



PRIVILEGES, IMMUNITIES AND POWERS OF PARLIAMENT COMMITTEE

**NATIONAL PARLIAMENT OF
SOLOMON ISLANDS**

OFFICIAL HANDSARD TRANSCRIPT OF COMMITTEE HEARING

Mr. Frank Kabui

Wednesday 18 June 2008

**First Hearing
Second Sitting**

Hon. Kengava (Acting Chairman): This afternoon we are privileged to welcome Mr. Frank Kabui to this special hearing of the Committee on the privileges, immunities and powers of Parliament. I would like to welcome you Mr. Kabui to this session. You are most welcome. I think if there are no other comments from other Members we will proceed right away. You are welcome to proceed, Mr. Frank Kabui.

Mr. Kabui: Mr. Chairman, I do not know the procedure for writing submissions, but I wrote back to the Chairman of the select committee in response to his letter inviting me to make a submission if I wish to, so I expressed my views in the letter dated 1st of May 2007, which I think Parliament officers might have.

I suppose it is difficult for me to express anything new, or recent intentions. My submission was based on what the position is in England, and so as in Canada, I think, and is reflected in some of the Standing Orders of the National Parliament. I have set out some of the issues there in my letter, listing some of the rights or immunities or powers of Parliament as they exist in England and in Canada, and to a certain extent in Solomon Islands in the form of our Standing Orders.

In the last page of my submission I set out what I think is the issue. I said that there the issue here is one of identifying which privileges, immunities and powers in the House of Commons ought to be codified under section 69 of the Constitution. I think section 69 of the Constitution gives Parliament the power if it wishes to do so, to enact legislation in this respect. If it does not wish to do so, it may not do so. But the opportunity is provided in section 69 of the Constitution. We have with us the Standing Orders which we adopted from the previous legislative assemblies before Independence on 7th July 1978. We have provisions in the Standing Orders to regulate the conduct of Parliament. And in them is a number of relevance to the application of the rules of procedure in the House of Commons. It also provides that where there is doubt, you know what to do in those circumstances.

I suppose, what really needs to be done here is really to identify what are the immunities, what are the privileges and what are the powers of Members of Parliament that we wish to endorse as it were in the form of an Act of Parliament in the form of a Bill. It not only talks about the immunities, powers and privileges of Members of Parliament but also of Parliament itself, the House.

Are there any questions?

That is how I see it and I have given a number of examples. In Australia, they codified parliamentary privileges in an Act of Parliament which was passed in 1987. In England, codification in terms of legislating has not yet begun, it may though, I am not aware. But it is not in the same position as it is in Australia. The same was done in Papua New Guinea. They have a Parliamentary Powers and Privileges Act 1964. In Fiji, they also have the Parliamentary Powers and Privileges

Act, chapter 5, which codifies what is considered as what is relevant to Fiji Parliament.

We may like to do if we wish. We can do that under section 69 of the Constitution. But before doing that we have to identify and choose which of the privileges that we ought to be put into legislative form and which ones we want to leave out.

That is a question that depends on Members of Parliament and perhaps the Speaker. I do not know. But those are the questions we should ask. Are we satisfied with what we have in the Standing Orders at the moment? That is question number one.

The second question is to say to yourself, "we want a little bit of clarity in what is in the present Standing Orders". That question raises two issues: (1) is whether or not to have the present Standing Orders amended or in other words overhauled so as to explicitly identify the privileges, immunities and powers and put them back in the Standing Orders, as the guide book for parliamentary procedure or parliamentary proceedings. Or, we may say no, after having identified the privileges, immunities and powers, we need to put them in a legislative form, like what is done in Australia and elsewhere. That we can do. But it all depends on what approach the Committee would like to take. It is not a problem, I suppose it is a concern rather than a problem and that is that once you decide to legislate the privileges, immunities and powers, you are almost want to set in a storm, in that "that is what the law says".

The experience in Australia is that, that kind of setting invites the interpretation of the provisions of the Act by the Court. One concern is, for example, contempt. The danger is that if Parliament thinks its conduct amounts to contempt in the House of Parliament, the Member concerned or the Member affected may think otherwise is not "contempt" and so he goes to court and the court interprets the provision as 'not contempt'. That is a kind of conflict between the view taken by the Court and what the Speaker has decided in Parliament, and so it raises the question of whether it is good to leave it as it is in the Standing Orders but make them clear and let the decision to be taken by the Speaker as and when appropriate. It gives the Speaker the discretion, if you like, in terms of interpreting the Standing Orders that is in Parliament. What he decides is more or less final. It is not going to be subject to legal challenge whereas if put in a form of legislation, it is bound to be challenged, and you may find that the Court rules otherwise than what the Speaker decided as interpretation of a particular Standing Order.

I suppose those are the issues that need to be considered by the Committee to decide on what approach it is going to take. I myself do not see any difficulty in terms of identifying the privileges, the powers and the immunities because they can be located in publications like the Erskine May as in the case of England and other publications in Canada and elsewhere. That can easily be located. I see no problem with that. You can identify that. But what you have to decide is

having identified them what do you do with them, where do you put them? Do you want to put them in the Standing Orders now? If the answer is “yes”, we will have to overhaul the Standing Orders, amend them to include those things. If the answer is “no”, then we may have to do it by legislation. That is by drawing up a bill which goes to Parliament for debate, which can either be passed or defeated. That is how I see it. It is really deciding on what approach you take on those issues.

Mr. Chairman: Thank you. Right now, I think getting more insight into the issues is what the Committee is now doing, and such views are most welcomed so as to help the Committee to decide on which way, it will enlighten us on a number of questions. Maybe the Minister there, do you want to ask for any further clarification?

Hon Tozaka: We have some very valuable background information briefing from Don Paterson and Joseph this morning. In fact what you have said is true as well. Some of us were thinking along those lines, especially the challenge because the purpose of this, as you rightly said is to protect the Legislature and its members in discharging their Constitutional functions effectively and efficiently, and the last thing we would like to do is to get this one done and we go around in circle and ending up in the Court again to challenge this. That is a grey area, I think, and that is one of the points we are going to look into. We were also talking about the boundaries within which these privileges would be given and to us Members of Parliament to do things within the bounds then we might not be subject to challenge by the Court. May be legislate that too or we try to define that.

The feeling generally, is that some of our Members are not here, but as the Chairman said we are also ignorant of the laws guiding us at the moment - the immunities that we have in United Kingdom. We would also like to see what those privileges are. But although we do not know them we seem to have been going on all right for these past 30 years. But things are a little bit more complicated, as you know last year, where we confronted certain situations where interventions by the Speaker were a bit not consistent. A particular area I could remember is the vote of no confidence where Members are not allowed to vote, or take part, and so that reduces the number to be able to take part and it also puts some problems in our Legislature. So these are the things we thought it would be good that we actually write them down or have them in the legislation. But we take into account what you have said and maybe you can advice us, “if you do this, do it this way, then you will not be taken to Court”. Something like that. That is what I want to hear from you.

Mr. Kabui: My view is that, I think it is important for the Clerk to Parliament to be a lawyer. That is my personal view. I think that is important because we have a set up where the Clerk to Parliament is not a lawyer, and very often the Speaker is not a lawyer. If a person is to become a Speaker and if the Speaker is not a lawyer, he probably should be given some training because the Standing Orders do not set out the privileges that we are talking about. It makes reference to them, Order 25, makes reference to parliamentary privileges. Now the question

is: what are they, where are they, and what are the limits? Anybody who is not familiar with the privileges of the House of Commons would not know. You would not know. Of course, there is this privilege of "free speech". Why is there a "free speech?" Well, it began in the Bill of Rights in 1689 in the United Kingdom. That is all right, but what are the limits? Where does it begin and where does it end? Those things are not here, they are not set out in the Standing Orders, and that is why a number of Members are not able to identify what those privileges are and what their limits are. And if the Speaker is not aware of them, he would find some difficulties in terms of making rulings, which some Members may think are inconsistent with what they understand to be the privileges and the immunities etc. etc. But I think that is to be expected in a situation like we have here where often the Speaker comes outside of Parliament, he is not a Member of Parliament, and so you might get a school teacher. He teaches in the classroom all right but this thing is new to him. You might get an ex-pastor where he is all right in the pulpit but this would be a new thing to him, and so he needs training, yes he would need some training. But in England and elsewhere within the rest of the Commonwealth, especially the older members of the Commonwealth, the Speakers there, I think are well versed with what their privileges are, they have no problems with them and they will make rulings quite intellectually.

In our situation, Standing Order 25 simply acknowledges the existence of parliamentary privileges and allows Members to raise matters of privilege in Parliament. This is really like opening a door, but you do not know what is inside. This is a problem, but I think we can get over it in time by identifying what they are and maybe setting them out in the Standing Orders - setting them up in the notice so that everybody is able to read them.

I think what has happened over the years is that, like in the Courts, the Courts also develop the law. They also develop the common law. It is not static, it is developed. As new circumstances arise the laws are developed. They improve the laws.

I suppose the Speakers of Parliament should also behave likewise. That is if Standing Orders are not put into a legislative form as it were. Once it is put there, it is rigid because you are looking for certainty. And if there is doubt in certainty you go to the Courts. That is a concern but Australia does it the way it likes. Papua New Guinea does it the way it likes it, Fiji does it the way it likes and so forth and so on. And so likewise we should do it the way we like it, I think.

Hon Tozaka: The way to regulate it, I think is to put it in legislation.

Mr. Kabui: I say that because that concern is expressed in the case of Australia because I think their Parliament is very active, pro-active really! (laughter) and so they keep hammering all the time, and because of that some Members don't give in easily and so they challenge the Speaker by going to the Court, because they do not think their conduct amounts to contempt". And if the Court says the Speaker is wrong then it kind of cuts across the old demarcation between

Parliament and the Courts because what goes on in Parliament is not the business of the Courts. The Courts should not intervene. The Parliament is there, it is self-regulatory. But if that is what the people like and that is what Parliament likes and the law is passed, so be it. If there is a conflict, so be it.

Hon Tozaka: Mr. Chairman, we also challenged in courts under the present Standing Order you can still challenge it in Court. The Speaker's decision can still be taken to the High Court. If it is prescribed then maybe Member of Parliament would know his rights and understand where his limits are.

Mr. Kabui: Because some provisions in the Constitution link, like the motion of no confidence and the election of the Prime Minister under schedule 2, which are quite unique features of our Constitution as compared with other constitutions, and more so England where there is no written constitution but more like a convention.

The English system is like an elastic, which can be moved and developed, but when put in the form of legislation, it is static. It is like it is set in a stone; it cannot be moved, unless you amend the legislation or unless the Court rules. Otherwise it is there, that is where the full stop is.

But I am not saying that cannot be done, it can be done because Australia has done it and other countries have also done it.

Hon. Kengava: Can legislation that sets out the privileges and immunities and powers of Members of Parliament, can it be said that that legislation may also state that such cannot be challenged in Court, in certain areas and a certain period of time? If it is in such a way then we can allow for such legislation.

Mr. Kabui: It could, it could.

Hon. Kengava: if that way then we can allow draft of such legislation.

Mr. Kabui: Yes, it can be done by the Attorney General. But I think there is a slight difference there. Once the privileges, immunities and the powers have been elevated to the legislative level, it becomes an Act of Parliament, which is an ordinary law, and so it has slightly different status from being simply Standing Orders to govern the conduct of Parliament. But that is something to be considered for further discussion with the Attorney General.

Hon. Kengava: May be something like it cannot be challenged in Court under certain circumstances, may be within the Parliament if something is said or done, or within the area of the Parliament but maybe outside, yes, it can it be challenged in Court.

Mr. Kabui: Technically, what the previous Prime Minister did to the Speaker in Parliament could have been contempt to the House. To challenge the Speaker is not expected because he is the boss of the House, and so you cannot throw

him out. He allows you to come into the House and he can bar you from getting into the House. So for you to try and throw him out is unthinkable. Things like that.

Hon. Kengava: These are the things that surround us in our 30 years of Independence as we grow up and there is sort of a high turnover of new MPs all the time. That is why in our case a codified and written legislation would be more helpful to us in Solomon Islands where it can clearly tell maybe somebody not to challenge the Speaker on whatever decisions he made. Because in other advanced countries, they understand this but for us who have elections after every four years and new Members of Parliament coming in now and then, there is need to have a written legislation to guide Members of Parliament to know what they are supposed to do and not to do and the role of the Speaker, and all these sorts of things.

I think the Standing Orders are very limited, in my view, and very open and so it is very much up to the Speaker but the Members of Parliament feel free to challenge him any time they want. I think it is open to that particular situation. We have a written legislation with some provisions to say that the Court cannot challenge this or that, and so it is a problem, and so we are to make it easier for us to move forward. Otherwise we will have Members disputing the Speaker's decisions all the time. Sometimes a Member of Parliament before standing, being a candidate feels that outside there he feels that once he becomes a Member of Parliament, nobody can go against him. He thinks he has all the powers and privileges to say whatever he wants because he is the Member of Parliament, and that sort of thing. That is the general feeling of everyone wanting to become a Member of Parliament. For me, that is what I thought. When I stood to become a Member of Parliament, I thought that I will be the boss but in reality we don't understand all these things. When we come to privileges, immunities and powers, sometimes we don't understand them except what is written in the Standing Orders and through normal procedures you start come in and make use of your understanding that only in Parliament you have that privilege but outside of it you still come under the Common Law. If you commit a crime, even if are a Member of Parliament, you can still be taken to jail. I think maybe a written form would be one way to improve that particular situation or in our case in Solomon Islands.

The suggestion is either we improve our Standing Orders or we have a separate written legislation. This is what the committee is looking at. Suggestions like that coming in would be very helpful to the Committee when it comes to making its final decision.

Hon. Tozaka: On the point raised by the Chairman in regards to challenging legislation, I think that would be quite difficult because the Constitution is still the supreme law, as you said. And so any matters under the supreme law can still be challenged in court because the freedom of speech is also in the Constitution.

The point that you raised is very valid. I am convinced about it but I think it is better that we have these things in writing so we can understand them. But we must be aware too that these can be subject to be challenge in the Courts.

Another thing I want to ask you before you go is that you said in the last part is that you said you have read a book entitled the House of Commons Procedures and Practices. What are those books?

Mr. Kabui: I got them from the internet.

Hon. Tozaka: Oh, okay, because we are trying to know what those practices are, may be you can share them.

Mr. Kabui: I got them from the internet

Mr. Cahill: We've got them here.

Hon. Tozaka: Oh, all right, we've got them.

Mr. Kabui: I think you've got the latest version of Erskine May. I was looking at the 1950 version, which is the very old one.

Hon. Kengava: May be Mr. Kabui would like to say some final comments.

Mr. Kabui: I have nothing else to say, except to thank you for inviting me to speak to you. When the letter came to me, I thought I should assist by making this submission to your office which I have done.

I think it is an appropriate time to have a re-look at the Standing Orders with a view of improving them because this is really bridging the gap. It is really a bridge between the old order and the new order being the Independence Order. I think section 69 of the Constitution does envisage a time when the present Standing Orders would be re-visited and improved.

Hon. Kengava: On behalf of the Committee Frank, we would like to thank you very much. I am just sitting here as acting Chairman as the Chairman is still away. I would like to thank you so much for your time and presence and your contribution to the Committee. As we go along, who knows we might call you back again for further presentation.

Mr. Kabui: You are welcome, you are welcome!!

Hon. Kengava: Yes, with your experience in the Solomon Islands laws you would be a very important resource to the Committee. With those few remarks we thank you.

Evidence Concluded