"Article 22 (1) Freedom of Expression: Its Application in the Legislative Branch of Government, Public Perception, and other practicalities of said right."

A paper delivered by the Leader of Government Business, Hon. Bernard Georges, during the Symposium held on the theme "The Freedom of Expression", at the Palais des Justice on the 17th of June 2024 on the occasion of the Day of the Constitution.

"Freedom of expression and maintaining the authority and independence of the National Assembly, ie how members have immunity on the floor, how that bolsters public debate, etc."

All Animals are Equal…

The right to freedom of expression extends to every citizen. But, in the same way that the pigs who took over Farmer Jones' farm in George Orwell's classic soon came to realise that all animals were equal, but some animals were more equal than others, so too, with the right to freedom of expression. Or perhaps it is not the animals that are more equal, but the circumstances in which they exercise their freedom of expression that guarantees them more freedom than others. One species of more equal animal in the exercise of the freedom is the Member of Parliament. This short discussion will seek to demonstrate how and why this came about.

Equality and Privilege

Let's start with privilege, and with those privileges enjoyed by members of parliament. The word 'privilege' in the context of freedom of expression is well known to lawyers who have practiced the law of defamation. As we know, some defamatory utterances are excused by the doctrine of absolute privilege; others by a species of qualified privilege. Parliamentary privileges are much wider in scope but have the same motivation, namely that not all animals are equal all the time.

Unlike the privilege to defame someone with impunity in certain instances, which has grown with accretion over the years, parliamentary privilege can be seen as both a necessity and an anachronism: a necessity because parliaments must have the ability of operating independently from the other organs of the State if they are to effectively discharge their functions, and an anachronism because most modern parliaments have not had a history of wresting power from the monarch and their privileges are therefore creations of modern constitutions, subject in consequence to the law of the land. Nonetheless, all parliaments embrace and jealously cherish their privileges as necessary for their proper functioning.

Parliamentary privilege is the sum of the rules of a parliament which protect parliament itself, but also its individual members, from external interference in its, and their, work. Additionally, parliamentary privilege extends to the right of parliament to regulate its own procedure. Erskine May, the Bible of parliamentary practice, defines privilege as the sum of the peculiar rights enjoyed by parliament collectively and its members individually '*without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals*.'[1]

[1] Erskine May, *Parliamentary Practice* 21st Ed., p 69

McGee, the other Bible of parliamentary procedure, from down under New Zealand, says of parliamentary privilege that it '*has been justified in law on the grounds that a legislature must enjoy freedom from control by the Crown and the courts (an aspect of the constitutional separation of powers); that it must possess certain powers to facilitate the carrying out of its functions; and that it, its members and others participating in its proceedings must enjoy certain immunities for the legislature to discharge its functions effectively*.'[2]

In this quotation we see the interrelation between privileges, powers and immunities. All three exist simultaneously to give to parliament the ability to function effectively. This is the bargain struck with the State – the public interest justifies the granting of these peculiar rights to a body and its members over and above those enjoyed by other organs of government and other citizens. It is worth remembering that this is not Napoleon the pig speaking. It is we, the people, ordaining it.

Constitutional and Legal Basis for Privilege

Nonetheless, criticism of parliamentary privilege revolves around its constitutional doubtfulness, insofar as it is a species of legal power reserved to the exclusive use of a class of persons. Use of the constitutional principle of classification to circumvent the equality provisions of Article 27 of the Constitution is, happily, not required in Seychelles, given that the main privileges and immunities of the National Assembly are constitutionally ordained. Article 102 and 103 of the 1993 Constitution grant the Assembly and members freedom of speech and debate, freedom from arrest when the Assembly is in session, freedom from not having to attend court if that interferes with the functions of the member, and freedom from prosecution or civil suit for an act done or words spoken or written under the authority of the Assembly.[3] Additionally, there is a prohibition from service of process within the precincts of the Assembly.[4]

These privileges are repeated, and extended, in law. Since 1975, the National Assembly (Privileges, Immunities and Powers) Act has recognized the privileges of the National Assembly and has given them legal status. The privileges have thereby become part of the general law of the land and are not simply vestiges of privileges extracted from the Crown[5] and conferred by the Assembly upon itself.

Philosophically, it is argued that the cloak of protection which parliamentary privilege throws around the institution and its members, and which is denied the ordinary citizen, is necessary for its proper functioning. Members must be free from outside pressure – whether this comes from individuals, pressure groups, NGOs and the media – to perform and discharge their duties. The privileges and powers members and the institution enjoy allow us to perform our role unimpeded by outside influences. These privileges are legally and philosophically not unlike the ones enjoyed

[2] McGee, *Parliamentary Practice in New Zealand* 4th Ed
[3] Article 102. The constitutional consequence of this is that Article 27 will have to be read in light of Articles 102 and 103
[4] Article 103
[5] In 1975 Seychelles was still a British Crown Colony

– for similar reasons, namely that they should not be under pressure from external influences in the discharge of their respective functions – by the President and Judges.[6]

Waiver of Privileges

Members enjoy yet another protection, this time against ourselves, and our occasional rashness. Members of the Assembly often – from the protection of the Chamber – boldly dare another member, or a member of the public, to take action against us for something we say during a sitting with the words, 'I waive my privilege'. That is not possible, either by the member or by the Assembly. A member, or the whole Assembly, may nonetheless simply not invoke a privilege. Practically, the outcome will be the same as waiving the privilege. Juridically, parliamentary privilege imposes a jurisdictional bar on a court against questioning or impeaching proceedings in the Assembly. The consequence of this is that the court will be unable to use any evidence of proceedings in the Assembly, even when the suit has been initiated by a member, for it has been held that institution of a suit does not open up a member's parliamentary conduct to judicial scrutiny.[7]

The Courts and Privilege

Privilege, '*though part of the law of the land, is to a certain extent an exemption from the general law.*' So says Erskine May,[8] but since parliamentary privilege is part of the law of Seychelles, it is the duty of the Courts to apply the law. Courts may be called upon to rule on issues of parliamentary privilege which arise, and they cannot abdicate that function, but they must do so on the basis that, given that the idea of parliamentary privilege is to free the Assembly's functioning from judicial control, they approach any matter concerning privilege with this idea in mind. As the House of Lords in *British Railways Board v Pickin* [1974] AC 765 succinctly put it, "*The remedy for a parliamentary wrong, if one has been committed, must be sought from Parliament and cannot be gained from the courts*."

This difficult balancing act is probably best summed up by McGee[9] as follows: '*The courts naturally have a primary role in articulating the scope of parliamentary privilege, but it is for Parliament itself to determine how it exercises its privileges. Where there is uncertainty over the precise extent of a privilege, it is ultimately a matter for the court, but the court will have careful regard to any views expressed in Parliament.*'

In matters of parliamentary privilege, thus, courts will operate on the basis that jurisdictionally they have no right to interfere but, if a question as to the existence or scope of the privilege is at issue, they must, in the performance of their interpretative function of the law, assume jurisdiction and decide.[10] What they are precluded from doing is interfering in the manner in which the

[6] Article 59 of the Constitution protects the President from civil or criminal action while in office and Article 119(3) grants judges and justices of appeal immunity from suit for acts or omission in the performance of their functions
[7] *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC)
[8] n 222 *supra*
[9] McGee, *Parliamentary Practice in New Zealand* 4th Ed, p 718
[10] Barnett, *Constitutional and Administrative Law*, 8th Ed., p459:'*The role of the courts in matters of privilege is confined to determining whether a privilege exists, and its scope. If the court rules that a disputed matter falls within parliamentary privilege the court will decline jurisdiction.*'

privilege has been exercised or the decision which has been taken by the Assembly in the matter. The Assembly must be left to take any remedial action necessary – or not – on the basis of the interpretation as to existence and scope of the privilege given by the Court. Indeed, the Constitutional Court has stated that it is up to members to ensure '*that such privileges and immunities are safeguarded and not sacrificed or surrendered.*'[11]

In so operating, the Courts are not deferring to the High Court of Parliament (such as it would in the United Kingdom) but, since the National Assembly does not aspire to have a judicial function in the same vein as the Houses of Parliament at Westminster, they do so on the basis of the strict constitutional separation of functions and in recognition of the fact that National Assembly privileges are creatures of the Constitution and law.

Freedom of Speech in the National Assembly

That was the context, and I apologise for having laboured it. Now to its application in the realm of the main privilege enjoyed by MNAs, that of the freedom of expression. This is the privilege which members of the Assembly – and also persons appearing before the Assembly or any Committee thereof – enjoy to speak freely without fear that they may be sanctioned by the Courts or external agencies. The privilege extends to writings emanating to or addressed to members, even if these are to or from persons or bodies outside the Assembly, so long as they relate to the functions of a member as member.

Although a privilege exclusive to, and hard won by, the Westminster Parliament for a long period, this freedom has permeated all parliaments and has been accepted by them as a necessary right to the proper functioning of the institution. This parliamentary privilege was enshrined in Article IX of the Bill of Rights of 1689, following the Glorious Revolution of 1688 in the UK.

McGee states that '*Parliament's freedom of speech is an important expression of legislative independence. Without it, the House's ability to facilitate the Government's legislative programme and scrutinise its executive actions would be subject to legal challenge and control in the courts. The fundamental principle of freedom of speech in debate ensures that these functions are not justiciable.*'[12]

In Seychelles, the privilege enjoys the highest authority, being both constitutional and legal. Article 102(1) of the Constitution provides that there shall be '*freedom of speech and debate in the National Assembly and a member shall not be subject to the jurisdiction of any court or to any proceedings whatsoever, other than in proceedings before the Assembly, when exercising the freedoms or performing the functions of a member in the Assembly*.'

The same right is repeated in section 3 of the National Assembly (Privileges, Immunities and Powers) Act 2011: '*There shall be freedom of speech and debate in the National Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly*.' The freedom is extended in section 4 of the Act which prohibits proceedings against members '*for words spoken before, or written in a report to, the Assembly or to a committee*

[11] *Prea v Speaker of National Assembly & Anor* Const. Case 09 of 2011
[12] McGee, *Parliamentary Practice in New Zealand* 4th Ed, p 723

thereof by reason of any matter or thing brought by the member therein by petition, Bill, resolution, motion or otherwise.'

As we have learned, freedom of speech exists not only for the Assembly. Article 22 of the Constitution articulates the freedom of expression as a human right, applicable to all persons. However, again as we know, the freedom in Article 22 is not absolute and is subject to derogations, such as the law of defamation. For the Assembly (as also for Courts), the freedom is elevated to the rank of absolute privilege '*for maintaining the authority and independence of the courts or the National Assembly.*'[13] The Seychelles law of defamation is English law and parliamentary proceedings in English law enjoy the protection of absolute privilege as a defence.

Insofar as communications external to Assembly debates are concerned, the privilege extends to communications to and from members so long as these are related to the functions of the members as members. The defence of qualified privilege for defamatory statements would likely extend to communications not covered by absolute privilege, so long as a corresponding duty and interest could be established in the making and receiving of the statement respectively. Here, the member of the Assembly is in the same position as the ordinary citizen.

These provisions underline a number of important issues.

First, the freedom is absolute only insofar as it cannot be questioned '*outside the Assembly'*. The words have been held to cover not only courts but also other agencies of the State which might be interested in the statements, such as the Human Rights Commission, Ombudsman, Anti-Corruption Commission or other bodies with an investigatory capacity.

Next, it is a recognition that only the Assembly is competent to determine matters relating to the exercise of the freedom.

Third, protection only extends to the exercise of the freedoms or performance of the functions of a member, and not to functions of the member outside of the Assembly.

Fourth, the freedom extends – by virtue of section 3 of the National Assembly (Privileges, Immunities and Powers) Act 2011 – to anyone appearing before the Assembly and therefore covers witnesses appearing before the Assembly or any Committee thereof.

The principle behind such wide coverage is nothing less than to enable the Assembly to operate autonomously from other organs of State or government and to ensure that members and witnesses are not inhibited from stating fully and freely what they have to say. However, the freedom is not to be confused with a carte blanche for members and witnesses to say anything they please; it is simply a recognition that they are liable only to the Assembly and not to any forces external thereto.

The freedom of debate, being an extension of, and a necessary adjunct to, the freedom of speech, enjoys the same constitutional and legal protection.

[13] Article 22(2)(d)

There is no difficulty in the notion of the Assembly controlling its own proceedings, the so-called 'exclusive cognisance'. The difficulty arises in respect of matters ancillary to the discharge of these proceedings. To what extent are these matters amenable to review by the Courts? It is important to stress that the opening words of Article 101 are 'Subject to this Constitution…' These words have been held in Commonwealth countries with a similar provision that the power given to the Assembly to regulate its own procedure and conduct is not beyond the reach of the Courts.[14] As we have seen, access to the Courts is always possible to determine the existence of a privilege or a power. What is beyond the Court's reach is the manner of exercise of the privilege or power, so long as this does not breach the Constitution. If it does, the Court has the power to redress the even the exercise of the privilege or power.[15] Thus, the right of the Assembly to exclusive control of its own proceedings is subject to: (i) the Courts' power to enquire into the existence of a privilege but not the manner of exercise of the privilege, and (ii) the Court's power to strike down the exercise of a privilege if this has contravened a provision in the Constitution.

This is an important point to make. Only the Assembly can interfere with the exercise of the freedom of expression enjoyed by members. Although absolute in scope, the parliamentary freedom of expression can be limited by parliament itself. Notwithstanding the words of Article 102, members cannot be heard to say that they can speak when they want and for as long as they want. That is why the principle of filibustering does not exist in the National Assembly of Seychelles. The Standing Orders, made by the Assembly, limit the time for speaking and give the Speaker a discretion to limit the numbers of members who can speak, and the time allocated to them. Courts cannot interfere with a decision of the Speaker to refuse a member the right to speak on a subject, or to limit the time allocated. This is a matter for the Assembly to determine. Courts are limited to defining the scope of the privilege, not the manner of its exercise.

Complaints are addressed elsewhere. I now turn to this.

Remedial action for Breach of Privilege

The exercise of a privilege by a member may infringe on the rights of other persons, and the actions of third parties may affect the privilege enjoyed by members. Remedial action must be possible to redress any damage caused by the exercise of the privilege or its infringement.

Action by Third Parties

Article 102(6) of the Constitution recognizes that, while exercising the freedom of speech in the Assembly, a member may say something that affects a third party, and therefore provides the affected third party a method of redress. This is by way of writing to the Speaker submitting a reply to be read in the Assembly. The Speaker is required to circulate the reply to every member and read it at the start of the next sitting.

The exercise of the right of reply is limited in a number of respects.

[14] E.g. *Honourable P R Berenger v Sir R Jeewoolall* [1999] MR 57

[15] Unless, of course, the Constitution itself grants an exemption. The freedom of speech in the Assembly is one such instance. The right to freedom of expression in Article 22 of the Constitution allows for derogations made by law necessary in a democratic society. One such law is the National Assembly (Privileges, Immunities and Powers) Act.

First, the right is only exercisable against words spoken by a member. This is clear from a reference to the words 'exercise of the right under clause (1)'. That right is the freedom of speech and debate and applies only to members. If a visitor to the Assembly (and this includes ministers and other persons who are allowed to speak in the Chamber or before Committees of the Assembly) makes a statement in the Assembly, a person aggrieved by it has no right of reply. That visitor, not being protected by the absolute privilege afforded to members, can be subject to the law of defamation, just as any other citizen.

Next, the right of reply is not a right of correcting statements. The right only applies to persons who are 'aggrieved' by the words of a member. Often a member, wittingly or unwittingly, makes a mistake in a statement which a person wishes to correct by invoking the right of reply. This is not the purpose behind the right of reply. It is only words spoken which have the effect of affecting a person to the extent that the person is aggrieved that are covered. This requires a high degree of offence caused by the statement, not a mere inaccuracy. Those statements can be corrected in other ways – during the course of a debate itself by another member or by a visitor in the Chamber, or by a personal explanation by a member under Standing Order 35. It does not matter whether the statement is made deliberately or inadvertently – if it is strong enough to cause offence on an objective assessment, the right of reply must be afforded.

The reply, if found to be proper and meritorious of being read, often contains matters extraneous to those in issue, or words which are intemperate and which are likely to prompt a request for retraction by the member in question. For this reason, the Speaker has a discretion to edit the reply tendered and only read the relevant parts. The Article suggests, however, by the mandatory use of the word 'shall', that the reply in full should be circulated to members.

Action by Members – Raising Matters of Privilege

Members are empowered to raise a matter which the member alleges affects his or her privileges, including the privilege of absolute freedom of expression.

Order 36 gives every member who believes that a matter affects the privileges of the Assembly may raise the matter. The matter does not have to be personal to the member, nor affect the member directly. In raising a matter of privilege, the member is acting in the defence of the privileges of the whole Assembly. The matter may be aimed at another member, or a person or agency outside the Assembly.

In raising a matter of privilege, a member must be able to point to a privilege. This will either be a specific one (for instance, limitation on freedom of expression, or another privilege in the National Assembly Privileges Powers and Immunities Act).

This is an often-used procedure, but it does not always succeed. The procedure is as follows:

The member wishing to raise a matter of privilege does so at the first sitting of the Assembly by drawing the Speaker's attention to the matter.[16] This can be done privately to the Speaker or openly in the Chamber.

When called upon by the Speaker to raise the matter, the member briefly states the grounds on which the matter rests. This occurs after question time and before motions.

The Speaker then decides whether the matter does or does not affect the Assembly's privileges. This is done by an *ex tempore* oral ruling, or through a considered written ruling delivered at a future sitting.[17] If the Speaker rules that the matter does not affect the privileges of the Assembly, that is the end of the matter.

If the Speaker indicates that the matter may affect the privileges of the Assembly, the member may move a motion relating to the matter. This is heard immediately after question time and ahead of any Bills or other motions on the Order Paper. [18]

The motion is dealt with as any other motion and a vote is taken on it.[19] The Speaker has no power to take any action on a breach of a Member's privilege or to impose any sanction for the breach. This is solely in the hands of the Members.

Conclusion

As the animals who took over Animal Farm were quick to realise, there is nothing new in the universe and life has a nasty habit of circling round back to the beginning. At the end of the day, although some animals are more equal than others, the fact remains that we are all animals and, in the context of the freedom of expression, we are all creatures of the constitution. Whatever we do is ordained by our Supreme Law. Our equality before the law is relative. Our privileges are ephemeral. As soon as we step outside the bounds of the law, we are fair game for Farmer Jones and his shotgun (here represented by judges and their judgments). And that is the way it should be. As the Constitution itself says over and over again at the start of an article which appears to grant a right, 'Subject to this Constitution…' And that is the way we should think in terms of our rights, including that of freedom of expression. The right is a right. Any gloss on it is but a privilege, and all privileges are limited in time. Monarchs die, judges reach 70 years of age, and members of parliament are voted out. We forget these truths at our peril. We will do well to think of them before we open our mouths.

Bernard Georges
Leader of Government Business

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[16] Unless the matter arises during a sitting of the Assembly, in which case the business is interrupted in order that the matter of privilege may be dealt with: SO36(5)

[17] An example of the latter is the ruling of Speaker McGregor on 13 November 2001 on a matter raised by Hon Georges relating to what the member considered was inadequate and inaccurate coverage by the national broadcaster of his intervention in the Chamber on a Bill: McGregor *A Parliamentary History of Seychelles* 2004 p 85

[18] SO24(2)

[19] This rarely happens. It is more usual for matters of privilege to be dealt with ex-tempore by the Speaker one way or the other, including – if the matter is successfully raised – making an order on it.

In the National Assembly