CONTEMPT OF PARLIAMENT IN PAPUA AND NEW GUINEA

By P. A. McNamara*

Proceedings in some Australian legislatures in recent years in relation to alleged contempts of Parliament and breaches of Parliamentary privilege[1] have been followed by a similar episode in the House of Assembly of the Territory of Papua and New Guinea. The proceedings in the Territory are noteworthy not only because they were the first of their kind there, but also because they drew attention to substantial and unforeseen difficulties in attempts to transfer the power to deal with contempts and breaches of privilege from Parliament to the courts. The House of Assembly of the Territory of Papua and New Guinea, along with the Legislative Council of the Northern Territory, has effected through legislation an abdication of its powers to punish those persons found guilty of contempts.[2] This transfer of power from Parliament to the courts has been shown to be of uncertain extent by the proceedings in the House of Assembly. The fact that even a partial delegation of this power has been achieved in these two jurisdictions distinguishes the two territorial legislatures from those of all the Australian States and from the House of Representatives of the Parliament of the Commonwealth, which have generally preserved to themselves the power to deal with alleged breaches of privilege.[3] As will be seen, this transfer of power presents the two territorial legislatures with novel and distinctive problems, no solution to which has yet been reached.

On June 16, 1969, in the Papua and New Guinea House of Assembly, there were brought to the attention of the House certain statements made in Australia, both to live audiences and on television, and subsequently reported in the press, by the then Secretary of the Pangu Pati, Mr Albert Maori Kiki.[4] These statements were interpreted as allegations of corruption on the part of ministerial members and of members of the Independent Party, the political party then having a majority in the House. Mr Kiki was reported to have said:

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[1] For a general review of these proceedings, see D. C. Pearce, "Contempt of Parliament . . . " (1969) 3 F.L.Rev. 241.

[2] The legislation in the two jurisdictions is in similar terms: Parliamentary Powers and Privileges Ordinance (1964-1965) (Papua and New Guinea); Legislative Council (Powers and Privileges) Ordinance (1963-1966) (N.T.).

[3] A treatment of the general law relating to contempts and breaches of Parliamentary privilege may be found in E. Campbell, *Parliamentary Privilege in Australia* (1966), and D. C. Pearce, *op. cit.*

[4] H.A. Deb. Vol. II, No. 5, 1123.

> Ministerial members are merely stooges of the Administration and . . . the Administration has bought them with high salaries and cars and status.
> Planters have paid the independent members of the House of Assembly $60,000 to accept a platform drawn up by planters.[5]

There were, in addition, other comparatively minor remarks disparaging the status and power of the House of Assembly and further sarcastic comments on the social status of the native peoples of the Territory. The introduction of the matter was followed by an inconsequential debate that same day.

The following day, Mr Traimya Kambipi, elected member for Kompiam-Baiyer, raised a matter of privilege in respect of the same statements. He alleged that statements appearing in the transcript of an ABC *Four Corners* interview with Mr Kiki of 3 May, 1969 and articles appearing in the *New Guinea Times Courier* of 1 May and 8 May, in *The South Pacific Post* of 2, 9 and 12 May and in *The Australian* of 30 April, constituted "a grave breach of privilege amounting to contempt of the house".[6] At his request, the Speaker of the House duly referred the question whether the statements made by Mr Kiki, as subsequently reported, did in fact constitute a breach of privilege of the House of Assembly to the Committee of Privileges for consideration, with a view to obtaining a report back to the House.[7]

The Committee first convened on 18 June. That same day, as a result of a motion moved successfully in the House by its Chairman, Mr Dutton, it gained powers "to send for persons, papers and records".[8] The Committee was also granted power to act during recess.[9] Little is known of the procedure followed by the Committee. The Report of the Committee is silent on this matter. It appears, however, that the Committee acted as inquisitors in seeking to ascertain facts, but were instructed and advised as to the state of the law; its members were assisted and counselled by an officer of the Department of Law, who was present throughout; members were able to question this officer and all the witnesses who appeared. Further, evidence on oath as to the state of the law was received from at least two members of the Faculty of Law of the University of the Territory. All accused were notified of the complaints laid against them; all were allowed to be assisted by counsel, to give evidence and so make explanations of their conduct. It is not known whether the accused were allowed to cross-examine adverse witnesses, nor whether these parties were permitted to be present during the entire proceedings of the Committee.

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[5] H.A. Deb. Vol. II, No. 6, 1535.
[6] H.A. Deb. Vol. II, No. 5, 1134.
[7] *Id.*, 1176.
[8] *Id.*, 1179.
[9] *Id.*, 1420.

The Committee was acting without precedent when it decided to allow the charged parties to be counselled by trained lawyers. The Committee observed in its Report that it had made this allowance out of an excessive concern for the rights of witnesses, and that its decision to do so was regrettable, in view of the fact that at least one of the witnesses, Mr Kiki, objected to answering questions relevant to the statements made by him, on the ground supplied by section 30(2)(a) of the Parliamentary Powers and Privileges Ordinance, that is to say, on the ground that the answer would tend to incriminate him of an offence against the law. Generally, the Committee found the presence and employment of counsel to be an impediment to the execution of its task, and recommended that in future, and at least where the Committee comprised laymen, counsel not be allowed to attend. It vaguely appears from the Report that the advisers to Mr Kiki did act so as to frustrate the efforts of the Committee,[10] and only on this basis is the recommendation fair that no counsel be allowed before an untrained Committee. It is to be hoped, however, that the Committee's recommendation on this point is not interpreted as a recommendation to exclude counsel in all cases. Such an interpretation would be an unjustified and retrograde step. There can, in fairness to both sides, be no objection to permitting accused persons to be assisted by counsel where at least one member of the Committee is a lawyer or where the Committee itself is assisted by a lawyer, as it was in these proceedings.[11]

The Report of the Committee was finally delivered by its Chairman on 25 August, 1969. Debate by members was postponed until August 28. Immediately after the debate, the Report was accepted by the House, by fifty-eight votes to ten.[12]

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[10] According to an outside source, these objections were advised solely for the purpose of depriving the Committee of evidence which would have been most damaging to the defence of Mr Kiki, and were raised whenever Mr Kiki was questioned as to the text of the statements allegedly made by him. Of course, if Mr Kiki had at any time made these statements before the Committee, a District Court would have been competent to entertain a prosecution against him under s. 15 of the Ordinance, and might have been provided with evidence upon which a conviction could be sustained.

[11] It is pertinent to point out that the Select Committee on Parliamentary Privileges in its Report to the House of Commons recommended that in all cases the right to counsel should be subject to the discretion of the committee of enquiry: see *Report from the Select Committee on Parliamentary Privilege* (1967) para. 186. This recommendation is not readily understandable; for while in some cases the presence of counsel might hinder a committee in collecting evidence, it is only proper that an accused be able to seek advice whenever he believes that the making of a given statement would tend to incriminate or otherwise damnify him. This Committee also recommended that the right to attend and to listen to submissions should also be subject to the discretion of the committee of enquiry: *Id.*, 185.

[12] H.A. Deb. Vol. II. No. 6, 1535, 1607. Among those who voted in favour of accepting the Report were nine of the ten Official members of the House and eleven of the seventeen ministerial and assistant ministerial members of the

Framed as a declaratory report, it began by pointing out that the House of Assembly has, through the provisions of the Papua and New Guinea Act 1949-1968 (Cth), full constituent powers, that is, the same powers to make laws for the peace, order and good government of its territories as have the Parliaments of the United Kingdom and the States of Australia, save that no bill becomes law until assented to by the Administrator, or, in some cases, by the Governor-General.[13] The report then proceeded briefly to sketch the historical path whereby the House of Commons acquired its powers of contempt, and whereby these powers were passed by legislation to the House of Representatives of the Commonwealth Parliament and then to the House of Assembly of Papua and New Guinea. Section 48 of the Papua and New Guinea Act confers on the House of Assembly a power to make Ordinances—

> (a) declaring the powers (other than legislative powers), privileges and immunities of the House of Assembly, and of its members and committees, but so that the powers, privileges and immunities so declared do not exceed the powers, privileges and immunities of the House of Commons and of the Parliament of the United Kingdom or of the members or committees of that House, respectively, at the establishment of the Commonwealth;
> and
> (b) providing for the manner in which the powers, privileges and immunities so declared may be exercised or upheld.

The definition of "privileges" adopted in the report is that found in *May's Parliamentary Practice,* 17th edition.[14] At these pages, the editor of *May* defines parliamentary privileges as—

> rights which are absolutely necessary for the due execution of its [the Parliament's] powers. They are enjoyed by individual members because the House cannot perform its functions without the

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House; four of the five members of the Committee of Privileges did likewise. One assistant ministerial member voted to the contrary. The fifth member of the Committee appears to have abstained. This last-mentioned person is a former leader of the Pangu Pati.

Delays in the proceedings were caused by the facts that the House was in adjournment from March 14 until June 16, 1969, and that it went into recess from June 27 (the end of the fifth meeting of the first session) until August 20. The Report had been completed before the sixth meeting of the first session began, but its presentation was delayed until August 25, the fourth sitting day of that meeting, for the purpose of giving the accused a chance to apologise to the House: H.A. Deb. Vol. II., No. 6, 1537. (It appears that no accused ever apologised.) It is also noteworthy that debate on the Report was adjourned until the day following the presentation of the Report, as a result of a motion put to the House by the Chairman of the Committee of Privileges, and carried. These delays are abnormal, matters of privilege being commonly disposed of with as much expedition as possible, having precedence over all other business of Parliament.

[13] Papua and New Guinea Act 1949-1968 (Cth) ss. 52-57.

[14] Pp. 42-43. *Report from the Committee of Privileges,* paras. 6, 7. The Report is set out in full at H.A. Deb. Vol. II. No. 6, Appendix A.

> unimpeded use of the services of its members and by each House for the protection of its members and in vindication of its own authority and dignity.

The Committee noted that disciplinary powers over both members and outsiders were essential to the authority of every legislature, and that the functions, privileges and disciplinary powers of a legislative body are closely connected, for the "privileges are the necessary complement of the functions and the disciplinary powers the necessary complement of the privileges". The Committee also adopted the definition of "contempt" formulated in *May* at p. 117. Contempts are there described as those acts which—

> tend to obstruct the House in the performance of its functions by diminishing the respect due to it. Reflections upon members, particular members not being named or otherwise indicated, are equivalent to reflections on the House.

Some complication to the legal position in the Territory in the matter of contempts and breaches of privilege was caused by the enactment in 1964, in pursuance of section 48 of the Papua and New Guinea Act, of the Parliamentary Powers and Privileges Ordinance. This Ordinance takes as one of its objects a transfer of the jurisdiction to try contempts from the House to the courts.[15] Of the Ordinance, Parts II, III, IV and V, encompassing sections 7-25, are the most relevant. Parts II and III establish basic privileges, freedoms and immunities on behalf of the House and its members; Part IV deals with contempts of the House and like matters; Part V creates special regulations of conduct within the precincts of the House. Each of the sections within these Parts appears to be a declaration of some power, privilege or immunity possessed at some stage by the House of Commons. Failure to comply with any section is a criminal offence made punishable by section 41, which provides a penalty of a fine of $400 or imprisonment for six months. No prosecution under the Ordinance is to be commenced unless ordered by the Speaker of the House (section 40) who would presumably act in accordance with Standing Orders.

The sections of the Ordinance which had the most bearing on the proceedings under study are sections 7 and 15. Section 7 of the Ordinance provides:

> (1) The powers (other than legislative powers), privileges and immunities of the House and of its members and committees, to the extent that they are not declared by the provisions of this Ordinance other than this section, shall be the powers (other than legislative powers), privileges and immunities of the House of Commons of the Parliament of the

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[15] It is not clear whether the transfer of power is total or partial. Writers on the subject have differed. Contrast E. Campbell, *op. cit.*, n. 3, 113-114, with D. C. Pearce, *op. cit.*, n. 1, 265-266.

United Kingdom, and of the members and committees of that House, respectively, at the establishment of the Commonwealth.

Section 15 of the Ordinance provides:

(1) Subject to the next succeeding subsection a person shall not publish any words, whether orally or in writing, or any cartoon, drawing or other pictorial representation tending to bring the House into hatred or contempt.

(2) An offence against the last preceding subsection shall not be deemed to have been committed if the publication complained of was such that, had the material published been defamatory, it would have been protected, justified or excused under the *Defamation Ordinance* 1962.[16]

At first glance, section 7 and the remaining sections of Parts II-V are, in combination, ambiguous and inconsistent. In the opinion of the Committee of Privileges, the question arising from the coupling of these sections is whether section 7, despite sections 8-25, is effective to confer on the House of Assembly all the powers, privileges and immunities of the House of Commons as at 1 January, 1901, or whether sections 8-25 were intended exclusively to declare the powers, privileges and immunities of the House of Assembly. If the former view be adopted, then the House would possess a power to initiate contempt proceedings of its own motion, to summon the accused before its Bar, to debate the matter, sitting in judgment on the accused, and, if it sees fit, to impose some punishment on that person. On this view, sections 8-25 result merely in the creation of additional and specific criminal offences punishable, if at all, upon conviction in a District Court. On the latter view, however, on which Parts II-V of the Ordinance declare the sole powers of the House in respect of contempts, the powers of the House are confined to conducting a preliminary investigation and, at its pleasure, subsequently authorising the Speaker of the House to order the commencement of a prosecution in the District Court; further, the nature and extent of potential punishments are in all cases strictly circumscribed, the House itself has no powers of prosecution, and the House is not entitled to judge and punish a private citizen. In these three highly important respects, the powers of the House would stand in stark contrast to the almost limitless and scarcely examinable powers and privileges of the House of Commons and of some of the Houses of Parliament in Australia.[17]

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[16] The section was inserted as an amendment to the orginal Ordinance by the Parliamentary Powers and Privileges Ordinance 1965, s. 3. This amendment had the result that all the defences open to a defendant in a defamation action are available to a person accused of an offence against s. 15 of the Ordinance. These defences include those of truth, fair comment, public interest, public benefit, and good faith. See the Defamation Ordinance 1962 (Papua and New Guinea), ss. 14, 15, 16. Parliamentary debate on the amendment is reported at H.A. Deb. Vol. I. No. 5, 688.

[17] See E. Campbell, *op. cit.*, n. 3, Ch. 7; D. C. Pearce, *op. cit.*, n. 1.

The Committee of Privileges resolved this ambiguity in favour of the second view; that is to say, the Committee decided that the declarations of power in sections 8-25 stated to their full extent the powers of the House to punish for contempts and like matters. Such a decision presupposes a conclusion that the provisions of Parts II-V are so thorough in their declaration of the powers, privileges and immunities capable of being inherited from the House of Commons as to leave no room for the inheritance by the House of Assembly of any powers, privileges or immunities other than those declared in the Parliamentary Powers and Privileges Ordinance itself.

It is not made clear in the Report why the Committee decided as it did; the Report states simply that the Committee "accepted legal advice that the second view is more likely to be upheld by a court".[18] The advisers to the Committee appear to have overlooked the fact that sections 8-25 of the Parliamentary Powers and Privileges Ordinance do not cover the whole ground of possible contempts, although the coverage is admittedly fairly thorough. Brief reference to Chapter 8 of *May* must lead the reader to conclude that the types of conduct capable of constituting contempts of Parliament are impossible of rigid enumeration and of specific and precise definition.[19] In the face of the many instances of adjudicated breaches of privilege collected in *May,* it is a difficult contention to sustain that sections 8-25 of the Ordinance were intended exhaustively and exclusively to delimit the types of conduct liable to be complained of as contempts. While it is unquestionable that the decision of the Committee on this point is the most desirable in the circumstances, it is not easy to lend that decision whole-hearted support on its legal merits. Indeed, the Report acknowledges that the decision of the Committee is probably inconsistent with the true intention of the House of Assembly when it enacted the Parliamentary Powers and Privileges Ordinance.[20]

Any opinion about the joint effect of section 7 and sections 8-25 of the Ordinance must be suggested with diffidence. In truth, the position would be sufficiently complex if section 7[21] stood alone, for any application of that section would involve an enquiry as to the exact powers (other than legislative powers), privileges and immunities possessed by the House of Commons at 1 January, 1901. The effect of the Ordinance seems to be that one starts with the position that the House of Assembly, its members and committees do have all these powers, save that where there is found a declaration in respect of some given power, privilege or

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[18] *Report,* para. 9.

[19] However, attempts have been made at such enumeration and definition: see Parliamentary Privileges Act 1891 (W.A.) and Constitution Act 1867-1968 (Qld).

[20] *Report,* para. 9.

[21] This section is very similar to s. 4 of the Legislative Council (Powers and Privileges) Ordinance 1963-1966 (N.T.).

immunity within the Parliamentary Powers and Privileges Ordinance, then that declaration conclusively delimits that power, privilege or immunity, and governs the position, at least insofar as it does not seek to confer on the House any powers greater than those enjoyed by the House of Commons at the date of the establishment of the Commonwealth. On this view, one must turn first to any declaration of a power within the Ordinance, and determine which privilege or immunity it purports to regulate. That privilege or immunity must then be divorced from the nebulous residue of powers capable of being inherited from the House of Commons, and its regulation left solely to the provision within the Ordinance. This same procedure must be followed in relation to every declaration of a power within the Ordinance.

If this interpretation be sound, one arrives at the singularly unhelpful position where the powers of the House in respect of its privileges and immunities must be divided into two categories. On the one side, there are those powers which have been declared with precision in the Parliamentary Powers and Privileges Ordinance; any treatment of these is governed exclusively by the declaratory provision, breaches of which are punishable through the criminal law: the methods of proceeding and the extent of potential punishments are closely defined by the general law. On the other side stand the undeclared and vague "common law" powers and privileges inherited from the House of Commons; in the case of these, it is for Parliament to resolve upon both procedure and punishment, subject only to scant judicial review.[22] Further, this interpretation gives rise to the questions "what amounts to a sufficient declaration for the purpose of carrying a power or privilege out of the one category and into the other?" and "which body is to have power to answer the first question posed?". The answer to the first question would depend upon an interpretation of the relevant provisions in the Parliamentary Powers and Privileges Ordinance; the answer to the second is, of course, a court of law.

On this interpretation, a number of shortcomings in the law become apparent, and some amendment to the law is seen to be necessary. In the first place, there must be provided a means by which a party accused of a breach of one of the "common law" privileges could apply to a court for an answer to the question whether his case falls within one of the declaratory provisions: this would be important, for an affirmative answer would give an accused party all the protections and benefits of the criminal process, and would carry his case outside the arbitrary influence of Parliament and politics. Secondly, it must be made decisively clear that once a person has been either acquitted or convicted under one or some of the declaratory provisions, the Parliament retains no further power over him in respect of the behaviour

[22] *The Queen v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157.

complained of: but this would not mean that Parliament would lose its powers if a court merely decided that the case falls outside any declaratory provision; and, similarly, that infliction of any punishment by Parliament would be a complete answer to a prosecution under one of the declaratory provisions in respect of the same facts or conduct. Any different arrangement would leave an accused liable to be put twice in jeopardy for the one act.

The interpretation of the Ordinance suggested here is different from that accepted by the Committee of Privileges. While the writer's interpretation would concede some effect to section 7 of the Ordinance in an appropriate case, that interpretation acted upon by the Committee leaves section 7 almost nugatory, in all cases. Any discrepancy in the two views would have led to no different result in the proceedings against Mr. Kiki and the newspapers which, on either interpretation of the Ordinance, would be regulated exclusively by section 15. Divergent consequences would flow where the behaviour complained of by the House did not fall within one of the declaratory provisions of the Parliamentary Powers and Privileges Ordinance; on the view accepted by the Committee of Privileges, the House would in such a case be powerless to act; on the alternative view proposed, the House would in that situation have all the powers of the House of Commons as at 1 January, 1901.

However, neither interpretation is satisfactory, and the writer respectfully states his agreement with the observations of the Committee of Privileges on the unsatisfactory state of the present law on this matter in the Territory.[23]

As a result of its conclusions on the law, the Committee felt justified in restricting its deliberations to two questions only, viz.—

(1) whether the words complained of by Traimya Kambipi do, in fact, constitute a contempt of the House of Assembly; and if so

(2) whether the House should request the Speaker to initiate prosecutions of the publishers of the words in the district court.[24]

An affirmative answer to the first question required, of course, that the facts or circumstances were such as could be brought within section 15 of the Parliamentary Powers and Privileges Ordinance. Such an answer was given to this question by the Committee upon a consideration of *May,* of the most recent case of contempt of the House

[23] *Report,* paras. 9, 24. After the vote on the Report in the House of Assembly, the Committee of Privileges was instructed to make a further and more detailed study of all aspects of the Parliamentary Powers and Privileges Ordinance for the purpose of recommending amendments to the Ordinance. To date, no amendment to the Ordinance has been enacted.

[24] *Id.,* para. 10.

of Representatives of the Parliament of the Commonwealth,[25] and after making some adjustments and allowances for the differences in attitude and political understanding of the electors of Papua and New Guinea, as compared with their Australian counterparts.[26]

The Committee ruled that the two statements complained of, deprecating as they did the integrity, in the one case, of ministerial members of the Parliament, and, in the other, of the political party then having the majority in the Parliament did in fact constitute serious breaches of the privileges of the House of Assembly. These statements were adjudged by the Committee to be, in all probability, "the most likely kind of allegations to bring the House of Assembly into disrepute in the eyes of the ordinary village people of Papua and New Guinea".[27] The Committee formed the view that "the only test of what constitutes a contempt of the House of Assembly of Papua and New Guinea is whether it is likely to bring the House into hatred or contempt in the eyes of the people of Papua and New Guinea".[28] Again, no reasons are given in support of this conclusion; it appears, however, to be based on judicial decisions in the criminal law to the effect that questions wholly or partly subjective in relation to the commission of offences are to be answered by reference to the state of mind of the average or ordinary reasonable man of that locality.[29] The adoption of such a view had the result that the English and Australian precedents were rendered of slight assistance only, once allowance was made for the disparate political understandings of the subject peoples.

In point of fact, all the precedent cases and all the learning in *May* are quite beside the point here, for, in strictness, the question to be answered by the Committee was not whether, as a matter of opinion, the facts as found would or might have constituted a contempt or breach of privilege had the House of Assembly been endowed with all the powers of the House of Commons, but whether, as a matter of law, the circumstances, as ascertained by the Committee, did, in their opinion, fall within the terms of section 15 of the Parliamentary Powers and Privileges Ordinance. The Committee appears to have decided both that in such circumstances a contempt of Parliament would have been committed, and that section 15 of the Ordinance was applicable. However, in view of the Committee's conclusion that section 7 is ineffective to confer any special powers on the House of Assembly, the former decision was quite supererogatory, since section 15 wholly governed the case.

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[25] The *Bankstown Observer* case. The Parliamentary proceedings in this case are reported at 1955 H.R. Deb. 1613-1617, 1625-1664.

[26] *Report,* para. 11.

[27] *Id.,* para. 12.

[28] *Id.,* para. 13.

[29] *Kwaku Mensah v. The King* [1946] A.C. 83, 93. This topic has been thoroughly canvassed elsewhere; see C. Howard, "What Colour is the 'Reasonable Man'?" (1961) Crim. Law Rev. 41.

Notwithstanding its belief that the cases in respect of all five accused could be pressed to conviction under sections 15 and 41 of the Parliamentary Powers and Privileges Ordinance, the Committee was convinced that the interests and dignity of the House would be best served by refraining from causing the initiation of proceedings in this instance.[30] The Committee appears to have been willing to excuse the accused persons on the ground that these persons did not know or understand that the statements made or published by them were in breach of the privileges of the House, this being the first time a matter of this kind had been raised in Papua-New Guinea. In respect of the foremost accused person, Mr Kiki, the Committee reported that he made his contemptuous statements about the House of Assembly as part of a wide diatribe without any express intention to bring the House into contempt. Notwithstanding that such an express intention appears not to be a necessary element of any offence against section 15, the Committee recommended that no prosecution of Mr Kiki be directed. In respect of the two local newspapers and the A.B.C., the Committee found no intention to bring the House into disrepute; but, as against the local newspapers, the Committee formed the opinion that a republication of the statements complained of before the House constituted an aggravation of an originally unintentional contempt. The recommendation of the Committee was, however, that the House content itself with accepting a public apology from all the accused.[31]

In addition to its recommendation not to prosecute, the Committee reported that in its opinion the District Court had no jurisdiction to entertain a prosecution under section 15 of the Parliamentary Powers and Privileges Ordinance, in respect of anything said or done outside the Territory of Papua-New Guinea. No reasons are proffered in support of this opinion.[32]

In any event, this conclusion of incompetence was insignificant in the case of the charges brought against the newspapers, and the A.B.C., for they had published the allegedly disrespectful statements within the jurisdiction of the District Court of Port Moresby; the conclusion might have been of some consequence in the case against Mr. Maori

[30] The Committee may have been aware that it would be rather severely embarrassed if, after it authorised the prosecution of an accused, the District Court subsequently acquitted that person of the offence charged. An element of caution will thus be introduced into contempt proceedings whenever a body independent of Parliament is invested with ultimate power to decide in any particular case. See *Report from the Select Committee on Parliamentary Privilege* (1967) para. 144, where this factor was foreseen.

[31] *Report,* paras. 14, 22, 24.

[32] The competence of a District Court to try persons for acts done outside its area is not made decisively clear by the enabling legislation, the Districts Courts Ordinance 1963-1964 (Papua and New Guinea). The most relevant sections are ss. 28(1) and 29(5).

Kiki, for the statements made by him were made in Australia, that is, outside the immediate jurisdiction of the District Court. On this ground, the Committee reported that a prosecution against Kiki would probably fail, even though there was some evidence that he repeated his statements within the jurisdiction of the District Court on at least one occasion.

In the final result, the Committee reported that, in its view, the House had no power to authorise a prosecution against Maori Kiki, although it did have power to direct him to apologise publicly to the House; and that the House had power to deal with the editors of the accused newspapers. This power entitled the House either to authorise the prosecution of these newspapers in a District Court or to order the responsible persons to apologise publicly to the House for their misdemeanours. However, as against all the accused parties, the report recommended complete passivity, that is no prosecutions were recommended, nor was there any recommendation that any person be commanded to apologise to the House.[33]

As appears from these results, the report was the acme of moderation, and so it was described by the Chairman of the Committee.[34] It was self-protective rather than punitive. Its mildness was intentional for three reasons:

(1) Since this was the first time a claim of privilege had ever been raised in Papua-New Guinea, few people were aware of the existence of special powers in the Parliament to deal with these breaches, and even fewer were aware of their extent.

(2) The Committee formed the opinion that, even though the statements complained of were contemptuous of the House, the degree of culpability of the parties was negligible and, therefore, it would be below the dignity of the House to prosecute in respect of these unintended contempts.

(3) The Committee was conscious of the precedent value of its report. On the one hand, it had to formulate a report of such strength as to displace or prevent from arising any belief in the minds of the subject peoples that the House did not have sufficient power to preserve its own dignity. On the other, it was anxious not to appear eager to disrupt any proper freedoms of speech or publication.

There are perhaps other reasons which silently operated in the first instance to cause the Committee to proceed with an abundance of anxiety for the rights of the individual persons accused of being in contempt of the House, and, in the second instance, to move the Committee to colour its report with moderation. The anxiety spoken of had

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[33] *Report,* para. 24.

[34] H.A. Deb. Vol. II. No. 6, 1585.

been displayed by the Committee at an early stage in the proceedings: in seeking the power to send for persons, papers and records, the Committee had been motivated by the view that it was contrary to natural justice for a person to be kept under threat of possible prosecution for any longer than is absolutely necessary;[35] further to this, the Committee had, when examining both witnesses and accused persons, permitted these to be accompanied and counselled by trained legal advisers, admittedly an unprecedented step. This anxiety and moderation seemed to follow from three circumstances.

First, as became obvious during the debates consequent upon the Report, this matter had political ramifications far wider than its pure legal issues, and at the same time, the belief was widespread that here was truly a case where the weapon of privilege was being used largely for political and partisan purposes. The question of privilege had been raised by a member of the Independent group, and voting proceeded throughout strictly on party lines, with official and ministerial members voting with the Independent Party in favour of the report, and against the Pangu Pati.[36]

Secondly, no member of the Committee had undergone any course of legal education, nor could any member claim to have special knowledge in this matter; indeed, of the ninety-four members of the House of Assembly, only one was a trained lawyer. These facts must have caused the members, both of the Committee and of the House, to hesitate before vigorously asserting any rights on behalf of the House.

Thirdly, speaking objectively, no member either of the Committee or of the House could be said to be thoroughly detached from the alleged contempts, and each must have had some subjective involvement in the matter. Of the members of the Committee, one was a member of Mr Kiki's political party, two were ministerial members of the House of Assembly, and two were actively associated with the Independent Party: these last four were members of the groups which Mr Kiki was alleged to have accused of corruption. One of the ministerial members of the Committee was a blood relation of Mr Kiki. Thus, there was no member of the Committee who could claim that he had not been outwardly affected or aggrieved by the statements made by Mr Kiki; the Committee's composition must have caused a reasonable man in the position of Mr Kiki to have a real apprehension that substantial justice was not about to be meted out to him. The Committee had been convened, and its membership settled upon, at a time before this affair arose, but nevertheless this aspect of the matter forcefully impresses one with the disadvantages and undesirability of having complex matters of law disputed away from the objective

[35] H.A. Deb. Vol. II. No. 5, 1179, 1420.

[36] H.A. Deb. Vol. II. No. 6, 1607.

detachment of a court of justice, especially when a citizen is being put in jeopardy and his rights are being seriously interfered with. It is repugnant to basic notions of fairness that an aggrieved party (in this case, the House of Assembly) should have a power to commit in its own cause, to judge, and, at its own whim, to punish for an offence against itself.[37]

A further though directly related matter of privilege was raised in the House on the very day when the Report of the Committee was adopted.[38] The party charged on this occasion was the South Pacific Post Pty Ltd, which had been formed as a result of the merger of the two previously accused local newspapers, the *New Guinea Times Courier* and *The South Pacific Post.* As stated above, both these newspapers were adjudged to be in contempt of the House, but the only recommendation made in respect of them by the report was that a public apology be expected, though not directed. Subsequently to the tabling of the report in the House, the legal adviser to the South Pacific Post Pty Ltd submitted to the Clerk of the House the following statements:

> We are instructed by our client, South Pacific Post Pty Ltd respectfully to convey to Honourable Speaker and to the Honourable Chairman of the Parliamentary Privileges Committee, the following information:
>
> (1) Our client instructs us that it has considered again with its legal advisers the whole history of the publication relating to remarks by and about Mr A. M. Kiki and still believes it did not commit, and never has committed, contempt of the Honourable House of Assembly.
>
> (2) We are further instructed that our client will respectfully request that if the Honourable House considers our client has committed contempt of the House, the matter should be allowed to proceed by the appropriate legal action in court.[39]

In the face of this ostensibly impertinent and contumacious challenge to the House's authority, a resolution was passed by a substantial majority that the Speaker forthwith exclude from the precincts of the

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[37] This reasoning applies equally to the disciplining of members as to that of outsiders. It has commonly been accepted that it is fitting that Parliament should retain exclusive jurisdiction over its members: see *Report from the Select Committee on Parliamentary Privilege* (1967) para. 145; D. C. Pearce, *op. cit.*, n. 1, 263, 264. But when there arise cases as extreme as the episode in the House of Assembly of Papua and New Guinea and cases analogous to that of Sir Henry Bolte in the Victorian Parliament in 1968 (reported at 1968 P. Deb. (Vic.) 2026 *et seq.*), the conclusion is irresistible that Parliament is a body least suited to wield the weapon of privilege, largely because of its susceptibility to abuse on partisan grounds.

[38] H.A. Deb. Vol. II, No. 6, 1607.

[39] *Id.*, 1585-1586.

House any person who acts as representative of or agent for South Pacific Post Pty Ltd for the purpose of reporting the proceedings of the House for publication in *The Papua and New Guinea Post-Courier* for the remainder of that meeting of the House. In order to give effect to this mandate, the Speaker did not need to refer to the troublesome contempt provisions. Rather, did he act on the power provided by sections 23(2) and 24 of the Parliamentary Powers and Privileges Ordinance which provide:

> 23(2). The Speaker may at any time and whether the House is sitting or not, direct that a person who is not a member be removed from the precincts of the House.
>
> 24. Where the Speaker has directed the exclusion of a person from the precincts of the House, that person shall not—
> (a) refuse or fail to leave the precincts of the House; or
> (b) re-enter or attempt to re-enter the precincts of the House at any time during which the direction is in force.

Non-compliance with section 24 is a criminal offence made punishable by section 41.

Thus, the accreditation and right to use the Press Gallery of *The Papua and New Guinea Post-Courier* were effectively curtailed for the balance of that meeting of the House. There was no technical finding or ruling that the paper had been guilty of a contempt. Although the proceedings began when a member of the House raised a question of privilege, the newspaper was not punished through those sections of the Parliamentary Powers and Privileges Ordinance dealing directly with contempts and breaches of privileges. The newspaper had been penalised without committing either a crime or an admitted breach of privilege and deprived of a valuable right without a hearing and without being allowed to raise a defence, either by way of justification or excuse. Accuser and judge were one and the same party, an aggrieved party at that. Precepts of natural justice had once again been offended, with no right of judicial review being afforded to the affected party.

This whole series of proceedings in the House of Assembly has revealed a number of difficulties inherent in attempts so far made to transfer power over contempts and breaches of privilege from Parliament to the courts. As matters presently stand both in the Territory of Papua and New Guinea and in the Northern Territory, preliminary powers of investigation, along with certain ancillary powers, are vested in the House of Assembly and the Legislative Council, respectively. That this is both awkward and undesirable is now beyond question. These powers amount to a power to commit for trial. A person incurring the wrath of a majority of the Parliament is at present liable to have complex issues of law disputed before an untrained body of

interested persons, with serious social and financial consequences hanging in the balance. No person or body has authority to prevent this investigation, any bad faith or fraud in its instigation notwithstanding; the person being investigated has no guaranteed rights; any privileges afforded to him, such as the right to answer the charges brought against him, or the right to be represented by counsel, or the right to cross-examine adverse witnesses, may be withdrawn at the whim of the Parliament; there are no legislative provisions for securing fair play to the individual in this very grave matter. Yet the problem remains of referring an alleged contempt to a court, to be tried as a criminal prosecution under one of the specific provisions of the Parliamentary Powers and Privileges Ordinance. At present, Parliament alone has the power to effect this reference. The House's decision to authorise a prosecution is not examinable in a court of law, and the fate of *The Papua and New Guinea Post-Courier* shows how awkward and delicate is the position of a person attempting to persuade Parliament to proceed to the court against its own judgment for a final and conclusive settlement of the matter. There can now be no doubt that a more satisfactory situation would obtain if the power to authorise prosecutions for contempts was transferred from the Parliament to a disinterested party, for example, an independent director of public prosecutions, and if the preliminary investigation itself was conducted in a court, in the ordinary legal manner in which committals for trial proceed.

Further, the Parliamentary Powers and Privileges Ordinance and the Legislative Council (Powers and Privileges) Ordinance must be amended to provide that once a person has been either acquitted or convicted of an offence against one of the specific provisions of the Ordinances, then no additional proceedings can be launched against him, either in Court or in Parliament; that where the conduct complained of by the Parliament falls within one of the penal sections of the relevant Ordinance, and the facts are such that the person responsible would have a conclusive answer to a prosecution in a court, then no proceedings of any nature can be conducted in Parliament in respect of that behaviour; and, more urgently, that the Ordinances themselves do exhaustively list those matters which the Parliament is entitled to cite as contempts or breaches of privilege.

The confusion and doubt which prevailed throughout the proceedings in the House of Assembly have not yet been dispelled either by legislative amendment or judicial decision. While in the short term there is an urgent need for an elucidation and a definitive and authoritative explanation of the House of Assembly's powers in respect of breaches of privilege, a more ideal long-term result would be attained by Parliament expressly abdicating all its powers in respect of breaches of privilege, save those needed to control its own proceedings and to prevent wilful interruptions to these, to some independent and disinterested body.

Short of this fundamental change, nothing less than the making available to an accused person all the protections of the criminal law, as a matter of course and not of caprice, at every stage of the proceedings, will suffice. This would include conferring on an aggrieved party the right to have proceedings set aside if the rules of natural justice have not been complied with, the provision of closely circumscribed penalties, a right of appeal from the judgment of the Parliament to a court, and the enumeration within the relevant legislation of the conduct liable to be treated as contempts of Parliament. Above all, there must be provided a means of guaranteeing that the ultimate decision in any proceeding is based, not on grounds of politics and expedience, but on legal merits alone.