Parliamentary Privilege and the Polarisation of Constitutional Discourse in New Zealand

By Guy Fiti Sinclair*

I. Introduction

This essay explores two key issues of constitutional significance arising out of a report of the Privileges Committee of the New Zealand House of Representatives, issued in May 2005, entitled *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings* ('the Report'). The first issue concerns the preservation of freedom of speech, in relation to both parliamentary proceedings and public political debate. The second issue concerns the proper constitutional relationship of Parliament to the courts.

In the course of a debate in the House of Representatives in December 1997, Owen Jennings MP alleged (among other things) that the New Zealand Wool Board had arranged sponsorship of a rugby tour so that two senior officials, one from each side of the agreement, 'could continue an indulgence in an illicit relationship'. These allegations received widespread media coverage. Some weeks later, an article in *The Independent* newspaper set out Jennings's allegations and reported that he 'did not resile from his claim about the officials' relationship'.

Roger Buchanan sued Jennings in defamation. Buchanan claimed that Jennings's statement that he did not resile from his claim, as reported in *The Independent*, 'referred to, adopted, repeated and confirmed as true and [were] understood to refer to, adopt, repeat and confirm as true the [earlier parliamentary] statement and subsequent reports of the statement'. Jennings defended the action on the basis of absolute privilege, and argued that no statement he had made outside the House of Representatives founded a cause of action in defamation.

Three judgments in the High Court supported the view that, although absolute privilege barred Buchanan from suing Jennings directly on the basis of his comments in the House of Representatives, Jennings had effectively repeated his defamation outside Parliament and therefore could be sued on the basis of those extra-parliamentary statements.[1] Two further judgments – by the Court of Appeal and the Privy Council[2] – confirmed the decisions in the High Court, and upheld the doctrine of 'effective repetition'.

This essay examines the perhaps surprisingly heated controversy surrounding the judgments in *Buchanan*. In this essay, I do not rehearse all of the arguments put forward in those judgments,

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1 *Buchanan v Jennings* [1999] NZAR 289; [2000] NZAR 113; and [2001] 3 NZLR 71.

2 *Buchanan v Jennings* [2002] 3 NZLR 145 ('*Buchanan* (CA)'); and [2005] 2 All ER 273 (at the Privy Council).

as others have done so at length elsewhere.[3] Suffice it to say that the Court of Appeal majority judgment saw little value in general statements of principle regarding parliamentary privilege. Instead, the Court focussed on the particular words of article 9 of the Bill of Rights 1688 (Imp)[4] – which declares 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' – and relied heavily on: 'its purpose and related principle (even if the particular understanding of both may shift over the centuries), and the actual rulings in, and facts of, the leading cases, as well as the particular facts of the case before the Court.'[5]

Both the Court of Appeal majority and the Privy Council found confirmation for the 'effective repetition' doctrine in earlier Australasian cases where defamation proceedings had been founded on non-privileged statements and where the earlier parliamentary record had been called on to complete the non-privileged statement.[6] In contrast Tipping J – the sole dissenter in the Court of Appeal – relied more on passages in earlier cases that emphasised a broader principle of mutual restraint between the courts and Parliament.[7]

Whereas the judgments in the High Court received relatively little attention, the Court of Appeal and Privy Council decisions provoked considerable academic reaction, and the Report itself refers to and at times explicitly draws on the scholarly articles that emerged in the wake of those decisions. In Parts II and III of this essay, I outline the published responses to the Courts' judgments that appeared in academic journals prior to the Report, and in the Report itself, with particular attention to their treatment of the two key issues described above.[8] At this point in the essay I make some initial comments on the Report's recommendation, pointing out what I consider to be significant flaws in the drafting of that recommendation.

In Part IV, which focuses on the freedom of speech issue, I offer a broad outline of the theoretical justifications of free speech, some of the problems with each of those various justifications, and the common themes that can be identified in each. In considering the application of theory to practice, I suggest that the Privileges Committee's treatment of the freedom of speech issue is superficial and short-sighted, taking into account only a limited range of interests and disregarding the Courts' concerns with maintaining an equilibrium among the various free speech interests in society. Finally, Part V relates the long history of disagreement over the ambit of parliamentary privilege to the broader controversy concerning parliamentary sovereignty.

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3 See, for example, J Burrows and U Cheer, *Media Law in New Zealand* (5th ed, Oxford University Press, Melbourne, 2005) 86-87 and J Allan 'Parliamentary Privilege: Will the Empire Strike Back?' (2002) 20 NZULR 205.

4 In force in New Zealand by virtue of the Imperial Laws Application Act 1988 s 3 and sch 1 and the Legislature Act 1908 s 242.

5 *Buchanan* (CA), above n 2, para 50.

6 Ibid paras 55-60. The cases were: *Hyams v Peterson* [1991] 3 NZLR 648, *Beitzel v Crabb* [1992] 2 VR 121 and *Laurance v Katter* (1996) 141 ALR 447.

7 In particular, Lord Browne-Wilkinson's judgment in *Prebble v Television New Zealand* [1995] 1 AC 321 (hereafter, '*Prebble*').

8 Several academic articles have appeared since the publication of the Report, but for the purposes of this essay I concentrate mainly on those that were published before the Report.

II. Academic Criticism of *Buchanan*

The earliest commentaries on the High Court decisions in *Buchanan* were relatively moderate in tone, and barely even expressed any dissenting views. Professor Joseph's *Constitutional and Administrative Law in New Zealand*,[9] written after the Full Court's review of the strike-out application but before trial, acknowledged that 'effective repetition is an established principle of the law of defamation' but deplored its 'chilling effect' on 'members' freedom of speech through the media'.[10] That effect was simply assumed without either argument or analysis; Joseph did not express any concerns over the implications for freedom of speech in Parliament or the constitutional relationship between Parliament and the courts.

Professor Burrows's review of media law developments in 2001 made no criticism of the decision at all, noting only that there had been a 'deliberateness' about Jennings's reassertion of his parliamentary allegations 'that will not always be present' in other cases.[11] A similar review by Ursula Cheer simply recited the facts and the decision at trial and stated that the High Court thought the case 'clear enough not to have any chilling effect on members of parliament'.[12]

The Court of Appeal decision provoked more of a reaction. The only editorial comment in Rosemary Tobin's half-page note on the Court's decision was that Tipping J's 'careful and closely reasoned dissent … is to be preferred'.[13] In contrast, however, James Allan's lengthy and highly critical response argued that that decision reduced the scope of parliamentary privilege,[14] and derided the majority's reasoning in relation to the sequence of statements (according to which an 'identifying' statement in Parliament is acceptable after non-specific allegations have been made, but not before). He also reinforced the concern expressed by Tipping J that the majority's decision created uncertainty because it gave no clear rule for determining where 'effective repetition' would take place, and politicians would find it difficult to determine exactly how much they could say in response to journalists' questions. Perhaps worse still, the decision vested too much discretionary power in judges who would decide similar cases.

Allan's article castigated the Court for distinguishing *Prebble* and thus, in his view, 'defeating the very purpose of the doctrine of precedent',[15] and took the Court to task for considering the possibility of abuse of parliamentary privilege without assessing its benefits, a policy consideration which he says is 'unacceptable, indeed unconstitutional'.[16] Allan concluded: 'We should all hope the Privy Council overturns the majority judgment and prefers the dissent of Tipping J.'[17]

In a note on constitutional law,[18] Professor Joseph praised Tipping J's 'substantive assessment' of the issues, and argued that political discourse outside the House of Representatives would be impoverished if Members were unable to contribute to it. Joseph also lamented the majority's disregard for the need 'to avoid the courts from becoming enmeshed in inquiries that might involve

9 P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, Wellington: Brookers Limited, 2001).

10 Ibid 411.

11 J Burrows 'Review: Media Law' [2002] NZ Law Review 217, 222.

12 U Cheer 'New Zealand Media & Arts Law Update – Recent Developments' (2001) 6 MALR 247.

13 R Tobin 'Student Companion – Torts' [2002] NZLJ 326.

14 Allan, above n 3, 205 and 207-210.

15 Ibid 210.

16 Ibid 217.

17 Ibid 219.

18 Joseph 'Constitutional Law' [2003] NZ Law Review 387, at 430.

scrutinising the truth of or motives behind members' statements in debates'.[19] In spite of these 'troubling implications', Joseph concluded rather mildly, saying that it would be 'disappointing' if the Privy Council decision on appeal 'did not address the broader implications of the effective repetition doctrine'.[20]

Another article following the Court of Appeal decision, by the Clerk of the House of Representatives, David McGee,[21] addressed the broader issue of the constitutional relationship between the courts and Parliament in more depth. McGee argued persuasively for the role of parliamentary privilege in conferring autonomy on Parliament and 'effecting a modus vivendi between the legislature and the other two branches of government'.[22] Identifying a set of rules relevant to freedom of speech, he downplayed the significance of article 9 and instead placed high value on the 'wider legal policy of avoiding judicial involvement in parliamentary proceedings'.[23]

Two arguments presented by McGee are noteworthy for their originality. First, McGee argued that parliamentary privilege should be narrowly defined, so that the distinctiveness of parliamentary debate is not eroded and the 'legal incentive to members and witnesses to debate publicly important issues in Parliament' is not lost.[24] McGee therefore expressed little interest in or concern with freedom of speech in public debate, in marked contrast to what appeared to be Joseph's concern with the chilling effect on political speech.

Secondly, McGee argued that the sequence of statements was irrelevant because the issue of freedom of speech was not decisive. In McGee's view, concern with freedom of speech underpinned article 9, but that article did not require proof that freedom of speech had actually been impaired in a particular case: 'That would make art 9 dependent on a case by case judicial assessment of the impact of the use of parliamentary material on freedom of speech. It is not intended that art 9 depends on such a judicial assessment, the legislation determines that it does'. [25] This argument suggests that by linking parliamentary privilege too closely to freedom of speech, the courts are tempted to intervene in particular cases and the broader principle of Parliament-court relations is vitiated. Extrapolating only a little, one might conclude from McGee's comments that freedom of speech, whether within or outside Parliament, should be disregarded as a basis for absolute privilege.

Three academic pieces in 2004 responded to the Privy Council judgment. Firstly, a new edition of Professor Burrows's text on media law[26] described the case and the decision in some depth, but contained little commentary, other than noting that the judgment included 'a long and compelling dissent from Tipping J'[27] and suggesting that the case was one of a series that 'indicate a steady undermining of parliamentary privilege'.[28]

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19 Ibid 430-431.

20 Ibid 432.

21 D McGee 'The Scope of Parliamentary Privilege' [2004] NZLJ 84.

22 Ibid 84.

23 Ibid 85.

24 Ibid 85.

25 Ibid 88.

26 Burrows and Cheer, above n 3 at 86-88.

27 Ibid 87.

28 Ibid 87.

Another media law review by Burrows in the same year went further in describing the judgment as 'less than satisfactory', and again expressed concern that the outcome would affect freedom of speech in public.[29]

Finally, an article by Andrew Geddis[30] described the courts' task in defining parliamentary privilege as 'somewhat fraught'.[31] Referring to an 'ongoing constitutional minuet' involving the courts and Parliament, he argued that the courts' concern in each case is to guard individual rights against possible abuses of power by institutions.[32] In particular, he acknowledged the Court's concern for 'the reputational rights of individual citizens' and observed that 'the Court in each instance cabins, or restricts, the ambit of [parliamentary] privilege so as to "let the Courts do their job"'.[33] While noting that some doubt remains about when an effective repetition will arise, he appeared to have some sympathy for the view that 'an MP who publicly continues to raise false accusations outside of the House, even if only obliquely, should have to account in Court to the citizen they have thereby harmed'.[34]

In summary, the critical commentary published prior to the Report focussed broadly on the two key issues, but differed in emphasis. Joseph's – and to a lesser extent Burrows's – primary interest, for example, appeared to be the chilling effect of the courts' decisions on freedom of expression in public political debate. On the other hand, McGee downplayed freedom of speech concerns and instead emphasised the importance of ensuring that judges do not stray into the proper sphere of Parliament. Tipping J's judgment and several of the academic pieces demonstrated concern for both key issues, as well a preference for straight-forward principles that could be easily applied.

III. The Privileges Committee's Report

A. Academic Input to the Committee

In the Report, the Committee refers to three of the scholarly contributions outlined above that criticised the Court of Appeal and Privy Council decisions.[35] The Committee also acknowledges having met with and received advice from four individuals who had already published scholarly commentary on *Buchanan*: the Clerk of the House of Representatives, and three academics – Burrows, Joseph and Geddis.[36]

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29 J Burrows 'Review: Media Law' [2004] NZ Law Review 787, 790.

30 A Geddis 'Privilege, Parliament, and the Courts' [2004] NZLJ 302. Geddis has written two more articles touching on this subject, both after the Report, and therefore not considered in this part of the essay. The articles are: 'Comments – Defining the Ambit of the Free Speech Privilege in New Zealand's Parliament' (2005) 16 PLR 5 (12-17) and 'Parliamentary Privilege: *Quis Custodiet Ipsos Custodes?*' [2005] PL 696. Other recent articles commenting on *Buchanan* and effective repetition include: U Cheer 'New Zealand Media Law' (2005) 10 MALR 325; P Joseph 'Scorecard on our Public Jurisprudence' (2005) 3 NZJPIL 223; and M Hollard 'Members of Parliament and defamation' (2005) 86 Parliamentarian 260.

31 Geddis 'Privilege, Parliament', above n 30, 302.

32 Ibid.

33 Ibid.

34 Ibid.

35 Page 4 of the Report. The three articles are: Allan, above n 3; Joseph, above n 18; and McGee, above n 21.

36 Named in Appendix A to the Report.

The notes of the latter three are appended to the Report.[37] Burrows's notes are consistent with his earlier published comments; his main concern continues to be freedom of speech in public, for witnesses and the media as well as for Members of Parliament. Burrows comments that witnesses in particular 'may be dangerously ready to be interviewed about submissions they have made which may be critical of some person';[38] journalists and politicians alike will be likely to err on the side of caution. His rather equivocal comment that the Privy Council's decision 'appears to infringe parliamentary privilege'[39] seems to indicate that he does not regard constitutional relationships to be particularly threatened by the decision.

Joseph's notes appear rather more definitive and assertive than his earlier comments on the case. He briefly addresses both key issues, noting that the effective repetition principle 'represents a departure from the absolute privilege of parliamentary free speech' and 'infringes the Article 9 prohibition' insofar as it requires 'questioning' of proceedings in Parliament.[40] He also refers again to the 'corrosive effect' of the effective repetition principle on public political speech by politicians.[41]

Geddis also appears to be more willing than before to criticise the Privy Council's decision.[42] He suggests that the decision 'reduced the scope of article 9 to a policy that participants only need remain free to speak in an uninhibited fashion while directly involved in the proceedings of Parliament'[43] and says that the effective repetition doctrine is built on a 'fiction'.[44] Like Joseph, he appeals to the 'reality of our media society' and argues that complete silence is not a realistic option for individuals who are called on to defend their parliamentary statements.

B. The Key Issues in the Report

A close reading of the Report suggests that the Privileges Committee was above all concerned with the ability of Members of Parliament to speak to the media about their parliamentary statements without fear of legal action. Under the heading 'Chilling effect on public debate', the Committee warns that media will become cautious about following up and challenging parliamentary statements, and argues that Members of Parliament and witnesses will be 'reluctant to submit themselves to subsequent interview for fear of losing their parliamentary immunity. This would be so even if they were prepared to modify, clarify or restrict their parliamentary statement … It is hard to see how this promotes the public interest in facilitating discussion of public affairs'. [45]

Even under the heading 'Effect on free speech itself', where the Report begins to discuss the impact of the Privy Council's decision on the contributions of participants to parliamentary proceedings, it notes that the media and the public expect Members who say something controversial in Parliament to 'respond, at least minimally, in an interview'.[46] Finally, in its brief 'Conclusions', the Committee again returns to this theme, reporting that 'Members are being challenged in media

37 As Appendices C, D and E respectively.

38 Report 14.

39 Ibid 13.

40 Ibid 17.

41 Ibid 18.

42 Geddis 'Comments', above n 30, expands on the arguments set out in his notes.

43 Report 26.

44 Ibid 27.

45 Ibid 5-6.

46 Ibid 5.

interviews in terms directly derived from the "effective repetition" principle', and arguing that '[u]nless public debate is to be stymied, this must be addressed'.[47]

The Committee's principal concern appears to be shared by other Members of Parliament. Of the ten who spoke to the Report in a parliamentary debate on 1 June 2005, eight mentioned their concerns with the effect of the *Buchanan v Jennings* ruling on freedom of speech in public, five specifically mentioned the difficulties that arise when Members are questioned by the media concerning their parliamentary statements, and only two spoke against the Report.[48] The parliamentary vote was 105-13 in favour of taking note of the Report. Perhaps most tellingly, Russell Fairbrother MP made the following statement:

> Of course, every time a member of Parliament is engaged by the media, every person who votes tries to make an assessment on the veracity or reliability of that member. If that then puts a member in the position whereby he or she prevaricates, or tries to avoid the issue, that member is in the very difficult position of having made a statement that he or she believes should be made in the House but that can then reflect badly on his or her public persona outside the House. [49]

C. The Recommendation

In addition to commenting generally on the Privy Council's decision, it is apparent that the three academics who assisted the Committee were also invited to consider possible legislative responses. Both Joseph[50] and Geddis[51] suggested that the Legislature Act 1908 could be amended. Joseph suggested that the Act could be amended to state: 'No person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statements would not, but for the proceedings in Parliament, give rise to criminal or civil liability'.

Joseph's wording was adopted without amendment by the Committee, and constitutes the Committee's recommendation. However, it is worth noting the tentative tone of Joseph's recommendation: he says that a 'general amendment to the Legislature Act 1908 *may* be preferable than [sic] simply amending the Defamation Act 1992'[52] and that his draft provision '*might* provide a suitable override to negate the [effective repetition] principle'[53] (emphasis added to both quotations).

The dangers inherent in legal drafting may explain the other two experts' reluctance to offer specific wording. In his notes, Burrows does not even mention the possibility of amending the Legislature Act, instead recommending that the narrowest solution – an amendment to the Defamation Act – be adopted.[54] In Burrows's view, this approach is preferable for three reasons; it would be the easiest to draft, the easiest to pass, and – most significantly – because it would make 'the least inroads into established principle'.[55]

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47 Ibid 9.

48 New Zealand House of Representatives Parliamentary Debates (Hansard), First Session, Forty-Seventh Parliament, 2002-2005, Wednesday 1 June 2005 (for inclusion in Volume 626), 20890-20910.

49 Ibid 20904.

50 Report 18-19.

51 Ibid 29.

52 Ibid 18.

53 Ibid 19.

54 Ibid 15.

55 Ibid 16.

D. Some Initial Comments on the Recommendation

How effective, then, is the legislative amendment recommended by the Committee? Undoubtedly it would act as a bar to criminal and civil liability arising from the 'effective repetition' of parliamentary statements outside Parliament. However, several problematic features may be noted at the outset.

First, it is arguable that if the intention is to negate the doctrine of effective repetition entirely, then the wording does not go far enough. The Report itself expresses concern that the principle of effective repetition may extend to words spoken under the protection of absolute privilege in court proceedings.[56] Nevertheless, the recommendation refers only to 'words written or spoken in proceedings in Parliament'; if enacted, it would therefore not prevent courts from continuing to develop the principle of effective repetition altogether.

Secondly, the recommendation, if enacted, would not have the presumed effect of conferring credibility on Members' extra-parliamentary comments on issues raised in Parliament. A retired judge of the Court of Appeal has described the Committee's recommendation as aiming to spare MPs who are interviewed outside Parliament 'the personal embarrassment of having to decline to comment when they are not prepared to be held legally accountable for that they have said in Parliament'.[57] According to this argument, the only way the public is able to assess the true convictions of a Member is if she fully repeats her parliamentary statements outside Parliament, thus exposing herself to an action in defamation. However, if statements that effectively repeat the defamation outside Parliament (without actually repeating the defamatory 'sting') are to be protected by absolute privilege, then the public will come to know this and will give exactly the same weight to those statements as to the original statements made in Parliament. It is difficult to see how the recommendation would help the public to hold Members to account for their parliamentary statements.

Thirdly, the proposed amendment to the Legislature Act would easily give rise to abuses. If the amendment were enacted, a journalist could, in an interview with a Member of Parliament, read extract after extract of defamatory statements made in Parliament by that Member, and it would be perfectly permissible for the Member to repeatedly affirm, endorse and adopt those statements. The Court of Appeal majority described precisely this scenario as a policy consideration supporting their decision to follow the Australian cases on effective repetition.[58]

Allowing that the Privileges Committee took this possibility of abuse into consideration, the proposed wording is still too permissive with respect to *who* would be allowed to effectively repeat a privileged statement outside Parliament. The recommendation allows *any* person – not just the individual who spoke or wrote the original words in Parliament – to affirm, adopt or endorse those words. Conceivably, then, a newspaper journalist would be permitted to quote a parliamentary speech at length, no matter how defamatory (this is already protected by qualified privilege), and immediately afterwards affirm that the words quoted are true. It is not difficult to see how this could give rise to the most egregious abuses.

A related concern is that if such abuses did arise, Parliament may feel the need to intervene and discipline the offender for breach of privilege. Such action would have the unfortunate conse-

56 Ibid 6.

57 Rt Hon T Thomas 'Extended Privilege Wrong Both in Principle and Law' *New Zealand Herald* (9 June 2005) A.15.

58 *Buchanan* (CA), above n 2, para 62.

quence of bringing Parliament's disciplinary powers into potential conflict with the proper sphere of the judiciary.

Finally, the proposed wording would not necessarily remove parliamentary privilege out of the Courts' reach. The enactment of the proposed clause would, like any legislative provision, require the Courts' interpretation. For example, the phrase 'proceedings in Parliament' would need to be interpreted by the courts.[59] If the Committee hopes to re-establish a modus operandi of 'mutual restraint' between the courts and Parliament, then, it may be well advised to reconsider its recommendation.

The Report, its analysis and its recommendation are problematic for other, more fundamental reasons. The next two Parts of this essay delve more deeply into the theoretical foundations of the two key issues, and the controversies currently surrounding them, in an effort to reveal how and why the Report raises more questions than it answers.

IV. First Key Issue: Freedom of Speech

A. Free Speech Justifications

For all of the academic and political references to the importance of freedom of speech and expression that are surveyed in Parts II and III of this essay, it is remarkable that none of them undertake more than a highly cursory discussion of *why* that freedom is important or even justified. For most of those concerned, it seems, the importance of freedom of speech was not in dispute, and therefore did not require justification. It is true that in most cases the application of a free speech principle will probably not turn on how we choose to justify that principle.[60] Nevertheless, I would suggest that there are occasions on which our rationales for freedom of speech do have consequences for how that freedom is applied and understood in a particular case.

1. *Three free speech justifications*

The most commonly articulated freedom of speech arguments rely on the value of free speech in enabling the discovery of truth, full participation in democratic society and individual self-fulfilment.[61] Other justifications have been attempted, but most appear to be variations on these themes. Of the three, the argument from truth, which has been identified especially with JS Mill,[62] is 'the predominant and most persevering',[63] but has taken a variety of forms. Mill himself constructed a utilitarian argument based on an objective distinction between falsity and truth, claiming that false speech of all kinds should be permitted because it ensured that the ability to defend the truth would not decline.[64] American judges have supported freedom of speech on the basis that a free market in ideas would allow the best ideas to emerge.[65] Another variation on the argument from

59 This phrase is undefined in the Bill of Rights 1688, the Legislature Act 1908 and the Interpretation Act 1999.

60 G Marshall 'Press Freedom and Free Speech Theory' [1992] PL 40, 47.

61 E Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press, 2005) treats these as the three principal arguments for freedom of speech.

62 Ibid 7.

63 F Schauer, *Free Speech* (Cambridge: Cambridge University Press, 1982) 15.

64 Barendt, above n 61, 9.

65 Ibid 11.

truth begins from the premise that truth is an 'autonomous and fundamental good' whether or not it has utilitarian value, and freedom of speech is a necessary condition for that good to flourish.[66]

The argument from democracy assumes, of course, that liberal democratic principles are generally accepted and applied.[67] In a democratic society, the argument goes, freedom of speech ensures that the electorate has all the information it needs to exercise to engage in democratic processes and thus enables the ideals of popular sovereignty and democratic self-government to be realised.[68] Free speech also helps to keep government officials accountable.[69] In this sense, the argument from democracy relates to the idea that free speech can be a check on the abuse of authority, as officials are less likely commit such abuses if they believe that their wrongs may be publicly exposed.[70] The arguments from democracy and truth are thus closely related.[71] Another argument, based on the inherent value of diversity arising from individual differences, has elements in common with the argument from truth[72] and may be related to the liberal democratic idea that freedom of speech is necessary to ensure that competing interests and desires are accommodated.[73]

The argument from individual self-fulfilment, in turn, is closely related to both of the preceding arguments. Freedom of speech enables both intellectual self-development and provides the conditions for individuation, individual freedom and individual choice – all liberal democratic ideas.[74] From a deontological rather than utilitarian point of view, the universal human right to dignity requires freedom of speech, and restrictions on that freedom inhibit the growth of individual personality.[75] Free speech is thus itself an integral part of human nature and self-realisation, quite apart from any other benefits it may supply to the individual.[76] A related rights-based argument is that government should always treat people as if they are rational and autonomous, which demands that full information is available so that individuals can make rational and autonomous decisions.[77]

2. *Problems with the free speech justifications*

Each of the justifications for free speech outlined above is problematic in one way or another. For example, the argument from truth may mistakenly assume a prevalence of reason among humanity, and that truth has an 'inherent ability to gain general acceptance'.[78] Certain forms of the argument are circular, as they posit that an open marketplace of ideas promotes truth, yet simultaneously define truth as whatever survives that marketplace.[79] Most significantly perhaps, these forms

66 Ibid 7.

67 Schauer, above n 63, 36.

68 C R Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) xvii and xx.

69 K Greenawalt 'Free Speech Justifications' (1989) 89 Colum L Rev 119, 143.

70 Ibid 143.

71 TRS Allan 'Common Law Constitutionalism and Freedom of Speech' in Jack Beatson and Yvonne Cripps, *Freedom of Expression and Freedom of Information* (Oxford: Oxford University Press, Oxford, 2000) 17.

72 Schauer, above n 63, 66.

73 Greenawalt, above n 69, 141.

74 Schauer, above n 63, 62.

75 Barendt, above n 61, 13.

76 Schauer, above n 63, 48.

77 Greenawalt, above n 69, 150. Also see Richard H Fallon 'Two Senses of Autonomy' (1994) 46 Stan L Rev 875 for a classification of two different kinds of autonomy.

78 Schauer, above n 63, 26.

79 Ibid 19-20.

of the argument from truth disregard asymmetries in market access; the marketplace of ideas is 'skewed to afford status quo views greater opportunity for public exposure and acceptance'.[80]

On closer examination, the argument from democracy is similarly problematic. One problem is the paradox that a democratically-elected and sovereign Parliament can enact legislation to restrict freedom of speech.[81] It is arguable that the rights of citizens to participate in representative and participative democratic processes are 'so fundamental that [they] cannot be surrendered to the powers of the elected majority'.[82] Another awkward anomaly is that it is sometimes necessary to suppress free speech in order to preserve the values of democracy – for example, by enacting laws to restrict hate speech or incitement to violence.[83] Most theorists allow that freedom of speech is not absolute, but disagree on exactly where to draw the line. Finally, versions of the argument from democracy often beg the question whether freedom of speech is an inherent human right; if free speech is fundamental to democratic society, is it conversely unimportant or unjustified in a non-democratic society?

3. *Distrust of authority – a golden thread?*

Despite these disagreements around the fringes, the ideal of freedom of speech persists and is frequently invoked by more than one party to a dispute (as we have seen in *Buchanan v Jennings*). Greenawalt describes a 'subtle plurality of values that … govern[s] the practice of freedom of speech'[84] and has argued that the free speech does not in practice 'depend on a single systematic version of liberal political theory'.[85] Each of the arguments for freedom of speech may apply to a greater or lesser extent in different circumstances, and sometimes in conflicting ways. However, Schauer identifies as a golden thread running through them all the idea of the separation between individuals and government, based in large part on;[86] 'distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense'.

As an overarching principle, distrust of authority appears to be overly negative,[87] and probably does not give enough weight to individual fulfilment. Nevertheless, Schauer's 'argument from governmental incompetence'[88] provides a useful starting point when specific cases arise involving freedom of speech. Although each of the justifications cannot alone provide guidance to resolve specific cases, consideration of their various perspectives can help to 'delineate what interferences with expression are most worrisome and that operate as counters, sometimes powerful ones, in favour of freedom'.[89]

In cases involving parliamentary privilege, then, first principles might suggest that we should give attention to power imbalances between parliamentarians and individual members of society.

80 S Ingber 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke LJ 1, 48.

81 Schauer, above n 63, 40.

82 Barendt, above n 61, 19.

83 See the essays in D Kretzmer and F Kershman Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague: Kluwer Law International, 2000).

84 Greenawalt, above n 69, 119.

85 Ibid 123.

86 Schauer, above n 63, 86.

87 Ian Cram, *A Virtue Less Cloistered* (Portland, Oregon: Hart Publishing, 2002) 19-20.

88 Schauer, above n 63, 86.

89 Greenawalt, above n 69, 154.

The greater access to media enjoyed by the former – even setting aside parliamentary privilege – should arouse our suspicions. Applying the 'argument from distrust', we should ask whether absolute privilege gives too much power to parliamentarians; whether it puts individual rights at risk; and whether a report by a parliamentary committee on privilege is too self-interested to be trusted. In a forthcoming article, Andrew Geddis acknowledges that unlike Parliament the courts focus above all on preventing privilege from 'becoming a shield for the abuse of an individual right by institutional power'.[90] However, he argues that these factors prevent the courts from taking a wider view, and he argues that Parliament is better suited to taking into account 'wider structural concerns' such as the 'possible flow-on consequences' of a particular decision.[91]

It would be too simplistic to end our inquiry here. As the Privy Council noted in *Buchanan v Jennings*, the law places a number of limits on freedom of speech that impact on the power imbalances described above.[92] One such limit consists in the law of defamation.

B. Freedom of Speech and Defamation

Despite the Privy Council affirming it to be so,[93] it is not self-evident that the law of defamation in New Zealand is a 'reasonable limit' on freedom of speech. Although perhaps less so than in England, defamation law in New Zealand is relatively plaintiff-friendly; for example, the defence of honest opinion (equivalent to 'fair comment') is not destroyed by malice,[94] but untrue allegations of fact are nonetheless unprotected.[95] One text on rights and freedoms in New Zealand describes defamation law as establishing extensive limitations on freedom of expression,[96] and calls for reform to that law, concluding that 'the [l]aw's strong preference for personal reputations can no longer be maintained'.[97]

By way of comparison, freedom of speech is much more highly valued under American law.[98] From *New York Times v Sullivan*[99] onwards, the law in the United States has provided a broad qualified privilege for any criticism of politicians, government officials and other public figures. In contrast to the position under English common law, defamatory speech directed against a public figure in the United States will only incur damages liability if the speaker had actual knowledge that the speech was false, or was recklessly indifferent to its truth or falsity. A second, less 'speech-protective' rule applies to suits brought by people who are not public figures; in such cases, knowledge of falsity or recklessness as to falsity need not be demonstrated.[100]

In a fascinating treatment of the subject, Frederick Schauer examines the differences between English and United States defamation law at the time (1980). He argues that the American ap-

90 Geddis 'Parliamentary privilege', above n 30, 705.

91 Ibid.

92 *Buchanan* (PC), above n 2, para 6.

93 Ibid.

94 Burrows and Cheer, above n 3, 143.

95 Ibid 132-135.

96 G Huscroft 'Defamation, Racial Disharmony, and Freedom of Expression' in G Huscroft and P Rishworth (eds), *Rights and Freedoms* (Wellington: Brookers Limited, 1995) chapter 5, 176.

97 Ibid 191.

98 Ibid 174.

99 376 US 254 (1964) ('*Sullivan*').

100 Sunstein, above n 68, 9-10.

proach is 'rather more behavioural';[101] it recognises that social commentators exercise self-censorship because they know that judicial determinations of factual truth or falsity are sometimes wrong, and therefore 'a rule penalizing factual falsity may penalize truth'.[102] The American law takes into account the reality that publishers of criticism may not always be able 'to verify every statement to a demonstrable certainty',[103] and it also recognises that litigation is both expensive and inconvenient, thus magnifying the deterrent effect, 'because a publisher may be effectively penalized even if he ultimately prevails in the legal system'.[104] In contrast, the English defence of fair comment appears to ignore or minimise the danger of self-censorship. Schauer concludes that, under the *Sullivan* rule, '[f]alsity is not protected because it has any value. It is protected because, in an imperfect world, it is the only way to protect truth from self-censorship.'[105]

The United States law of defamation is certainly more consistent with the argument from democracy than the corresponding law in England. According to Schauer, the differences between defamation law in the United States and England may be explained by the social observation that United States politics focuses more on individuals and personalities whereas politics in England focuses more on questions of policy.[106] The American law also reflects the traditionally important role of the press in resolving public issues, while English law reflects the high value placed on individual reputation and privacy.[107] Following the same reasoning, one might venture that the New Zealand law of defamation, sitting as it does somewhere between the two, points towards a political culture that contains elements in common with both.

As we have seen, McGee argued that absolute privilege should be narrowly circumscribed so as to ensure that the value of parliamentary debate is not compromised. However, there is also as persuasive an argument to be made in favour of extending the protection of absolute privilege to ordinary citizens engaged in public political discourse.[108] Less radically, at least one person has argued that section 14 (concerning 'freedom of expression') of the New Zealand Bill of Rights Act 1990 supports the idea that the law of defamation should be modified in this country to provide a qualified privilege for defamation of public figures such as in the United States.[109] The Court of Appeal's decisions in *Lange v Atkinson*[110] come closer than ever before in doing this,[111] and may indicate a gradual movement towards the United States position, perhaps influenced by the American dominance of free speech theory.[112]

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101 Schauer 'Social Foundations of the Law of Defamation A Comparative Analysis' (1980) 1 Journal of Media Law and Practice 3, 10.

102 Ibid.

103 Ibid 11.

104 Ibid.

105 Ibid.

106 Ibid 15.

107 Ibid 18.

108 Barendt, above n 61, 201.

109 M Harris 'Sharing the Privilege: Parliamentarians, Defamation, and Bills of Rights' (1996) 8 AULR 45.

110 [1998] 3 NZLR 424 and [2000] 3 NZLR 385.

111 See Burrows and Cheer, above n 3, 96-97.

112 See I Loveland 'A Free Trade in Ideas – and Outcomes' in Ian Loveland (ed), *Importing the First Amendment* (Oxford: Hart Publishing, 1998) 1-21.

C. Freedom of Speech in Parliament

It was not disputed at any level of *Buchanan v Jennings* that absolute privilege is necessary to enable Parliament, its members and officials to carry out their functions effectively. The United Kingdom Parliament's Joint Committee on Parliamentary Privilege ('the UK Joint Committee') articulated this necessity in its 1999 report[113] when it described freedom of speech as 'central to Parliament's role'.[114] According to the UK Joint Committee, without the protection of absolute privilege 'the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of its citizens would be … diminished'.[115] Acknowledging the need for absolute privilege – and even agreeing on the basis for privilege – does not, of course, guarantee agreement on the extent of that privilege. The UK Joint Committee sought to clarify the boundaries of the article 9 immunity,[116] and said that Parliament should be 'vigorous in discarding rights and immunities not strictly necessary for its effective functioning in today's conditions'.[117]

Two academic responses to *Prebble* argued that absolute privilege should be restricted beyond what the Privy Council judgment in that case had ruled. Concerned that the defendant in that defamation action had not been permitted to refer in its defence to statements made in Parliament by the plaintiff MP, Geoffrey Marshall argued that parliamentary privilege should not be used to trump freedom of speech concerns.[118] He suggested that the historical motivation of article 9 had become confused with other concerns, and proposed that: 'The freedom of debate is sufficiently protected if members enjoy absolute privilege from criminal and civil actions directed at what they say in the course of debate or proceedings in the House. There is no need to inflate claims of privileges beyond that'. [119]

A second academic critique of *Prebble* went even further. Drawing explicitly on the argument from democracy, Loveland and Sharland supported the principle that 'judicial interpretation should be guided by the principle of enhancing rather than restricting the public's right to disseminate and receive political information'.[120] On these grounds, they argued that parliamentary proceedings should attract only a qualified privilege, similar to that articulated in *Sullivan*, such that Members would be held liable for defamatory statements made in Parliament if they deliberately or recklessly publicised untrue facts. In their view, absolute privilege actually had a chilling effect on freedom of speech, because some people 'might hesitate to engage in political controversies if their arguments and assertions could not compete on equal terms with those disseminated by officials under the cloak of privilege'.[121] On the other hand, applying qualified privilege would only prevent 'robust and spirited debate and inquiry' in Parliament to the extent that it encouraged

113 United Kingdom Joint Committee on Parliamentary Privilege *Parliamentary Privilege – First Report* (March 1999) available at <www.publications.parliament.uk > (at 16 November 2005).

114 Ibid para 12.

115 Ibid para 3.

116 Ibid 'Executive Summary'.

117 Ibid para 4.

118 G Marshall 'Impugning Parliamentary Impunity' [1994] PL 509, 512.

119 Ibid 513.

120 I Loveland and A Sharland 'Absolutely fatuous: defamation of MPs, freedom of speech and Article 9 of the Bill of Rights – Part II' (1997) 2 Communications Law 24, 28.

121 Ibid 26.

Members 'to ensure that they had some plausible basis for believing the information with which they seek to sway out political judgment to be true'.[122]

D. Reflections on Freedom of Speech and the Report

The critiques and alternative approaches to parliamentary privilege mentioned above remind us of yet another 'balance' that the courts try to maintain. Any particular case will probably involve a variety of free speech interests, and these interests will often come into conflict with each other. In his text on freedom of speech, Eric Barendt offers an approach to analysis of the justifications for free speech based on an exploration of different interests involved; the speaker, the audience, and the public.[123] Although the speaker's interests may intuitively seem to be the most important,[124] other interests may be just as significant where parliamentary privilege is concerned. Indeed, the values of truth and democracy both arguably require an approach to privilege that gives priority to the public's interests over those of the individual Member and Parliament collectively, so that citizens are collectively able to reach informed decisions about their elected representatives.[125]

Returning to the criticisms surveyed in Parts II and III of this essay, it is remarkable that none of them considered this aspect. The Report itself focuses primarily on the interests of the speaker – Members of Parliament and parliamentary witnesses – and to a lesser extent on the interests of the media and the public, but only insofar they act as an 'audience' to the pronouncements of parliamentary participants. In fact, the Privileges Committee's discussion of freedom of speech in public entirely ignores two factors: firstly, that members of the public are themselves engaged in public debate; and secondly, that the interests of the public include the interests of individual members of the public who may be defamed by parliamentary speakers. Already, some members of the public may be discouraged from such participation if they feel that any parliamentarian with whom they disagree can attack them from behind the shield of absolute privilege; any such discouragement will be exacerbated if the parliamentarian is also permitted effectively to carry that privilege into the public arena. In short, great care must be taken to ensure that all the conditions of effective democracy are maintained.

I would not go so far as to replace parliamentary privilege with qualified privilege. However, I do consider that the Report's view of freedom of speech is both blinkered and myopic. It is blinkered because it takes into account only a limited range of interests. It is myopic because it does not anticipate the most likely outcome of its recommendation in the long term; that the courts' decisions in future cases will readjust the balance of interests between politicians and other public officials, the public as a whole and defamed individuals. Such a readjustment may well have the result of allowing greater criticism of Members of Parliament in the course of public political debate.

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122 Ibid 28-29.

123 Barendt, above n 61, 23.

124 Ibid 23.

125 I Loveland and A Sharland 'The Defamation Act 1996 and Political Libels' [1997] PL 113, 120.

V. Second Key Issue: The Constitutional Relationship of Parliament to the Courts

A. Border Skirmishes: Exclusive Cognisance and Mutual Restraint

According to Tipping J's dissent in the Court of Appeal, the dominant principle with respect to parliamentary privilege is that certain matters fall within Parliament's exclusive sphere of jurisdiction, and that the courts should exercise restraint to ensure that their proceedings do not stray into that sphere.[126] This principle of 'exclusive cognizance' is widely supported. The UK Joint Committee describes freedom of speech as only 'one facet of the broader principle that what happens within Parliament is a matter for control by Parliament alone',[127] and states that the courts have 'a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and immunities' but no 'power to regulate and control how Parliament shall conduct its business'.[128]

The same principle is often expressed as 'mutual restraint'. The UK Joint Committee thus reports that, for its part, Parliament 'is careful not to interfere with the way judges discharge their judicial responsibilities'.[129] Patricia Leopold ascribes the absence of any significant dispute between the legislature and judiciary for the past 150 years to 'a mutual respect and understanding of each other's rights and privileges'.[130] Professor Joseph's leading text on constitutional and administrative law in New Zealand describes the present relationship between the courts and Parliament as 'one of comity and mutual forebearance and restraint', in which each 'is astute not to trench on the autonomy and sphere of action of the other'.[131]

These statements of principle give little sense of any ongoing tensions between the two branches of government. But there are reasons to doubt that the depiction of mature equilibrium found in these accounts is entirely credible. First, the 'mutual respect' described above looks decidedly lop-sided: Leopold notes that the Courts' decisions have generally been favourable to Parliament, enlarging the definition of 'proceedings in Parliament', and that the courts have deliberately 'excluded a variety of matters from their [own] jurisdiction'.[132] Secondly, a more nuanced picture emerges from a closer examination of the relationship between Parliament and the courts over the past several hundred years.

Erskine May describes an ongoing conflict between the courts and Parliament, starting in the early seventeenth century when the major source of disagreement concerned whether the *lex parliamenti* was part of common law such that courts could judge it.[133] During the nineteenth century, judges came to regard the law of Parliament as part of the common law, and therefore 'wholly within their judicial notice'; nevertheless, a sphere remained in which the jurisdiction of the

126 *Buchanan* (CA), above n 2, para 167.

127 United Kingdom Joint Committee on Parliamentary Privilege, above n 113, 'Executive Summary'.

128 Ibid para 23.

129 United Kingdom Joint Committee on Parliamentary Privilege, above n 113, para 23.

130 P Leopold '"Proceedings in Parliament": the Grey Area' [1990] PL 475, 476.

131 Joseph, above n 9, 392.

132 Leopold, above n 130, 476.

133 W McKay (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed, LexisNexis UK, London 2004) 176 and 178-183.

House of Commons was absolute and exclusive.[134] This period included the 'last serious clash'[135] between Parliament and the courts – over the case of *Stockdale v Hansard*,[136] which involved an attempt by the House of Commons to assert that its resolutions had the force of law.[137] This and other cases from the same period demonstrated that judges at the time 'were prepared, when necessary, to adopt a robust approach if they felt Parliament had overstepped the mark and to express their views forcefully'.[138]

By the mid-twentieth century, judges had developed a certain deference to Parliament, and appeared generally to have taken the view that a matter is outside the jurisdiction of the courts when it is clearly a proceeding of Parliament, but uncertainty remained about where that line should be drawn.[139] Through most of the twentieth century, the conflict remained dormant as relatively few cases required the courts to decide on where the border lay between their own jurisdiction and that of Parliament.[140] A major crisis almost erupted in 1958 when a parliamentary committee concluded that certain correspondence had constituted a 'proceeding in Parliament'.[141] Fortunately, that finding was overruled by the House of Commons after voluntarily seeking an opinion on the issue from the Privy Council.[142]

Finally, in an increasing number of cases concerning parliamentary privilege towards the end of the twentieth century, the courts began to give greater emphasis to the rights of individuals, balanced against a continuing desire to avoid outright conflict with Parliament.[143] Commenting on a 'grey area' of 'proceedings in parliament', Leopold observed evidence 'that some judges are willing to take a more robust line against claims of privilege which appear to restrict the access of citizens to the courts'.[144]

What emerges from this narrative, then, is an ongoing dialectic regarding parliamentary privilege that is multi-dimensional and dynamic; guided by certain principles to be fair, but nevertheless far from being a settled order. If intermittent disputes over the precise boundaries of parliamentary privilege are in a sense the border skirmishes of constitutional law, then the past two decades have witnessed the development of a much more fundamental conflict over the nature and validity of the doctrine of parliamentary sovereignty. In what follows, I want to draw linkages between the two disputes, and to situate the disagreement over the outcome in *Buchanan v Jennings* in relation to the larger conflict, which stretches beyond the shores of New Zealand jurisprudence.

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134 Ibid 176 and 183-188.

135 G F Lock 'Parliamentary Privilege and the Courts: the Avoidance of Conflict' [1985] PL 64, 64-66.

136 (1839) 9 Ad & Ell 96; 112 ER 1112.

137 Lock 'Statute law and case law applicable to Parliament' in D Oliver and G Drewry (eds) *The Law and Parliament* (Butterworths, London 1998) chapter IV, 51.

138 Ibid 52.

139 McKay, above n 133, 188-190.

140 Ibid 177.

141 See S A de Smith 'Parliamentary Privilege and the Bill of Rights' (1958) 21 The Mod L Rev 465 and Lock, above n 135, 66-68.

142 Lock, above n 135, 67.

143 McKay, above n 135, 177 and Lock, above n 137, 54.

144 Leopold, above n 130, 476.

B. Parliamentary Sovereignty

1. *The Diceyan view and its critics*

According to Professor A.V. Dicey, the dominant characteristic of the English constitution was the sovereignty of Parliament. The legislature derives its sovereignty from the democratic electoral process, and therefore has the right to 'make or unmake any law whatever'; no person can set aside any law made by Parliament.[145] Even as a matter of history, it is clear that parliamentary sovereignty is inextricably bound up with the idea of parliamentary privilege. According to this 'orthodox' view, Parliament's sovereignty was 'put beyond effective challenge' by the Glorious Revolution and the Bill of Rights 1688,[146] at the same time that parliamentary privilege was confirmed in article 9.[147] However, the Parliament's supremacy is not simply a creature of statute, but is 'constitutionally established'.[148]

The Diceyan concept of parliamentary sovereignty has been subjected to close scrutiny and challenge over the past decade, including by eminent members of the English judiciary.[149] In his short 1995 article, 'Droit Public – English Style', Lord Woolf identified the rule of law as resting upon two principles: the supremacy of Parliament and the role of the courts as 'the final arbiters as to the interpretation and application of the law'.[150] Affirming the existence of mutual respect between the two branches of government, the Master of the Rolls described the courts and Parliament as 'partners both engaged in a common enterprise involving the upholding of the rule of law'.[151] Nevertheless, he felt that it was necessary to state clearly that there are 'limits of the most modest dimensions' on the supremacy of Parliament, and that the courts had the 'inalienable responsibility' to 'identify and uphold' these limits: 'if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent'.[152] Others have argued that the idea of parliamentary sovereignty – indeed, the very concept of statute as law – is a creation of common law, since it is not logically possible for Parliament to confer law-making authority, much less supremacy, on itself.[153] Sir John Laws, notably, has developed the idea of the 'rule of law' as a basis for limiting the law-making powers of Parliament.[154]

Nor does the challenge to parliamentary sovereignty rely on entirely hypothetical scenarios in which Parliament passes legislation permitting gross abuses of human rights. The United Kingdom has been a member of the European Union since 1973, and in 1998 incorporated the Eu-

145 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, London: MacMillan & Co Ltd, 1960) 39.

146 Philip Norton 'The Glorious Revolution of 1688: Its Continuing Relevance' (1989) 42 Parliamentary Affairs 135, 138.

147 See L G Schwoerer *The Declaration of Rights, 1689* (Baltimore: Johns Hopkins University Press, 1981) for a thorough account of the drafting of the Bill of Rights 1688.

148 R Blackburn and A Kennon *Griffith & Ryle on Parliament Functions, Practice and Procedures* (2nd ed, London: Sweet & Maxwell, 2003) section 3-007.

149 See Lord Woolf 'Droit Public – English Style' [1995] PL 57. Also see Sir John Laws 'Law and Democracy' [1995] PL 72 and Sir Stephen Sedley 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386.

150 Woolf, above n 149, 68.

151 Ibid 69.

152 Ibid. Also see Woolf 'The Rule of Law and a Change in the Constitution' [2004] CLJ 317.

153 Sir John Laws 'Meiklejohn, the First Amendment and Free Speech in English Law' in Loveland (ed), above n 112, 131; also see M Elliot 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2 Int'l J Const L 545, 551.

154 Laws, above n 153, 134.

ropean Convention on Human Rights into English law by way of the Human Rights Act 1998. These actions have had an inevitable impact on the courts' interpretation of domestic legislation. The courts have had to adopt ever more sophisticated explanations of how European law can take priority over Acts of Parliament (see, for example, *Thoburn v Sunderland City Council*)[155] while retaining 'the formal veneer of parliamentary sovereignty'.[156] According to one scholar, the trend of European jurisprudence is to suggest that the United Kingdom Parliament abdicated legislative sovereignty when it passed the European Communities Act in 1972.[157]

Academic lawyers have not failed to see the connections between the debate over parliamentary sovereignty and the long history of conflict over the ambit of parliamentary privilege. Arguing that legal systems contain multiple unranked sources of law, Barber identifies parliamentary privilege as an area that 'has long been a source of perplexity for constitutional lawyers',[158] given that '[t]he Commons and the courts have never reached agreement on who should be the ultimate arbiter of the scope of privilege'.[159] Barber suggests that it may be possible for two doctrines of privilege to exist at the same time – one held by Parliament and the other by the courts. Concluding that it is 'perfectly possible for a mature legal system to contain contradictory norms',[160] he nevertheless identifies a unifying belief, held by both judges and parliamentarians, 'that they are part of a single legal system, and that they are under a legal obligation to apply the same set of rules'.[161]

2. *The debate in New Zealand*

As relevant as it may be to legal developments in the United Kingdom, the modern debate over parliamentary sovereignty probably began in earnest with an article by a New Zealand judge, Lord Cooke.[162] Even before his short but seminal article, Philip Joseph and Gordon Walker argued that British parliamentary sovereignty had been acquired in particular historical and political circumstances far different from how New Zealand's legislative authority had been acquired: 'progressively, without incident, from a superior authority'. Joseph and Walker therefore questioned whether it was appropriate or necessary for New Zealand to 'assume the shackles of English sovereignty theory – of immutable, illimitable and perpetual powers of law-making'.[163]

The debate over parliamentary authority in New Zealand has continued ever since. More recent articles by prominent New Zealand judges such as Justice Thomas[164] and the Chief Justice, Dame Sian Elias[165] have proposed additional reasons to question whether parliamentary sovereignty was in fact absolute. Drawing on the human rights-based arguments of Cooke, Lord Woolf and others, Elias and Thomas have argued that the rights conferred by the Treaty of Waitangi may

155 [2002] EWHC 195 (Admin).

156 Elliot, above n 153, 551.

157 G Marshall 'Parliamentary Sovereignty: New Horizons' [1997] PL 1, 4.

158 N W Barber 'Sovereignty Re-examined: The Courts, Parliament, and Statutes' (2000) 20 OJLS 131, 137.

159 Ibid.

160 Ibid.

161 Ibid.

162 R Cooke, in 'Fundamentals' [1988] NZLJ 158. Lord Woolf described his own approach as 'a shadow reflection of a trail blazed by Sir Robin Cooke': above n 149, 68.

163 P Joseph and G Walker 'A Theory of Constitutional Change' (1987) 7 OJLS 155, 169.

164 E W Thomas 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millenium' (2000) 31 VUWLR 5.

165 S Elias 'Sovereignty in the 21st century: Another spin on the merry-go-round' (2003) 14 PLR 148.

be 'beyond the reach of Parliament to amend or revoke'.[166] Like Joseph and Walker, they have also questioned the assumption that the British doctrine of parliamentary sovereignty should apply in New Zealand, and suggested that it may be irrelevant to 'the fundamentals of the New Zealand constitution'.[167]

Noting that the introduction of the mixed member proportional system ('MMP') had created a wider appreciation that significant constitutional changes can and do occur, Thomas has suggested that the uncertainties of MMP had also made politics less certain and could result in unacceptable laws being passed by Parliament.[168] He has also pointed to the evolving basis of judicial review, and in particular the recognition that the ultra vires principle does not explain all cases of judicial intervention, as another indication that the courts can and do develop laws independently of – and at times in tension with – the legislative will.[169]

Both Thomas and Elias have offered alternative descriptions of the proper roles of the courts. Preferring to locate sovereignty in the people rather than in a 'dynamic settlement' between different arms of government, Thomas has argued that a strong and independent judiciary supported the sovereignty of the people.[170] In his view, too much deference to Parliament has 'strangled the development of the law',[171] and for practical reasons he prefers to leave open the question of when the courts might review the validity of 'extreme legislation': 'The resulting uncertainty or inconclusiveness itself serves the constitutional function of ensuring a balance in the distribution of public power between Parliament and the courts'.[172]

Elias's conclusions are similarly subtle. She has not recommended a formal amendment to the current relationship between Parliament and the courts, even were one possible. Rather, she has argued that our constitutional thinking has been 'impoverished' by our 'fixation with parliamentary sovereignty and the relative democratic merits of Parliament and the courts to the exclusion of a wider perspective'.[173] She has suggested that we move past overly simplistic formulations of that relationship, abandon our 'quest for the power that trumps',[174] and instead see the protection of human rights as a 'co-operative enterprise between parliament and the courts'.[175]

C. Reflections on Parliamentary Sovereignty and the Report

It is not necessary for the purposes of this essay to weigh all of the arguments for and against parliamentary sovereignty. Suffice it to say that the judicial writings explored above have not gone unanswered.[176] However, it is interesting to note the extent to which the antagonists in the New Zealand debate overlap with the participants in and commentators on *Buchanan v Jennings*. Thus, Elias CJ sat on the Board of the Privy Council that unanimously denied Jennings's appeal,

166 Thomas, above n 164, 9.

167 Ibid 10; also see Elias, above n 165, 153-157.

168 Thomas, above n 164, 11-12.

169 Ibid 13-14. Lord Woolf had expressed doubt over ultra vires as a basis for judicial review: Woolf, above n 164, 65-67. Also see Joseph 'The Demise of Ultra Vires – Judicial review in the New Zealand Courts' [2001] PL 354.

170 Thomas, above n 164, 19.

171 Ibid 35.

172 Ibid 36.

173 Elias, above n 165, 149.

174 Ibid, 150.

175 Ibid, 159.

176 See, for example, J Goldsworthy, *The Sovereignty of Parliament* (Oxford: Clarendon Press, 1999).

and Thomas J has written in support of that decision.[177] Philip Joseph (who himself commented on the decision and supplied the wording to amend the Legislature Act that was recommended by the Privileges Committee) has noted that Tipping J, the sole dissenter in the Court of Appeal, is also the only New Zealand judge to have 'mounted a rearguard action in defence of ultra vires'.[178] And finally, both James Allan (who wrote the most vehement criticism of the Court of Appeal majority's decision) and Michael Cullen (who sat on the Privileges Committee, and is currently Attorney-General) have published recent articles in defence of parliamentary sovereignty and attacking judicial activism in this area.[179] The involvement of these politicians, judges and academics in the ongoing debate over parliamentary sovereignty helps to explain why the appeal decisions in *Buchanan v Jennings* have stirred up such strength of feeling. It gives context to the Privileges Committee's recommendation and may also provide insights into why the Report has received such overwhelming support in the House.

The contemporary debate over parliamentary supremacy is part of what one commentator has described as 'a cauldron of quietly simmering constitutional issues'.[180] Other such issues include the Court of Appeal's controversial decision to allow the Maori Land Court to investigate Maori claims to 'Maori land' in the foreshore and seabed,[181] which Parliament quickly reversed by legislation.[182] Also relevant is the public disagreement between the Prime Minister and the Chief Justice over judicial independence and activism.[183]

The Report appears, then, at a time of strained relations between the government and New Zealand's most senior judges – and a perceived general threat to parliamentary sovereignty – as well as in direct response to judicial decisions involving a Member of Parliament. Unfortunately, the Report itself does not explicitly refer to this wider context, and so the reader is left to speculate on the deeper reasons for the Privileges Committee's recommendation. In my view, the biggest problem with the Report is that it is a product of, and feeds into, the excessively polarised political and academic discourse on parliamentary sovereignty and related constitutional issues in New Zealand.

Instead of confronting these issues head-on and acknowledging the possibility of their own bias, the members of the Privileges Committee opted to present their findings in terms of a dispassionate analysis of a single case, supported by the scholarly credentials of three academic lawyers. I agree with Harris that the constitutional issues in contemporary New Zealand society are politically and legally complex and deserve community-wide dialogue within generous timeframes.[184] But the Report's approach is piecemeal, rather than comprehensive. The inquiry is not widened to

177 Thomas, above n 57.

178 Joseph, above n 169, 358.

179 Allan 'Moonen and McSense' [2002] NZLJ 142; Hon Dr Michael Cullen 'Parliamentary sovereignty and the Courts' [2004] NZLJ 243.

180 B V Harris 'The Treaty of Waitangi and the Constitutional Future of New Zealand' [2005] NZ Law Review 189, 189. It is interesting to compare the situation in the United Kingdom, where Lord Woolf notes that there has been a 'torrent of constitutional changes' under the present Government: Lord Woolf, above n 152, 319.

181 Attorney-General v Ngati Apa [2003] 3 NZLR 643.

182 The Foreshore and Seabed Act 2004.

183 See, for example, A Young 'Avoid the political fray, PM advises Dame Sian' New Zealand Herald (27 July 2004) and F O'Sullivan 'Top judge takes a new swing at the PM' New Zealand Herald (29 October 2004).

184 Harris, above n 180, 191 and 215.

include other aspects of absolute privilege; there is no attempt to codify parliamentary privilege as a whole. Such an approach does not make for good policy, much less for effective law.

VI. Conclusions

This essay has indicated several specific problems with the wording of the Privileges Committee's recommendation. I have also outlined and discussed some more philosophical difficulties with the Report. Specifically, the Report fails to offer a thorough treatment of two key issues raised in the case of *Buchanan v Jennings*; freedom of speech and the proper relationship between Parliament and the courts. In exploring these difficulties, it has become clear that the issues addressed by the Report cannot be considered in isolation from the wider discourse on constitutional issues taking place in New Zealand society. The polarisation of that discourse has had an unacknowledged impact on the Privileges Committee's reasoning and recommendation.

Ostensibly ignoring that wider context, the Report attempts to treat the issues it addresses in a piecemeal, isolated way. In focussing primarily on the free speech concerns of parliamentarians and (to a lesser extent) those of the media, both the Committee and the academic critics fail to take into consideration the deeper justifications for freedom of speech, both inside and outside Parliament, and in relationship to the law of defamation. Similarly, in interpreting and describing the judgments in *Buchanan* as problematic for the proper constitutional relationship between Parliament and the courts, these critics do not explore satisfactorily the fundamental democratic principles that that relationship should sustain.

The debate surrounding *Buchanan v Jennings* tends to conceive parliamentary privilege and sovereignty as being in stark conflict with individual rights, such as the right to reputation. In my view, framing the debate in this manner is unhelpful and does not assist the resolution of genuinely difficult issues. Those who begin with the view that Parliament is sovereign will be predisposed to a certain conclusion; those who start with the belief that individual rights are paramount, and parliamentarians need restraining, will conclude the opposite. Both sides would do better to examine the underlying reasons for both parliamentary sovereignty and individual rights, and to explore how the two are intimately connected. What part does parliamentary privilege play in upholding individual rights and freedoms? How does uninhibited freedom of speech – of all, not only parliamentarians and the media – bolster the authority and contribute to the healthy functioning of Parliament? How do both principles work together to provide the necessary conditions for democratic governance?

Like most legal issues that have a constitutional dimension, the scope of parliamentary privilege requires a comprehensive, coherent and principled approach. In my view, the issue deserves broad public consultation, highlighting and further exploring the issues discussed in this essay. Of course, even the most thorough and dispassionate consultation on these issues will not necessarily reconcile deep-seated differences of opinion. However, it will have at least two salutary effects. First, it will foster greater freedom of speech, and make that freedom meaningful – by providing opportunities for all to be heard, including those who currently feel excluded and unable to contribute to the currently polarised debate. Second, it will strengthen the foundations of parliamentary sovereignty, because Parliament's ultimate decision will have been more fully informed, and those who participate in the consultation will have greater comfort that their elected representatives have at least understood and appreciated the complexity of the issues at stake.