PARLIAMENTARY PRIVILEGE, DISCIPLINE/SUSPENSION OF MEMBERS OF PARLIAMENT - THE FIJIAN EXPERIENCE

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INTRODUCTION

The modern era of parliamentary privilege has its genesis with the establishment of parliamentary supremacy through the English Bill of Rights in 1689.[2] Parliamentary privilege is legal immunity enjoyed by members of certain legislatures which grant protection to its legislators against civil or criminal liability for action done or statements made in the course of performing their legislative functions. This is common in all commonwealth countries whose constitutions are based on Westminster system.

In British Parliament, this privilege allows members of Houses of Commons and Lords to speak freely during all parliamentary proceedings without fear of legal action on grounds of liable, slander, contempt of court or breaching the Official Secrets Act. In the English Parliament, members can be suspended from sitting in the House of Commons by the Speaker for disorderly conduct.[3] The Speaker can order that a Member of Parliament be removed from the House until the end of the day, but the common practice is that the Speaker often "names" that Member. If a member is "named", a vote is taken in the House in similar manner as a normal vote on legislation. If the vote is successful, the member "named" is suspended for five days for a first offence and 20 days for a second offence, during which time the Member cannot take part in votes and debates in Parliament. The Member's pay during this period is normally suspended. Similarly Members of the House of Lords can also be suspended. This does not happen often. In 1642 Thomas Savile, 1st Earl of Sussex was suspended for acting against Parliament on behalf of Charles I. In more modern times, in May 2009, Labour peers Lord Truscott and Lord Taylor of Blackburn were suspended after a newspaper accused them of offering to change laws in

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[2] 1689 Chapter 2 1 Will and Mar Sess 2 - https://www.legislation.gov.uk/aep/WillandMarSess2/1/2

[3] Standing Orders 2005 (2) https://publications.parliament.uk/pa/cm200506/cmstords/416/41603.htm

exchange for cash.[4] In October 2010 3 more peers, Baroness Uddin, Lord Paul and Lord Bhatia were suspended following parliamentary expenses scandal.[5] The House of Lords (Expulsion and Suspension) Act 2015 is now in force. Under this statute, the House of Lords can expel a member or suspend a member for a definite period of time.[6] So far, no member has been expelled or suspended under this Act.

The House of Commons ultimate power of discipline over one of its members has always been expulsion, thereby creating a vacancy and subsequent by-election in that Members constituency. The House of Commons has used the power of expulsion very rarely in recent past. Only three times in the last century, to be precise. This is probably due to professionalisation of politics and the removal of systematic corruption rather than a dislike to involve electors in a new election.

By contrast the Australian Parliament can suspend a member, but not expel him/her. Section 8 of Parliamentary Privileges Act 1987 states that the "House does not have power to expel a member from membership of the House."[7] Prior to this Act, the Australian Parliament had expelled a member on only one occasion in 1920. A member was disciplined and expelled for making seditious and disloyal utterances at a public meeting about British policy on Ireland at the time.[8]

In Canada, the Senate, House of Commons and Provincial Legislative Assemblies follow parliamentary privilege as available in England. Members enjoy individual parliamentary privileges such as freedom of speech, freedom from arrest from civil action, exception from jury duty and freedom from obstruction, interference, intimidation and molestation. They also enjoy

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[4] Labour peers suspended in first Lords-for-hire scandal since 17th Century - http://www.dailymail.co.uk/news/article-1181572/Labour-peers-suspended-Lords-hire-scandal-17th-Century.html

[5] Three peers suspended from Lords over expenses claims - http://www.bbc.co.uk/news/uk-politics-11597922

[6] Section 1 House of Lords (Expulsion and Suspension) Act 2015 - https://services.parliament.uk/bills/2014-15/houseoflordsexpulsionandsuspension.html

[7] Australia's Parliamentary Privileges Act 1987 - https://www.legislation.gov.au/Details/C2016C00951

[8] Association of Secretaries Generals of Parliaments October 2007 https://www.asgp.co/sites/default/files/documents//LEROCTYQOCXCMPMNYMPNNCSUOGZQCK.pdf

a number of collective parliamentary privileges. The Canadian House of Commons has exercised its collective privilege to expel members on 4 occasions between 1874 and 1947.[9]

DOES PRIVILEGE OF ENGLISH PARLIAMENT ATTACH TO FIJI PARLIAMENT?

On 10 October 1874 Fiji was ceded to Great Britain. She was given colonial status and was administered by a Governor through the Legislative Council. Fiji remained a colony until 1970 and on 10 October 1970 Fiji was given independence and gained dominion status. A bi-cameral legislature under 1970 Constitution was adopted and the first general election held in 1972. Fiji thrived under parliamentary democracy for the next 15 years when that democracy was disrupted by a military-led coup in 1987.

Parliamentary democracy was returned in 1992 under the 1990 Constitution. This Constitution was revised and amended in 1997 and Fiji continued to be ruled through parliamentary elections until political upheaval in 2000. Parliamentary democracy returned in 2001. In 2006 there was another political upheaval. Following the establishment of a new constitution in 2013, elections were held in September 2013 to elect new members of parliament. The new parliament first convened on 6 October 2014. This Parliament is a unicameral legislature comprising 50 members elected by an open list proportional representation in one multi-member nationwide constituency.

When Fiji gained independence in 1970, pursuant to Section 22(1) of the Supreme Court Ordinance (now High Court Act Chapter 13 Laws of Fiji) the common law rules of equity and the statutes of general application which were in force in England on 2 January 1875 became law in Fiji (subject inter-alia to any Fiji legislation). By virtue of Section 23 of the same Act, such portions of practice of English Courts as existed on that date "and were not inconsistent with general rules of the Supreme Court" were also brought into force. The High Court Act itself was preserved as an existing law by Section 5(1) of the Fiji Independence Order 1970. At the time local Fiji legislation did not specifically provide that privileges of English Parliament would attach to the newly created Houses of Parliament in Fiji. There was also no statement in the 1970 Fiji Constitution which provided that until the powers, privileges and immunities of the House were declared by Fiji Act of Parliament, the powers, privileges and immunities of Fiji Parliament shall be those of the Commons House of Parliament. Nevertheless Article 54 (1) gives Fiji

[9] Canada Privy Council Office, manual of official procedure of the Government of Canada, Henry F Davis and Andre Millar (Ottawa: Government of Canada, 1968) pgs. 239-242 https://parliamentum.org/parliamentary-and-constitutional-documents/manual-of-official-procedure-of-the-government-of-canada/

Parliament power to make provision for powers, privileges and immunities of the two Houses "for the purpose of orderly and effective discharge of business of the two Houses".[10]

In the case of Madhavan and Falvey[11] the Fiji Court of Appeal provided further analysis of why the English privileges of House of Commons applied to Fiji;

> "The Parliamentary Powers and Privileges Ordinance (Cap 3) (now Chapter 5) provides for some powers and privileges but does not purport to be an exclusive list and is concerned largely with procedural matters and offences by individuals. It is not in our opinion intended by implication to abolish those established privileges of the House itself, the power to punish for contempt and the exclusive right to control its own internal proceedings. This view receives support from Section 23 of the Ordinance which reads:-
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> > 'subject to the provisions of this ordinance, a copy of the journals of the House of Commons, House of Parliament of the United Kingdom of Great Britain and Northern Ireland printed or purported to be printed by the order or by the printer of the Commons House aforesaid shall be received as prima facie evidence without proof of it's being such copy upon any enquiry touching the privileges, immunities and powers of parliament or of any member thereof.'
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> Section 17 also contains a reference to the usage and practice of the Commons House of Parliament. A further link with English practice can be seen in the Standing Rules and Orders where by Rule 86 cases of doubt are to be resolved in accordance with the relevant practice of the Commons House of Parliament, and likewise in any cases not provided for in the Fiji Rules and Orders that practice is to be followed." [Page 11 of judgement]

Hence despite abrogations, repeals and amendments of Fiji's four constitutions they have all preserved prior laws provisions that remained on Fiji's statute books as good law.[12]

FIJI'S LAW ON PARLIAMENTARY POWERS AND PRIVILEGES

[10] 1970 Fiji Constitution. http://www.paclii.org/fj/legis/consol_act/fio1970acof403.pdf

[11] 1973 19 FLR 140

[12] Section 173(1) of 2013 Constitution

Parliamentary Powers and Privileges Act (Cap 5) was enacted in 1965 and subsequently amended in 1970 and 1975.[13] The Act provides for powers and privileges for members and officers of Parliament. It gives immunity from legal proceedings to a member for words spoken and written in document either presented in parliament or to a committee.[14] The Act also gives immunity to a member from arrest for a civil debt while attending a sitting of Parliament or a Committee. It also provides immunity from arrest for a criminal offence when the member is inside parliamentary precinct. There is however no protection if the Speaker has consented to the arrest.[15] The Act excludes a suspended member from parliamentary precincts.[16] It also enshrines rights and privileges of witnesses. A witness has the same rights and privileges as he/she would have if appearing before a court.[17] This Act however also provides for offences and penalties against witnesses for various violations.[18] The Act gives recognition to practice and procedure used in England's House of Commons.[19] Hence Standing Orders of House of Commons fall within this definition. Fiji adopted its own Standing Orders which have been amended over time to reflect changes to parliamentary setup. More recently, Standing Orders have been amended to reflect the unicameral legislature which was introduced by 2013 Constitution.

Standing Orders currently in force were adopted by Parliament on 8 February 2017.[20] They are not dissimilar to Standing Orders in many other British Commonwealth jurisdictions and contain inter-alia different chapters on the following subjects:

- Opening of Parliament and Offices of Parliament
- Sittings of Parliament
- Questions
- Motions and Voting
- Rules of Debate
- Legislative Procedures
- Amendments to Motions and Bills

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[13] www.paclii.org/Databases

[14] Section 3 Parliamentary Powers and Privileges Act

[15] Section 4 Parliamentary Powers and Privileges Act

[16] Section 9 Parliamentary Powers and Privileges Act

[17] Section 15 Parliamentary Powers and Privileges Act
[18] Sections 18/22 Parliamentary Powers and Privileges Act
[19] Section 17 (c) Parliamentary Powers and Privileges Act
[20] Standing Orders of the Parliament of Republic of Fiji – Legal Notice Vol 19 No. 27 published 20 March 2017

- Committees
- Miscellaneous

Standing Order 127 provides for the establishment of Privileges Committee. This Committee comprises the following members:

a) Deputy Speaker who is the Chairperson of the Committee; and
b) Five members appointed by the Speaker in consultation with the Prime Minister and Leader of the Opposition

The mandate of the Committee is to:

a) Bring to the attention of Parliament any breach of privileges of Parliament committed by any person
b) consider any question of privilege which may be referred to it by Parliament or by the Speaker
c) inquire into any complaint that may be referred to it by Parliament or Speaker regarding any breach of privilege by any person
d) provide reports and recommendations to parliament as a result of such referral

This Committee is vested with powers to summon any person to appear before it and give evidence or provide information. Its powers are the same as the High Court to enforce attendance of witnesses and to examine on oath and can compel production of documents or other material as necessary to perform its functions properly.

To understand how Fiji courts have dealt with parliamentary privilege and its breach, one needs to look briefly at how the English courts have delved into this matter.

APPROACH OF ENGLISH COURTS TO BREACHES OF PARIAMENTARY PRIVILEGE

Following Parliament's victory over the Monarch in the great constitutional struggles which took place in England during 17th century, freedom of speech within the course of parliamentary proceedings was enshrined in Article 9 of the Bill of Rights 1689 which provides:

> "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"[21]

[21] 1 Will & Mar, Sess 2 Ch 2

This provision can be characterised as much a political settlement as a statutory rule and as a safeguard to the doctrine of separation of powers. In the absence of an exhaustive definition of words "proceedings in parliament" there was uncertainty not over the existence of a privilege but over its precise extent. For instance, there was uncertainty over the extent to which the protection afforded by article 9 extends beyond words spoken in the course of debate to briefing or correspondence that is preparatory to that debate. In such cases of uncertainty the decision as to whether a matter falls within parliament's sole jurisdiction rests, paradoxically with the courts. This approach has been accepted since the case *of Stockdale v Hansard*[22]. The Lord Chief Justice whilst acknowledging and accepting that in terms of "whatever be done" within the walls of either House must pass without question in any place" rejected the argument that the House of Commons in its guise as a court had sole jurisdiction over the extent of its own privilege". Here the court held that the House's publisher Thomas Hansard was not protected for an action for defamation in respect of a report published by order of the House. The long running law suit led ultimately to passing of Parliamentary Papers Act 1840 which put immunity afforded to such reports on statutory basis.

In *Bradlaugh v Gossett* the court gave unqualified recognition to the principal obtaining under Bill of Rights by authoritatively pronouncing on it on its own incompetence to enquire into the internal proceedings of the Houses of Parliament.[23] In respect of House of Commons procedures Chief Justice Lord Coleridge said,

> "as for certain purposes and in relation to certain processes it certainly is, and is on all hands admitted to be the absolute judge of its own privileges, it is obvious that it can, at least for those purposes, and in relations to those persons, practically change or practically supersede the law."[24]

Lord Justice Stephen went further to say that even if the House of Commons prohibited a member of that House from what a statute required him to do, and in order to enforce the prohibition, excluded the member from the House, the court had no power to interfere. He said:

> "I think that the House of Commons is not subject to the control of Her Majesty's court in its administration of that part of the statute law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable…… The whole of the law and custom of parliament has its original form this one maxim, that whatever matter arises, concerning either house of

[22] (1839) 9Ad & E1 1; (1839) 112 ER 1112

[23] (1883-4) 12QBD271

[24] Supra page 274

> parliament ought to be examined, discussed, and adjudged in that House to which it relates and not elsewhere."[25]

Parliamentary immunity is not a personal privilege of members of parliament but rather a corporate or institutional one which protects them from participating in parliamentary proceedings. In England it is recognised and accepted by the courts as part of the law of that country and is one that cannot be waived. This freedom is absolute and is not defeated by malice or fraud. It applies to courses of action arising from events taking place outside parliamentary proceedings, as well as to causes of action arising from events which took place within parliamentary proceedings. This protection applies to all members and officers of parliament as well as to non-members participating in parliamentary proceedings. It extends to attempts to use either statements or events which occurred in the course of parliamentary processes adverse to any participant in these proceedings whether directly or indirectly and through whatever means. As the Privy Council observed:

> "Parties to litigation by whomsoever commenced, cannot bring into question anything said or done in the House by suggestion (whether by direct evidence, cross examination, inference or submission) that action or words were inspired by improper motive or were untrue or misleading".[26]

In England the protection applies to both criminal and civil proceedings brought against members. Hence although the overall jurisdiction of a court of law is to ensure that a power which might result in the loss of a person's rights or liberty is exercised in accordance with the principles of procedural fairness is not applicable to members of parliament. The courts have traditionally denied any capacity to review exercise by a parliament of the power to punish for contempt. It is the same in Australia as can be seen from a leading case.

> "It is for the courts to judge of the existence in either House of Parliament of a privilege, but given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise,"[27]

Undoubtedly this stems from legislative and judicial branch's mutual desire to avoid situations in which one branch might be thought to be trespassing upon or even usurping the legitimate responsibilities of the other.

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[25] Supra page 278

[26] Prebble v Television New Zealand (1995) 1AC321, 337

[27] RV Richards: Exparte Fitzpatrick and Browne (1955) 92 CLR 157, 162

In the last 30 years a problem area has developed in England. Ever since the genesis of judicial reviews, the courts have looked at government's decision making process at the highest level. In this vein, the courts have examined ministerial statements to parliament to demonstrate what government policy is and as can be seen from court decisions.[28] The English courts have on several occasions in recent years gone much further. The Court of Appeal commented on a report by the House of Lords Merits of Statutory Instruments Committee in the following terms:

> "The Committee did not suggest that the regulations were unlawful but I regard their concern as supportive of the conclusion that I have reached."[29]

The House of Lords and House of Commons Joint Committee on Parliamentary Privilege report in 2013 had this to say on the subject:

> "Do such references (referring to comments made by the Court of Appeal on the above case) constitute questioning of proceedings in parliament thereby contravening Article 9 of the Bill of Rights? The Lord Chief Justice was clear that they did, noting that once an opinion expressed by a select committee was accepted by evidence, 'the other side must then contend that the opinion of the committee was wrong, and that this is questioning what the Committee has decided.' We agree with the Lord Chief Justice that, in an adversarial system the admission of evidence derived from the Committee reports in submissions from one party will necessarily lead to its questioning by the other party, thus contravening Article 9."[30]

Nonetheless the Lord Chief Justice felt that those were rare mistakes and should be treated as such which had limited significance. (Page 34 of the report).

APPROACH OF FIJIAN COURTS TO BREACHES OF PARLIAMENTARY PRIVILEGE

In the last 47 years since Fiji gained independence, there have been five judicial pronouncements on the subject of parliamentary privilege. The first case was decided when 1970 Constitution was in place, two cases were decided during currency of 1990 Constitution, one case each was

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[28] RV Secretary of State for the Home Department, exparte Brind (1991) 1AC696

[29] RV Secretary of State for Work and Pensions (2013) EWCA CIV 66

[30] House of Lords/House of Commons – Joint Committee on Parliamentary Privilege Report 2013 page 33 - https://publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf

decided when 1997 Constitution was in place, and the most recent case was decided in 2017 when 2013 Constitution came into effect.

Courts Approach under 1970 Constitution[31]

Madhavan and Falvey[32]
James Madhavan was a member of the House of Representatives. At the conclusion of a regular sitting of the House of Representatives, the Speaker adjourned the House *sine die* under standing orders. John Falvey and other respondents objected to the adjournment and physically took over the House and the fifth respondent purported to sit as Deputy Speaker. The appellant Madhavan sought various declarations from the Supreme Court, that the actions of the fifth respondent in sitting as Deputy Speaker was *ultra vires* the 1970 Constitution and that the actions of the respondents in physically taking over the House were unconstitutional and illegal, a breach of Fijian Constitution and a breach of the doctrine of separation of powers and conventions of parliamentary democracy.

In the High Court the trial Judge refused to make declarations sought. The appellants appealed to Fiji Court of Appeal which decided that:

a) The doctrine of separation of powers had no relevance to the facts of the present case

b) The privilege of the House to control its own internal proceedings had become part of the law of Fiji. Whilst Fiji Constitution does not provide a statement similar to Section 49 of the Australian Constitution, which states that until the powers and privileges and immunities of the House are declared by Act of Parliament, the powers, privileges and immunities of the House shall be those of the House of Commons, nonetheless the House of Commons privileges extended to Fiji either under common law, general statute law (e.g. Bill of Rights) or arose through the development in court practice. In the Courts view it became part of law of Fiji and was not negatived by either 1970 Constitution nor Parliamentary Powers and Privileges Ordinance.

c) The House had exclusive power over its own internal proceedings under the Constitution of Fiji, Article 54(1).

[31] Laws of Fiji (1985) Edition www.paclii.org

[32] (1973) 19FLR 140

d) Since the rights of the persons outside the House were unaffected, it was for the House alone to decide upon the conduct of Deputy Speaker in assuming the chair of the House.

e) Article 97 of the Constitution can only be called in aid by persons whose interests 'are being or are likely to be affected by such contravention'. The Court of Appeal did not define the word "interests". It however did say that motive, political or otherwise will not fall within this term.

The Appeal was dismissed with costs.

Courts approach under 1990 Constitution[33]

Butadroka v Attorney General[34]
Sakeasi Butadroka, the plaintiff in this action was a member of the House of Representatives and suspended from the House following confrontation with the Speaker. He was initially suspended for 3 days which was increased to two full sittings of the House. He sought declarations through Originating Summons process from the High Court that the manner of his suspension was in breach of the House's Standing Orders, that the Standing Orders themselves infringed his constitutionally guaranteed freedoms.

Mr. Justice Ashton-Lewis ruled in the High Court that:

a) The High Court can only enquire into the internal proceedings of the House where it can do so in its capacity as guardian of the Constitution and that will only be where internal proceedings of the House are specifically provided for in the Constitution, such as found in Section 67 (1) where the Constitution specifically sets out the requirement that someone must preside at a sitting of the House of Representatives and defines who it is that should preside. The jurisdiction of the court to enquire is based on the fact that a part of the internal proceedings of the House of Representatives has been specifically incorporated as a provision of the Constitution. Hence, if a procedure of the House is not specifically incorporated into the Constitution, then the High Court has no jurisdiction into the internal proceedings of the House.

b) The manner of application of Standing Order by the Speaker and the activities of the Privileges Committee are matters dealing with internal proceedings and should not be

[33] Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, Decree No. 22 of 1990

[34] Butadroka and Attorney General (1993) 30FLR 115

subject to the scrutiny or jurisdiction of the High Court.

c) The fundamental freedoms set out in the Constitution are also limited by consent of the individual himself. The fact that Butadroka took his seat in the House of Representatives implies consent on his part to be bound by the rules of the House and to accept limitations imposed on members for the orderly conduct of its business and proceedings. The suspension of Butadroka does not affect those fundamental freedoms that he enjoys outside parliament and in society in general. It is just that he cannot exercise his right to sit within the walls of Parliament for two months.

d) The trial Judge declined to grant the declarations sought by Butadroka.

Babla v Prasad[35]

Anand Babla was a member of the House of Representatives who was suspended from the House after the Privileges Committee found him to be in contempt of Parliament. Babla submitted a letter to the Secretary-General of Parliament in September 1997 asking several questions on which he wanted answers relating to various payments made to Ministers, Speaker, President of the Senate and Leader of the Opposition. The Secretary-General wrote to Babla in November 1997 advising him that his questions had been considered and were disallowed. It was felt that the time and staff resources required from different ministries to collect the information could not be justified. Babla wrote back insisting for the information citing his entitlement to it as an elected representative of the people. In addition to this, he took his complaint to the Fiji Times (a national daily newspaper published in Fiji) and was given front page publicity. The Speaker considered Babla's conduct to be seriously out of line and informed Parliament about his conduct. Following discussions in Parliament the Speaker asked Babla whether he stood by his comments to the newspaper that the Speaker was trying to protect interests of individuals concerned. Babla denied that he was standing by those statements. However, the same evening on national television he claimed that he only withdrew his statement in Parliament under duress from the Speaker. The next day the House passed a Resolution that Babla's conduct be referred to the Privileges Committee of the House to determine and report whether his conduct constituted contempt of the House. After deliberating on the matter, the Privileges Committee concluded that Babla's conduct was contempt and he was suspended from the House for two sittings. Babla applied to the High Court seeking declarations that his suspension was unconstitutional. Chief Justice Sir Timoci Tuivaqa held that:

a) In the absence of specific constitutional provisions to the contrary the internal proceedings of Parliament is not subject to judicial scrutiny.

[35] Babla v Prasad (1998) 44 FLR 184

b) Babla's freedom of movement and his right to represent his constituents had not been violated as a result of his suspension from Parliament.

c) Even if injustice is done to a Member of Parliament who is suspended for a period of time, then his/her remedy lies not in actions in law courts, but by an appeal to the constituencies whom that member represents.

Courts approach under 1997 Constitution[36]

Ratu Rakuita Vakalalabure v Ratu Epeli Nailatikau and others[37]
Rakuita Vakalalabure was elected to the House of Representatives in September 2001. The term of the House of Representatives was 5 years. Following his election he was also elected as Deputy Speaker of the House. On 6th August 2004 he was convicted in the High Court at Suva for 4 offences under the Penal Code and sentenced to imprisonment for a term of 6 years. His appeal against conviction to the Court of Appeal was dismissed in September 2004. However his appeal to the Supreme Court was still pending.

On 3 December 2004, the Speaker announced to the House that he had decided that the seat held by Vakalalabure had become vacant on the ground of his absence from two consecutive meetings of the House. In January 2005 Vakalalabure sought various declarations from the Court. One declaration was that the Speaker erred in his decision since Vakalalabure had not exhausted all avenues of appeal against his conviction and sentence. The trial Judge, Mr. Justice Jitoko said that the Speaker's decision which was challenged was made pursuant to Section 71 (1) (e) of the Constitution. Vakalalabure did not dispute that he was absent from two consecutive meetings of the House. Neither did he challenge the discretionary powers of the Speaker either to grant or not to grant permission to be absent after two consecutive meetings. He argued through his counsel that the Speakers discretion should have taken into account that his final appeal against conviction was still to be heard and in the circumstances it was premature to make that decision and declare his seat vacant.

The trial Judge however dismissed his application. The judge found that the whole process was closely intertwined with the internal processes of Parliament and was therefore non-justiciable and hence declined to make any of the declarations sought by Vakalalabure.

Courts Approach under 2013 Constitution[38]

[36] www.paclii.org

[37] Ratu Rakuita Vakalalabure v Ratu Epeli Nailatikau and others (2005) FJHC741
[38] www.paclii.org

The 2013 Constitution was promulgated in September 2013 by Fiji's President, but the interim government continued to rule by Decrees until September 2014 when the country went to the polls. In the last three and a half years, since elections, three members of the Opposition have been suspended from Parliament. It is essential to examine these suspensions in some detail.

Ratu Naiqama Lalabalavu

Lalabalavu was first elected to Parliament in 1999 and has been in Parliament since, except when Parliament sessions were disrupted by military coups. He has also served as government minister under two prime ministers. Lalabalavu ran as a candidate for the Social Liberal Democratic Party (SODELPA) in 2016 election

In May 2015 Lalabalavu was referred to the Privileges Committee for making derogatory comments about the Speaker at a constituency meeting.[39] Under Standing Order 27 (2) (b) the Privileges Committee is required to Consider any question of privilege referred to it by Parliament or Speaker.[40] Under Standing Orders 75 and 76, the Privileges Committee has powers to recommend penalties. The Privileges Committee considered the matter and submitted its report to Parliament in May 2015.[41] Committee members produced a majority and a minority report. Majority found Lalabalavu guilty of contempt and recommended a penalty of 2 years suspension. Minority view made up of members from the opposition suggested that Lalabalavu should be asked to withdraw his remarks and that should end the matter.

Fiji parliament consists of 50 members plus the Speaker. The governing Fiji First Party has 32 seats whilst the opposition parties have 18 seats.[42] On 21 May 2015 the House after vote decided to suspend Lalabalavu for two years. This was unprecedented. It is also not specifically stated in the Standing Orders that the Privileges Committee has power to suspend a member for a period of two years. There was immediate reaction from the Opposition parties who boycotted Parliament on 22 May 2015. Only Government Members of Parliament attended whilst the entire Opposition protested against punishment meted out to Lalabalavu.[43]

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[39] http://www.fijitimes.com/story.aspx?id=306295

[40] www.parliament.gov.fj

[41] www.parliament.gov.fj http://www.parliament.gov.fj/wp-content/uploads/2017/02/Privileges-Committee-Report-RE-Hon-Ratu-Naiqama-Lalabalavu-PP29-of-2015-2.pdf

[42] https://en.wikipedia.org/wiki/Parliament_of_Fiji

[43] www.fijivillage.com/newsfeature/oppositionboycottsparliamentsitting

On July 15 2015 Lalabalavu launched a constitutional challenge against his suspension by Parliament. Almost two and half years later the case has still not reached finality and a judgement has not been delivered to date. Lalabalavu's matter was also subject of discussion by the Inter-Parliamentary Union's (IPU) Committee on Human Rights for Parliamentarians. The Committee's recommendation was adopted unanimously by the IPU Governing Council at its 198th Session at Lusaka on 23 March 2016.[44] The Committee inter-alia denounced gender slander by Lalabalavu and said that he may have used words that were offensive and degrading and therefore totally unacceptable. The Committee however took the view that in the absence of a clearly defined legal basis the two year suspension was wholly disproportionate as it not only deprived Lalabalavu his right to exercise his parliamentary mandate, but also deprived his electorate from representation in Parliament for a period covering half the term of Parliament. After a two year absence Lalabalavu returned to Parliament to resume his seat on 22 May 2017.[45]

Tupou Draunidalo

in March 2014 Draunidalo was elected as President of the National Federation Party (NFP). She competed in the 2014 election and was elected as one of 3 representatives of NFP.[46]

In June 2016 following comments she made in Parliament against Dr Mahendra Reddy, the then Minister for Education, the Speaker referred her matter to Privileges Committee under Standing Order 134 for investigation. At the preliminary meeting of 2 June 2016, there was discussion within the Committee on the composition of its membership. Following discussions the Opposition members stayed away from Committee's deliberations, leaving the Committee to only comprise the Government side.[47] This Committee invited Draunidalo to present her views, but she chose to exercise her right of silence saying she believed she would not receive a fair hearing. The Privileges Committee unanimously found Draunidalo in breach of privilege and in contempt of Parliament and recommended that she be suspended for the remainder of the term of Parliament with effect from 3 July 2016. This would be in excess of two years since the parliamentary term will end in September 2018. On 3 June 2016 Parliament accepted the Privileges Committee's recommendations with 28 members voting in favour and 16 against.

Draunidalo, a lawyer by profession decided not to pursue her suspension in the Fijian courts. Her matter was also discussed at the IPU meeting by the Committee on Human Rights of

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[44] Archive.ipu.org/hr-e/198/fj101

[45] www.fjisun.com.fj/ratunaiqamawelcomebackaftertwoyearsuspension/may232017

[46] www.wikipedia.org/wiki/tupoudraunidalo

[47] www.parliament.gov.fj-reportonreferralofamatterofprivilege-re:HonTupouDraunidalo

Parliamentarians and this Committee's recommendations was also adopted by the Governing Council of IPU at its 199th Session in Geneva on 27th October 2016.[48] In its deliberations the Committee felt that the use of unparliamentary language by Draunidalo's use of words such as "fool", "dumb natives", "you idiot" are clearly offensive to any member of the House and has potential to promote or provoke ill feelings of ill will or hostility between communities or ethnic groups and constitutes prima-facie breach of privilege.[49] The Committee however took the view that:

> "Article 73 of the Constitution read together with Standing Order 76 (5) of Parliament does not provide sufficient legal certainty and clarity as a basis for such a suspension….. the suspension is wholly disproportionate as it not only deprives Ms Draunidalo of her right to exercise her parliamentary mandate, but also deprives her electorate from representation in Parliament for a period covering half the Parliamentary term; is also concerned about what appears to be a recent trend in Fiji to impose long term suspension on vocal opposition parliamentarians and the serious consequences this has for the opposition's ability to carry out its work effectively."

The sentiments expressed by IPU are shared in Fiji by many. Criticisms have also come from overseas. Amnesty International issued a news release on 3 June 2016 and said:

"Parliaments can only be worthy of their name when all members can speak freely on all issues….. Unless this suspension is immediately reversed, the Fijian authorities are proving they are intent on silencing critical voices."[50]

Draunidalo resigned her seat in Parliament with effect from 20 January 2017. She said at the time:

> "…From the time that Fiji First majority in Parliament saw fit to suspend me on 13 June 2016, I have not been able to be in the House to do what I was elected to do – which is to scrutinise Bills, laws and present coherent issues to strengthen legislation and assist with government policy formulation and implementation….."[51] Her seat is now occupied by another member of the NFP.

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[48] www.archive.ipu.org/hr-e/199fj102

[49] IPU Report Page 2 Supra

[50] https://www.amnesty.org/en/latest/news/2016/06/fiji-suspension-of-parliamentarian-underlines-government-stranglehold-on-freedom-of-expression/ - Rafendi Djamin, Amnesty International's Director for South East Asia and the Pacific.

[51] Roko Tupou Steps Down - www.fijitimes.com/story.aspx?ref=archived&id=386375

Ratu Isoa Tikoca

Ratu Isoa Tikoca (Tikoca) was elected to Parliament in September 2014 and sits in the Opposition as a member of SODELPA. On 5th July 2016 Tikoca made certain statements in Parliament which selectively targeted Fijians of muslim faith. He also named some Arab countries in reference to the usage of the name of Ministry of Economy and also named some muslim officials serving in state offices and used words such as "my kind" and this "elite group" during his speech. He was referred to the Privileges Committee for investigation. Following investigation and hearing of his matter, the majority members of this Committee which comprised government members of Parliament thought there were a serious breach of privilege as well as contempt of Parliament. They recommended that Tikoca be suspended for the rest of the term of Parliament.[52] On 29 September 2016 Parliament decided to suspend Tikoca for the remainder of his term. At the time of his suspension Parliament had two years left to run its full term.

Tikoca's suspension was also discussed by IPU Committee on Human Rights of Parliamentarians. The Committee's recommendation was adopted by consensus by IPU Governing Council at its 199th Session in Geneva on 27 October 2016.[53] The Committee said:

> "…is deeply concerned about Mr. Tikoca's suspension for the remainder of his term; considers that Section 73 of the Constitution, read together with Standing Order 76 (5) of Parliament, does not provide sufficient legal certainty and clarity as a basis for such a suspension; considers also that the suspension is wholly disproportionate as it not only deprives Mr. Tikoca of this right to exercise his parliamentary mandate, but also deprives his electorate from representation in Parliament for a period covering half the term of Parliament; is also concerned about what appears to be a recent trend in Fiji to impose long term suspensions on vocal opposition parliamentarians and the serious consequence of this has to be opposition's ability to do its work effectively."[54] (my emphasis)

This Committee went further in saying that a member's freedom of speech has been affected by this decision:

> "…Mr. Tikoca's words although touching on sensitive societal matters fall within his right to freedom of expression…"

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[52] Fiji Parliament Privileges Committee Report - http://www.parliament.gov.fj/wp-content/uploads/2017/02/Thursday-29September2016.pdf

[53] IPU Report - http://archive.ipu.org/hr-e/199/fji03.pdf

[54] Pages 4-5 Supra

Following his suspension Tikoca instituted judicial review proceedings in the High Court. After leave to institute judicial review was given, the Attorney General's Chambers filed summons seeking to strike out court action. The trial Judge, Mr. Justice Seneviratne said that he was bound by the Court of Appeal decision of *Madhavan v Falvey* and Others (supra). He decided to follow suit and ruled that the Court will not interfere with the internal proceedings of Parliament. He summed up by saying:

> "if the courts start interfering with the internal affairs of Parliament it will open flood gates for the Members to challenge any resolution passed by the Parliament in court which will lead to a situation where the judiciary will virtually be controlling the internal affairs of the Parliament and the entire system of administration of the country can collapse in no time." (Paragraph 25 page 9) The trial Judge struck out the application on the ground that the court lacks jurisdiction to hear and determine the case.[55]

Reform of Fiji's Standing Orders

It is not unusual to amend Standing Orders of Parliament from time to time and Fiji's Parliament amended its Standing Orders in 2016 and 2017. One significant amendment was to Standing Order 37 which relates to presentation of petitions. Prior to February 2016, all petitions presented to Parliament were referred automatically to the relevant Standing Committee by the Speaker. After February 2016 all petitions presented require 40% Parliamentary approval before it can be referred to the relevant Standing Committee.[56] The Opposition Parties criticized this amendment claiming that the intention of Government with this amendment is to prevent the Opposition from filing petitions in Parliament. They claim that this amendment will stifle debate and mean fewer petitions will be presented.

Standing Order 117 has also been amended. This outlines how the Chairperson of a Standing Committee is appointed. Before these amendments, the rule provided for example that the Chairperson of the Public Accounts Committee must be someone from the Opposition. Public Accounts Committee provides an important avenue for checks and balances over government finances. This Committee examines Government's usage of yearly expenditure by scrutinizing the Auditor-General's annual reports. The amendment made in February 2016 has now allowed the Government to appoint one of its own members as its Chair replacing the leader of NFP who had been the chair since election in 2014.[57]

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[55] FJHC 654 (Judgement delivered on 31 August 2017) http://www.paclii.org/fj/cases/FJHC/2017/654.html

[56] Standing Order 37 (6) – Parliament of Fiji

[57] Public Accounts Committee Appoints New Chair - http://fijione.tv/public-accounts-committee-appoints-new-chair/

On Thursday, 11 February 2016 SODELPA, the larger of the two opposition parties in Parliament walked out in protest at these amendments. Its leader, Ro Teimumu Kepa described the amendments "as a design to shut down democracy".[58] SODELPA returned to Parliament the next day.

There were other amendments to Standing Orders in 2016 and 2017 and the Government used its majority to pass them through Parliamentary process.

Proposed Amendments to Parliamentary Powers and Privileges Act

The Government proposed an amendment Bill in 2016.[59] The Bill intends to repeal the old Act and replace it with this new legislation. This draft Bill received wide condemnation from political parties, academia, non government organizations and individuals who expressed serious reservations on certain clauses in the Bill. One clause in particular (Clause 24) has drawn the bulk of the criticisms. This clause deals with defamation. Under this clause, any words or actions to defame, demean or undermine the sanctity of Parliament, the Speaker or a Committee will create an offence. Penalty for this offence is a fine of $30,000 and/or imprisonment for a term of 5 years. In case of body corporate, the fine goes up to $100,000.00 and imprisonment for each director and manager for a term of 5 years. SODELPA is on record as saying that if the law is passed, it will repeal this legislation when it forms the next government.[60] Leader of the NFP, Dr Biman Prasad said:

> "The Fiji First Government has become arrogant and out of touch…. Fiji First is so scared of criticism that it would put people in jail and fine them up to $100,00.00 if they spoke against Parliamentarians."[61]

Fiji Labour Party also voiced its condemnation of the Bill by saying:

> "The penalties for offending against this provision are mind boggling and reveal the true motive behind its intention, i.e. to intimidate or plant fear in the hearts of the people

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[58] Walkout - http://fijisun.com.fj/2016/02/12/walkout/

[59] Parliamentary Powers and Privileges Bill 2016 - http://www.parliament.gov.fj/wp-content/uploads/2017/03/Bill-No-28-Parliamentary-Powers-and-Privileges_2.pdf

[60] SODELPA's Vow - http://www.fijitimes.com/story.aspx?id=398794

[61] NFP to remove bodyguards - http://www.fijitimes.com/story.aspx?ref=archive&id=398921

deterring them from criticising the Speaker, Members of Parliament, the Parliament and any of its Committees."[62]

Joining this chorus of critics is Prof. Vijay Naidu who said:

"what we need is a more sort of nurturing and enabling environment towards this democracy, rather than laws that actually endanger fear or debate and discussion. But to introduce at this stage this kind of legislation as I see it is designed to stifle the very basis of democracy."[63]

Following large scale criticism of the Bill, the Government referred the Bill to Parliament's Parliamentary Committee which scrutinises legislation. This Committee began hearing submissions in May 2017, and it is yet to present its report to Parliament.

CONCLUSION

Case law in England confirms that historically courts prefer to stay a safe distance away from what happens in Parliament. Some resolutions in the House of Commons has shown that every now and again injustice has been done by the House to individual members, but the courts have said that the aggrieved member's remedy lies not in courts of law but by an appeal to the constituencies whom the member represents. This is in keeping with the ethics of mutual respect, and over the centuries the Courts have denied any capacity to review exercise of powers by Parliament on the matter of contempt. English Courts have also stressed that breach of fundamental freedoms which members have often complained about is also limited by the consent of the individual. The fact that an individual took his/her seat in the House of Commons implies consent on that person's part to be bound by the rules of the House, and to accept the limitations imposed on that member by Parliament. These are precisely the very same reasoning which permeates throughout the five decisions handed down by Fijian Courts spanning five decades.

However since 2013 Constitution was introduced, there are some changes in the composition of Fijian Parliament. Unlike previously, Fiji now has only one constituency to which all 50 members of Parliament represent. Hence appealing to one's own constituents is no longer a

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[62] FLP Submissions: Parliamentary Powers And Privileges Bill 28 Of 2016 - http://www.flp.org.fj/flp-submissions-parliamentary-powers-and-privileges-bill-28-of-2016/

[63] Fiji Academic Says Bill will Stifle Democracy - http://www.radionz.co.nz/international/pacific-news/329993/fiji-academic-says-bill-would-stifle-democracy

straight forward matter. A suspended member would also have to wait for up to 4 year's before the next election to bring his/her grievance to the electorate. Since Fiji's election in 2014, three Members of Opposition have been suspended, one of whom resigned her seat as she felt unable to perform her constitutional duty. Standing Order 76 stipulates 28 days maximum suspension period for disorderly conduct and suspension of one year for disobeying the Speaker. All three members were suspended for disorderly conduct and all three suspensions were either for 2 or more years. The two year period is not only excessive, but unprecedented and without legal footing. Its net effect has weakened the already small Opposition. There is no real recourse for aggrieved members of Parliament.