are part of our law having been brought from the Common Law, insofar as they do not conflict with the Constitution".[55] The Court came to the conclusion that it did not have any general right to intervene when the Speaker ruled on matters of procedure under the Standing Orders. He stated that[56]

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[53] *Danny Phillip v The Speaker of the National Parliament* [1990] SILR 227
[54] *Danny Philip*, above, 227-232.
[55] *Danny Philip*, above, 234.
[56] *Danny Philip*, above, 239.

> whilst the Court will never shirk from its duty to remedy any breach or infringement of constitutional rights of any person even if it requires an enquiry into the internal proceedings of parliament, it will only do so for the limited purposes of S.83 and in such a way as to reduce any potential conflict between institutions.

The Court would only intervene where the action of the Speaker had breached a constitutional right of the claimant. In this case, while the Speakers decision was not ultra vires, it was wrong, and this prevented the applicant from exercising a constitutional right. The Court reinstated the motion. The facts of this case are very similar to *Bérenger* except in this case the Speakers exercise of power did breach a constitutional right. The approach of the Court is identical, intervening in parliamentary proceedings only to the extent necessary to protect constitutional rights.

2.6.2 *Re Article 6 (1) (b) of the Constitution*[57] (Niue)

This case also concerns a motion of no confidence. A member of the Niue Assembly gave notice to the Speaker of an intention to move a vote of no confidence under article 6 (1) (b) of the Constitution. The motion was accepted by the Speaker despite the member refusing to disclose the names of the four members supporting him, as was required under the article. The Premier applied to the High Court of Niue for a declaration that the motion of no confidence was ultra vires under article 6.[58]

The Speaker's defence was to question the jurisdiction of the Court using article 24 of the Constitution. This article states that "neither the Speaker nor any member or officer

of the Niue Assembly in whom powers are vested for the regulation of procedure … shall in relation to the exercise by him of any of those powers be subject to the jurisdiction of any Court".[59] This provision is quite different to those considered in other cases as it gives parliamentary privilege a constitutional status. The immunity of the Speaker is a constitutional guarantee not a statutory or common law guarantee. This complication is side stepped by the Court, which categorises the application as concerning the *interpretation* of the constitution not an examination of the internal proceedings of parliament. However Dillon CJ does comment that the Courts "principal duty … is to uphold the Constitution"[60] and this is why Article 24 cannot inhibit the Court from interpreting the constitution.

This case does contain considerable factual differences to *Bérenger*, but the fundamental approach remains the same. The court's first duty is to uphold the constitution even if this requires intervention in the parliamentary process. In this case the intervention occurs to preserve the constitution although there are constitutional provisions designed to prevent such an action.

Both of these cases illustrate the development of a 'Commonwealth' approach. However they also illustrate that this approach is being significantly influenced by the availability of judgments and materials. All the judgments used in *Bérenger* were reported in the Law Reports of the Commonwealth series, while the case of *Danny Phillip* was not reported, and not used in *Bérenger* despite its similar facts. This is an

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[57] *Re Article 6 (1) (b) of the Constitution* (10 November 1994) High Court of Niue (Civil Division) C51/94.
[58] *Re Article 6 (1) (b)*, above, 1-2.
[59] The Constitution of Niue article 24(2).
[60] *Re Article 6 (1) (b)*, above, 3.

illustration of the effect that the availability of reports, and the choice of judgements to be included in those reports, can have on the development of the law.

3. COMMENTARY

3.1 Formal Elements

The judgment uses a rather unusual structure, with Pillay CJ choosing to first outline what the case was not about before stating the central issue. This has the effect of eliminating all peripheral issues and focusing on the actual application of the plaintiff. Unusually it also answers the application first, before moving on to provide justification. This is the reverse of many English style judgments, which survey the case law before coming to a conclusion. Aside from the unusual structure, the central features of Pillay CJ's judgment are the clear statements of the central principles, the reliance on the judgments of similar Courts in other Commonwealth countries and the extensive quoting with approval of other judgments.

3.1.1 Clear Statements of Principle

A central feature of the judgment of Pillay CJ is his clear elaboration of the principles upon which the court bases its conclusions. The judgment extends beyond the specific facts of the case to establish clear principles governing when a Court sitting in Mauritius has jurisdiction to intervene in the proceedings of the National Assembly. Instead of dismissing the case at the point at which he had established that there was no

constitutional breach, he proceeded to provide a detailed analysis of the Mauritian position.

A good example of the clarity of the judgment is found at 178, where he neatly summed up the role of the court. He commented that:[61]

> ...had this Court been satisfied that the alleged breach of the Standing Orders could give rise to an alleged breach of the Constitution, then this Court would have had the jurisdiction to determine the constitutionality of the disciplinary measures taken by the National Assembly and would not have been prevented by s.3 of the Act from doing so, since no Act of the National Assembly which is not sanctioned by the Constitution should be allowed to stand.

While Pillay CJ has tendency to write long sentences, the clarity of the writing leaves no room for misinterpretation or doubt.

3.1.2 Judgments of Commonwealth Courts

A second striking feature of the judgment is the extensive reliance placed by Pillay CJ on the judgments of similar Commonwealth Courts. He quoted extensively from judgments from Papua New Guinea, Canada, the United Kingdom and Jersey, as well as using examples from Zimbabwe[62], Tonga and South Africa[63] to illustrate specific points. This shows a clear acknowledgement of the common legal heritage and history of the post-independence countries of the Commonwealth.

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[61] *Bérenger*, above, 178.
[62] *Smith v Mustafa and Another* [1990] LRC (Const) 87 (Supreme Court of Zimbabwe).

Unlike the United Kingdom, many countries like Mauritius, Tonga and Papua New Guinea lack a historical Common Law tradition and constitutional conventions. These have been replaced by a written Constitution. While a Constitution provides a clear and definite elaboration of the rights and duties of both Government organs and individuals, it also brings a different range of legal issues that require resolution. In the absence of centuries of history and practice, the Courts of these Commonwealth countries are looking to each other to resolve these issues.

This process has been assisted by the publication of many of these cases in the Law Reports of the Commonwealth series. As noted above almost all cases cited come from this source. However the case of *Danny Phillip*,[64] from the Solomon Islands, which has similar facts and adopts a similar position, but was only reported in the Solomon Islands Law Reports is not cited in *Bérenger*. This is a good example of the publication of judgments affecting the approach of Courts across the Commonwealth.

3.1.3 Extensive Quoting

The final formal feature that stands out in the judgment is the way Pillay CJ chooses to quote extensively from the judgments of other Courts. In two cases the amount quoted occupies over a page of the judgment (*Maha*[65] and *Syvret*[66]). Within these sections the key points are underlined, but the extent of the quotations seems unusual compared to

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[63] *The Speaker of the National Assembly v P De Lille and the Pan Africanist Congress of Azani* [1998] Case No 297 (Supreme Court of Appeal - SA).
[64] *Danny Phillip v The Speaker of the National Parliament* [1990] SILR 227.
[65] *Bérenger v Jeewoolal* [1999] 2 MR 172, 181-182.
[66] *Bérenger*, above, 184-185

judgments of New Zealand or British Courts. This is partially explained by the similarities in Constitutional environments between Mauritius and the countries mentioned in the judgments. However, it must also indicate that Pillay CJ sees no point in restating what others have said adequately before.

The judgment of Pillay CJ in *Bérenger* is clear and well organised. He presents extensive evidence from cases both from Mauritius and the Commonwealth and uses them well to support his conclusions.

3.2 Substantive Elements

The effect of the judgment in *Bérenger* is to mould the traditional common law doctrine of absolute parliamentary privilege to fit the Constitutional environment of Mauritius. While Pillay CJ does depart significantly from the common law tradition, it is notable that he only departs from the Common Law to the extent necessary to preserve the role of the Constitution. He refuses to accept the contention of the applicant that the Court should intervene in cases of a breach of the Standing Orders, choosing instead to adopt a principle of limited intervention. The Court should only intervene when a breach of the Constitution has occurred. However the effect of the judgment should not be ignored. This is apparent if the facts of the case of *Bradlaugh v Gossett* are placed within the Mauritian context.

3.2.1 The Effect of *Bérenger* on *Bradlaugh v Gossett*

As mentioned above *Bradlaugh* is the seminal British case on the absolute right of Parliament to exercise its privileges without judicial intervention. In the case Bradlaugh, although being a duly elected Member of Parliament, was refused permission by the House to take his oath of office and banned from Parliament unless he gave an undertaking that he would not attempt to take the oath. The Court of the Queen's Bench refused his application for relief.[67]

If the case of *Bradlaugh* had occurred in present day Mauritius the result would have been completely different. Section 34 of the Constitution of Mauritius outlines the only possible reasons for a person being disqualified to be elected as a member. These include: insanity; membership of the public service; bankruptcy; and electoral fraud.[68] It was clear in *Bradlaugh* that the plaintiff was duly elected and it is apparent that he would not be disqualified from membership by S.34. If Bradlaugh had been excluded from the National Assembly of Mauritius in 2001 and not the House of Commons in the 1880s, he would have succeeded in his action in the Courts; claiming that the Assembly's exercise of parliamentary privilege had breached his Constitutional rights as an elected member. Provided that he could establish the Constitutional breach, under the ruling in *Bérenger*, the Court would have the jurisdiction to intervene and ensure that his Constitutional right was exercised.

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[67] *Bradlaugh v Gossett*, [1884] 12 QBD 271.
[68] The Constitution of Mauritius, s.34(1)(A)-(H).

The substantive effect of the decision in *Bérenger* is to place a limitation on the common law doctrine of absolute parliamentary privilege. This grants the Court jurisdiction to intervene only in the case of a breach of the Constitution. It reflects the Court's attempt to balance the need for parliamentary independence and a clear separation of powers with the status of the Constitution as supreme law.

4. ALTERNATIVE APPROACHES

While a similar approach to that of the Supreme Court of Mauritius has also been used in Tonga, Papua New Guinea, Zimbabwe and the Solomon Islands,[69] it is not the only possible solution to the conflict. The courts in Canada, Australia and Dominica have used alternative approaches. While one of these approaches is more conservative than that of *Bérenger* (Canada), other Courts have intervened or called for greater intervention in parliamentary proceedings (Australia and Dominica).

4.1 Canada - *Speaker of the House of Assembly v Canadian Broadcasting Commission*

This case concerned an application by the Canadian Broadcasting Corporation (CBC) to film the proceedings of the Nova Scotia House of Representatives. The Speaker refused this application because it would intrude on the "decorum" of the house.[70] CBC brought an action claiming that the Speaker's decision was in breach of s.2(B) of the Canadian Charter, which guaranteed freedom of the Press. The Speaker claimed parliamentary

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[69] *Danny Phillip v The Speaker of the National Parliament* [1990] SILR 227.

privilege. Both the trial judge and the appellate division of the Supreme Court of Nova Scotia agreed with the CBC.[71] However, the Supreme Court of Canada decided the opposite.

A majority of the Court (6-2) held that the Charter did not apply to the exercise of parliamentary privilege. McLachlin J delivered the main judgment of the majority. She argued that parliamentary privileges "are part of the fundamental law of our land and hence are constitutional".[72] Parliamentary privileges have achieved constitutional status "on the basis of the preamble of the constitution, historical tradition, and the pragmatic principle that the legislature must be presumed to possess such constitutional powers as are necessary for their proper functioning".[73] She held that as parliamentary privilege "enjoys constitutional status" it "cannot be abrogated or diminished by another part of the Constitution, in this case the Charter".[74]

By granting parliamentary privilege Constitutional status, the exercise of the privilege is freed from the possibility of judicial intervention to enforce *any* constitutional guarantee. The Court in CBC seems to have been particularly persuaded by the policy arguments used to justify non-intervention, centrally the necessity of parliamentary privileges to the proper functioning of the legislature. However, it seems questionable whether a limited jurisdiction for the Courts to enforce constitutional guarantees would impact on the functioning of Parliament. This was the position taken by Cory J in his

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[70] *Speaker of the House of Assembly v Canadian Broadcasting Commission* (1993) 100 DLR (4th) 213 (Supreme Court of Canada).
[71] *Speaker v CBC*, above, 216-222.
[72] *Speaker v CBC*, above, 269.
[73] *Speaker v CBC*, above, 262.
[74] *Speaker v CBC*, above, 261.

dissent. He had no problems applying the Charter to matters of privilege.[75] The majority however remained firmly convinced; to the extent that Chief Justice Lamer in agreeing with the conclusion of McLachlin J held that the House of Representatives was not the Legislature, (which was the House plus the Lieutenant-Governor) and hence was not covered by the Charter.[76] The Charter was only applicable to the Legislature, which did not equal the House of Representatives by itself; therefore the Charter could not apply. This argument is clearly overly legalistic but may be technically correct.

4.2 Australia - *Egan v Willis* [77]

This case concerned the power of the Legislative Council of New South Wales to request a document from a Cabinet Minister. The plaintiff (Egan) had refused to comply with such a request and had been suspended and forcibly removed from the house. He challenged the legality of his suspension and removal.[78] This raised three questions: whether the Council had the power to request documents; whether it had the power to suspend a member if a request was refused; and whether the Court could have jurisdiction.[79]

The High Court of Australia by a majority of 4-1 (McHugh dissenting) ruled that it had sufficient jurisdiction to decide whether the parliamentary privilege existed. Only McHugh J challenged the justiciability of the matter, commenting that "the common law courts will not examine the administration of the law - including statute law -

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[75] *Speaker v CBC*, above, 247-258.
[76] *Speaker v CBC*, above, 237.
[77] *Egan v Willis* (1998) 195 CLR 424 (High Court of Australia).
[78] *Egan*, above, 456-457.
[79] *Egan*, above, 458.

within the walls of parliament when the matters involved relate only to the internal proceedings of parliament".[80] Part of the reason why justiciability was not considered a big issue stemmed from the fact that "no objection was taken by the principal parties on the ground that the dispute was not justiciable".[81] As Kirby J notes the point was only raised by the State of South Australia as an intervener in proceedings.[82]

Only the judgment of Kirby J, among the majority, dealt significantly with the issue of justiciability, but his comments make interesting reading. He argues that there is a[83]

> ...further reason in Australia for dismissing the argument of non-justiciability. Courts in this country, at least in the scrutiny requirements of the Australian Constitution , have generally rejected the notion that they are forbidden by considerations of parliamentary privilege, or of the ancient Common Law of parliament, from adjudicating the validity of parliamentary conduct where this is to be measured against the Constitution.

While an initial response to this position may be that it is roughly the same as the Supreme Court of Mauritius's position in *Bérenger*, it is used by Kirby J and the majority to justify substantial intervention into the internal proceedings of Parliament. Instead of taking the *Bradlaugh* approach of acknowledging the right of parliament to police its own proceedings, the High Court of Australia actually looks at whether it has the right to exercise this privilege in the *specific context* of a request of documents. In this respect, the decision extends well beyond that of *Bérenger*, and to some, perilously

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[80] *Egan*, above, 461.
[81] *Egan*, above, 485.
[82] *Egan*, above, 487.
[83] *Egan*, above, 492.

close to reviewing the exercise of parliamentary privilege.[84] Previously the Court had been content to establish whether a privilege existed. In this case, they not only determine the existence but also examine the actual exercise of the privilege.

4.3 Dominica - *Sabroche v Speaker of the House of Assembly and Another* [85]

The final case that takes a slightly different approach to the issue of parliamentary privilege comes from Dominica. Sabroche was suspended by the House of Assembly for criticising a Minister who abused a farmer's group. He appealed to the court to have his suspension declared to be unlawful.[86]

The judgment of Redhead JA takes a rather unique approach to the issue of privilege. He argued that with[87]

> (T)he parliament of the Commonwealth of Dominica not having passed any legislation as provided for under s.41 of the Constitution and the House not having acquired privileges under the Common Law by virtue of ancient usage and prescription, the only privileges ... are those which are essentially necessary for its functions.

This is a slightly different situation to Mauritius due to the absence of legislation empowering the legislature to police its proceedings. However, the approach of the court is an interesting comparison.

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[84] See Russell Keith, "Judicial Intervention in Parliamentary Proceedings: The Implications of *Egan v Willis*" [2000] Federal Law Review Vol 28 549-574 for a critique of the High Court approach and an endorsement of McHugh J's judgment.
[85] *Sabroche v Speaker of the House of Assembly and Another* [1999] 3 LRC 584 (Court of Appeal of Dominica).
[86] *Sabroche*, above, 586-587.
[87] *Sabroche*, above, 595.

The judge found that the privilege used to suspend the member was not essential to the function of the Assembly and was in breach of the Standing Orders. He felt that in this situation "the Court is *obliged* to act and afford the aggrieved member appropriate relief" (emphasis added).[88] Redhead JA concludes that "the Court being the sentinel of the Constitution *must act* and has a *duty to act* when any authority acts in non-conformity with any rules or laws which it derives under the very Constitution" (emphasis added).[89]

This ruling goes further than either *Egan* or *Bérenger*. Not only is the Court accepting that it has jurisdiction to consider the existence of internal privilege, it also has a positive duty to act if the Constitution is breached by the exercise of parliamentary privilege. In *Bérenger* the Court would entertain a claim brought on the grounds of a breach of a Constitutional right, here the Court is suggesting that it has a duty to intervene even if there is no claim, in order to protect the Constitution. The extra step taken by the Court does reflect to some extent the facts of the case, where the Plaintiff had clearly been innocent of the claims levelled against him, and only guilty of scoring a substantial political point against the government.

4.4 New Zealand – *Prebble v Television New Zealand*

New Zealand's unwritten constitution places it in a different situation to most other Commonwealth countries. The similarity in position between New Zealand and the

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[88] *Sabroche*, above, 596.
[89] *Sabroche*, above, 596.

United Kingdom has led to a similar approach being adopted in New Zealand cases to that of the British Court. The central case concerning parliamentary privilege in New Zealand in recent years is the defamation case of *Prebble v Television New Zealand.*

The plaintiff (Prebble) had been Minister of State Owned Enterprise during the 1984-1990 Labour government. The defendant had aired a programme containing defamatory allegations. The defendant wanted to plead the partial defence of truth based on parliamentary proceedings. The plaintiff argued that the proceedings were privileged and inadmissible. The Court of Appeal agreed but stayed the action because, if allowed to proceed, the defendant would not have access to a fair defence.[90]

The Privy Council in the judgment of Lord Browne-Wilkinson applied the traditional Common Law position as set out in *Bradlaugh v Gossett.* While the case focussed mainly on defamation issues, the Court did consider the issue of privilege in general. Lord Browne –Wilkinson concluded that: "so far as the Courts are concerned they will not allow any challenge to be made to what is said and done within the walls of Parliament in performance of its legislative function and protection of established privileges".[91] Within a Westminster system of government such as New Zealand parliamentary privilege is supreme.

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[90] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, 1-3.
[91] *Prebble*, above, 7.

4.5 The Role of Policy

The alternative approaches of the different Courts clearly reflect the way that the weighing of policy factors affects the way that decisions are reached. *Bérenger* reflects the Court's attempt to balance the principle of the supremacy of the Constitution with the independence of Parliament and separation of powers. Conversely, the decision in *Speaker of the House v CBC* shows the Canadian Supreme Court placing a much higher value on parliamentary effectiveness and independence at the expense of the role of the Charter and the Constitution. The decisions in *Sabroche* and *Egan* see the Court citing the importance of the Constitution as paramount and placing a lower value on the independence of Parliament.

The central policy consideration in all judgements regardless of whether they allow intervention is the necessity of parliamentary privilege. Even in the decision in *Bérenger*, which acknowledges that when the Constitution has been breached a claim can be made, the extent of the claim is severely limited by parliamentary privilege. The emphasis of the Court is on giving the parliament maximum independence within the limits of the Constitution, rather than on guaranteeing constitutional rights first and foremost. This reflects the central position of the doctrine of parliamentary independence and the reluctance of the courts to intervene without a clear constitutional breach.

5. CONCLUSION

The decision of the Supreme Court of Mauritius in the case of *Bérenger v Jeewoolal* manages to balance the competing principles of the supremacy of the Constitution and absolute parliamentary privilege. This conclusion is based on a developing collection of Commonwealth jurisprudence on this issue. This development and its direction are clearly influenced by the availability of series such as the Law Reports of the Commonwealth.

Pillay CJ manages to deliver a clear and principled judgment that allows the Constitution to function, while retaining much of the independence of Parliament. By refusing to intervene in the absence of the breach of the Constitution he allows Parliament the maximum possible independence, while retaining the availability of a legal challenge should fundamental rights be threatened. This limits the possible instances of intervention to the most serious circumstances, thereby granting Parliament near complete control and ensuring a clear separation of powers.

While this approach has proved popular in many similar Commonwealth countries, the more conservative approach of Canada and the more radical approaches of Dominica and Australia provide an interesting contrast. Both the Dominican and the Australian approach show a rejection of the policy arguments advocating complete parliamentary independence. Particularly in the Dominican case the emphasis is on the Court to uphold the constitution before considering the effect on parliamentary sovereignty.

The judgement of the Mauritius Supreme Court is carefully reasoned and clearly argued. The clear and logical reasoning of the judgement combined with the detailed survey of the relevant authorities provides a judgment that gives an excellent guideline to future Courts, both in Mauritius and the wider Commonwealth.

Table of Cases

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