# Article 9 of the Bill of Rights: An Historical, Philosophical and Practical Primer

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***Abstract***: Parliamentary privilege at Westminster derives from each House constituting part of the High Court of Parliament. The supreme court of England was part of Parliament when it enacted Article 9 of the Bill of Rights 1688, guaranteeing parliamentary privilege. The High Court of Parliament was a 'supreme court – legislature', until specialisation separated the supreme court in O'Connell (1844). Following the creation of specialist and separate supreme courts, at Westminster and elsewhere, neither lower nor upper Houses, nor legislatures at large, can be considered courts. Further, lower Houses have been divided from upper Houses, a political division that obscures the separation of supreme courts from legislatures. The question then arises of how any legislature can be continue to be regarded as part of a High Court of Parliament, and so participate in parliamentary privilege. This paper is to help readers access, navigate and explore the key historical, philosophical and practical aspects of both Article 9 and its interplay with parliamentary privilege in Westminster parliaments.

## INTRODUCTION

We are at a remove of over 330 years from the history, philosophy and practices that originally attended the *Bill of Rights*. This paper is designed to help us access, navigate and explore that distance. Parliamentary privilege is founded upon the authority of the High Court of Parliament, according to *Erskine May*:

> *Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies*

> *or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.*[1]

Historically the Supreme Court of England, later the United Kingdom, was a constituent part of the High Court of Parliament.[2] The Lords sat as the Supreme Court as an ordinary part of their parliamentary duties, in addition to sitting as the upper house of the legislature. In 1844 the Lords finally conceded that the professional judges who 'assisted' them constituted the true supreme court and departed, allowing it to become specialised and separate from the legislature in *O'Connell v R*[3] Yet the Supreme Court continued to be a parliamentary body. Section 4 of the *Appellate Jurisdiction Act 1876* (UK) characterised it as 'Her Majesty the Queen in Her Court of Parliament'. The judicial House of Lords became the 'Appellate Committee of the House of Lords' in 1948.[4] The new Supreme Court of the United Kingdom was established in 2009, under the *Constitutional Reform Act 2005* (UK) which repealed the *Appellate Jurisdiction Act* but 'does not adversely affect — (a) the existing constitutional principle of the rule of law'.[5] The Justices of the Supreme Court continue

[1] *Erskine May*, UK Parliament, What constitutes privilege. Accessed at: <https://erskinemay.parliament.uk/section/4570/what-constitutes-privilege> ('*Erskine May*'). As to freedom of speech and debate generally see Enid Campbell, *Parliamentary Privilege*. Federation Press, Annandale, NSW, 2003, ch. 2.

[2] See A.F. Pollard, *The Evolution of Parliament*. London: Longmans, Green, 1926 ('Pollard').

[3] *O'Connell v R* (1844) 11 Cl & Fin 155; 8 E.R. 1061. See Robert Stevens, *Law and politics: the House of Lords as a judicial body, 1800-1976*. London: Weidenfeld and Nicolson ('Stevens'). Later history is set out in Louis Blom-Cooper QC, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords: 1870-2009*. Oxford: Oxford University Press, 2009 ('Blom-Cooper'); and Alan Paterson, *Final judgment: The Last Law Lords and the Supreme Court*. London: Bloomsbury, 2013. Pollard, *Evolution of Parliament*, records how the Lords reduced the king's council in parliament to a house of peers, and increasingly stressed peerage as the sole qualification for membership of the House of Lords, to progressively exclude non-hereditary and conciliar elements even from the position of advisers (pp. 309-12).

[4] Supreme Court of the United Kingdom, 'Appellate Committee of the House of Lords'. Accessed at: <https://www.supremecourt.uk/about/appellate-committee.html>.

[5] *Constitutional Reform Act 2005* (UK), Schedule 17, s 9; Part 1 'The Rule of Law' 'The Rule of Law' (a); respectively.

to be styled 'Lord' or 'Lady', a formality that ensures consistency[6] and, it is submitted, reflects the parliamentary history of the Supreme Court.

That history falls to be examined in terms of the legality, courtliness or 'curiality' of the High Court of Parliament. The fact that 'Parliament' was a court bears directly upon the application of the *Bill of Rights 1688* (Eng),[7] because it suggests that Article 9 confirms a juridical basis for parliamentary privilege and more broadly reflects a neglected, curial jurisprudence. I argue that parliamentary law and custom derive from the legal or 'juridical' character of the High Court of Parliament, rather than from its political, representative functions or the *Bill of Rights* which embodies that 'juridicality'. The High Court of Parliament is thus a 'supreme court – legislature', rather than a lower and upper House that asserts political power without reference to a supreme court. Curial jurisprudence, drawn from parliamentary history, philosophy and practice, complements the political basis regarding the provenance and rationale for Article 9, with which we may be more familiar.

## CURIAL JURISPRUDENCE

For centuries English jurisprudence was explicitly curial, in defining sovereignty as in other matters.[8] To place the modern concept of parliamentary privilege, it is useful for us to reflect on its origins, and specifically curial jurisprudence and the emergence of parliamentary sovereignty in England. AF Pollard sets out how English sovereignty grew, from a weak juvenile condition, through the growth of the jurisdiction or *sovereignty* of Parliament demonstrating that supreme monarchical, aristocratic or

[6] Supreme Court of the United Kingdom, 'Courtesy titles for Justices of the Supreme Court'. Accessed at: https://www.supremecourt.uk/docs/pr_1013.pdf (From personal correspondence with a Court officer, 16 September 2021).

[7] The Bill of Rights received Royal Assent on 16th December 1689. However, legislation.gov.uk elaborates how it (and previous, successive, official editions of the revised statutes from which the online version is derived) assigns the enactment to the year 1688, following *The Statutes of the Realm*, Vol. VI (1819). The Republic of Ireland, where the Bill of Rights continues to have effect, does likewise under its own legislation.

[8] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England*, 1450-1642. Cambridge: Cambridge University Press, 2006) ('Cromartie'); W.S. Holdsworth, *History of English Law*. London: Methuen, vol. 2, pp. 404-5.

democratic power acted ultimately inside the High Court of Parliament.[9] He cites Fleta, a pseudonymous author in the time of Edward I or II:

> *The king has his court in his council in his parliaments, in the presence of earls, barons, nobles, and others learned in the law, where judicial doubts are determined, and new remedies are established for new wrongs, and justice is done to every one according to his deserts.*[10]

Specialist judicial courts, administrative courts and the High Court of Parliament subsequently crystallised from a constitutional protoplasm of judicial, executive and legislative authority.[11] England required supreme power to act through and be mediated by autonomous courts; ultimately the sovereign Crown's High Court of Parliament, a supreme court and legislature.[12]

Early Stuart England defined sovereignty by juridically requiring that Bodin's 'sovereign power' act through autonomous courts. The separation of autonomous courts in England can be traced to the fourteenth century. In 1305 a Chief Justice said to counsel

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[9] In Chapters XI-XVII he addresses 'The growth of sovereignty in Parliament', 'The separation of powers', 'The Crown in Parliament', 'The Council in Parliament', 'The Peers in Parliament', 'The Commons in Parliament', and 'The State in Parliament'. In *The Sovereignty of Parliament*. Oxford: Clarendon, 1999, Jeffrey Goldsworthy defines sovereignty as jurisdiction, emphatically, in his chapter 'From James I to the Restoration', when identifying Coke's characterisation of Parliament's sovereignty as its jurisdiction:

> In the First Institute he treated ordinary law-making as part of the 'jurisdiction' of the 'court' of parliament: '[t]he jurisdiction of this court is so transcendent, that it makes, enlarges, diminishes, abrogates, repeals, and revives laws, statutes, acts, and ordinances'. He concluded that discussion by noting that 'this properly does belong to the jurisdiction of courts, and therefore this little taste hereof shall suffice', anticipating his more detailed treatment of the topic in the Fourth Institute. At the time, the word 'jurisdiction' commonly meant the power of ruling in general, and not just the authority of a judge; for example, 'supreme jurisdiction' was the same as maiestas, which we now call sovereignty (115) (footnotes omitted).

[10] Pollard, *Evolution of Parliament*, pp. 23-5.

[11] See Pollard, *Evolution of Parliament*, pp. 25, 239; H.D. Hazeltine, G. Lapsley, P.H. Winfield (ed), *Selected Essays, 'Introduction to Memoranda de Parliamento'* by F.W. Maitland, Cambridge: Cambridge University Press, 1935. C.H. McIlwain, *The High Court of Parliament and its Supremacy: An historical essay on the boundaries between legislation and adjudication in England*. New Haven: Yale University Press, 1910.

[12] Holdsworth contrasts this with the Continent, where local governments were instead becoming the mere delegates of a politically supreme state, in the late Middle Ages (W.S. Holdsworth, *A History of English Law*. London: Methuen, 1923, vol. 2, p. 405.

'(d)o not gloss the Statute; we understand it better than you do, because we made it'.[13] However, in 1365 the chancellor, before the king's council, reversed a decision by the court of common pleas.[14] Lord Coke referred to it in the *Case of Prohibitions*,[15] stating that 'one had a judgment reversed before the Council of State; it was held utterly void for that it was not a place where judgment may be reversed'.[16] JF Baldwin remarked that the King's Council was not regarded as the proper place, because it was not a court of common law,

> *and all the courts were ready to resist any such subjugation to the utmost. Parliament, on the other hand, was a court of record, which might review its own judgements on appeal of error.*[17]

That the House of Lords still constituted the supreme court strongly indicates why Parliament was recognised as a court of record. The Council, however, was neither a court of common of law nor a court of record. The specialisation of the judiciary separated it from the Council. That separation manifested judicial independence from the executive power which the Council originated in the executive branch. The executive power was to be extruded from the executive branch, through the events of the seventeenth century that culminated in the Revolution of 1688 and the Bill of Rights. In *Prohibitions* itself, Coke observed that the common law courts had specialised, such that the king lacked 'the artificial reason and judgment of law, which

[13] Year Books, Boston University School of Law, Accessed at: <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=1813?>. See Pollard, *Evolution of Parliament*, p. 34 and footnotes.

[14] (1365) 39 Edw. III 14. In the 'Case of the King's Council': '… the Chancellor reversed this judgment before the Council, where it was adjudged in the same course as the bishop had certified, and they sent the record back into the Common Pleas. And there, … it was awarded that the plaintiff recover her seisin and her damages. But the Justices did not take any regard to the reversal before the Council, because this was not a place where a judgment could be reversed'. Year Books, Boston University School of Law, Accessed at: <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=13473>. David J. Seipp of the School of Law compiled a long awaited index and paraphrase of Year Books from 1268-1535. He discusses the experience in 'Big Legal History and the Hundred Year Test'. *Law and History Review* 34(4) (2016) p. 857-872.

[15] *Prohibitions del Roy* (1607) 12 Co Rep 63 *('Prohibitions')*.

[16] *Prohibitions*, p. 64.

[17] J.F. Baldwin, *The King's Council in England during the Middle Ages*. Oxford: Clarendon, 1913, pp. 335-6.

law is an act which requires long study and experience'.[18] We might wonder whether James could have studied and qualified in law, yet the principle would have remained. The presumption of independence from the executive branch gained by such specialisation would have been negated by his personally embodying executive power. In the *Case of Proclamations*,[19] James I sought to prohibit new buildings in and about London. In response, Coke foreshadowed the *Bill of Rights*. The King could not change the law 'by his prohibition or proclamation'.[20] More precisely, just a few sentences earlier Coke stated that 'the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, *without Parliament*'.[21] The *Prohibitions* separation of the judiciary was a preliminary to *Proclamations*. It facilitated the later requirement that the prerogative of the Crown, in right of the Executive, be exercised and supervised ultimately inside the High Court of Parliament. These decisions accorded with Natural Law requiring that law and power be validated not by their mere assertion, but by their participation in greater, antecedent principles; in England, autonomous courts. James I asserted the medieval view of jurisprudence in *Prohibitions*, when Coke reports 'then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges'.[22] In *Proclamations* we also see James asserting that the private morality

[18] *Prohibitions*, p. 65.

[19] *Case of Proclamations* (1611) 12 Co Rep 74 *('Proclamations').* De Smith and Brazier described it as 'perhaps the leading case in English constitutional law' (Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*. London: Penguin, 1998, p. 74, ('de Smith and Brazier').

[20] *Proclamations*.

[21] *Proclamations* (emphasis added). In *Miller, R (on the application of) v The Prime Minister* [2020] AC 373, the UK Supreme Court referred to *Proclamations*, when holding that that an attempt to alter the law of the land by the use of the Crown's prerogative powers was unlawful. However, it identified the Crown and its prerogative with only the Executive and the executive branch: '… in the *Case of Proclamations* the court protected Parliamentary sovereignty directly, by holding that prerogative powers could not be used to alter the law of the land' [41]. Their Ladyships and Lordships juxtaposed 'parliamentary sovereignty' against the prerogative as if the Crown, a symbol of sovereignty, does not exercise the prerogative ultimately inside the dualistic High Court of Parliament itself. Again, at [49]: 'A prerogative power is therefore limited by statute and the common law', as if statutes are not themselves the Crown's exercise of its prerogative in its Parliament.

[22] *Prohibitions* (n 17) 64-5. Goldsworthy records in detail how royalists were adamant the King 'was accountable only to his own conscience, and to God, and not to any human tribunal or power' (*Evolution of Parliament*, p. 80). He then propounds this view as a precedent for parliamentary sovereignty.

of the Sovereign, unaided by an external framework, founds the constitutional order. Yet participatory, Natural Law, implicit in the medieval view of morality, was now embodied in autonomous courts; political power was to be mediated through autonomous courts, ultimately the High Court of Parliament, rather than directly. As we shall see Article 9 founded parliamentary privilege, by entrenching the High Court of Parliament, a supreme court and legislature, as an autonomous court through which even supreme power was required to ultimately act. Only thus can we see the later separation of the supreme court, from the legislature, as a cataclysm for the legislature's participation in parliamentary privilege.

The specialisation of the English judicature and specifically the Crown's High Court of Parliament separated the Crown's courts from its executive branch. This made supreme power accountable by requiring that it act through autonomous forums rather than arbitrarily, in isolation. Cicero wrote of true law being right or correct reason 'in agreement with nature'.[23] Medieval Europe and Hooker conceived true human law as based on and conforming to the higher or Natural Law of God.[24] It is submitted that in the new, juridified, English form of Natural Law, parliamentarians and other common lawyers differentiated legal authority from individual morality. Then, they required individual conscience and Bodin's 'sovereign power' to act lawfully and be validated through autonomous courts. However, the consolidation of political supremacy in the Executive was delayed by the Interregnum which saw rule by parliamentary committees for example.[25] It let in a novel philosophy that did not

[23] Marcus Tullius Cicero, *On the Republic*, 'On the Law of Nature' (tr. with introduction, notes, and indexes by David Fott). Ithaca, Cornell, 2014, p. 98.

[24] Richard Hooker, *Of the laws of ecclesiastical polity*, Book One; cf James Daly, 'Cosmic Harmony and Political Thinking in Early Stuart England'. *Transactions of the American Philosophical Society* 69(7) (1979), pp. 21-2.

[25] Clayton Roberts, *The Growth of Responsible Government in Stuart England*. Cambridge: Cambridge University Press, 1966) pp. 118-9, 145-51 ('Roberts'); Martin Loughlin refers to the inadequacy of this experiment becoming 'widely recognised' within just four years of the Commonwealth, leading to the replacement of parliamentary committees by the investiture of legislative power in the legislature, and executive power in the Lord Protector and Council, which after Cromwell's death led to the dominant faction in the army inviting Charles II to recover the throne (*Foundations of Public Law*. Oxford: Oxford University Press, p. 258. Loughlin also examines 'political jurisprudence' at length (ch. 6):

> But before coming directly to the power/liberty dynamic as it functions in public law, we should first address the question of why public law cannot be conceived as involving the perennial search for the key to a science of political right. Rather than being treated as an explication of the science of political right, public law should be recognized as an exercise in political jurisprudence (158).

require monarchical, aristocratic, or democratic power to act through autonomous courts.

## POLITICAL JURISPRUDENCE

Jeffrey Goldsworthy has traced the emergence of Parliament's distinctly legislative function to the 1640s.[26] Yet he describes this 'legislative sovereignty'[27] in terms of a political supremacy. Despite acknowledging that 'parliaments … exercised a legislative as well as judicial power',[28] Goldsworthy neglects the participation of the supreme court in the High Court of Parliament.[29] His precedent for 'legislative supremacy'[30] is the political supremacy of the monarch before the 1640s, despite the curiality of the monarch described above. A 2022 article[31] refers to *Jackson v Attorney General*,[32] where the judicial House of Lords affirmed the validity of Prime Minister Blair's fox-hunting legislation. Goldsworthy goes so far as to claim that statements by three Law Lords were 'based on known falsehoods'.[33] Further, in a footnote:

> *Lord Steyn's assertion at [102] that the judges created the principle of parliamentary sovereignty is demonstrably false, as is Lord Hope's related*

Instead it is argued here that this approach neglects the curial origination of political jurisprudence in the 1640s, described shortly.

[26] Goldsworthy, *Sovereignty of Parliament*, pp. 132-5.

[27] Goldsworthy, *Sovereignty of Parliament*, pp. 135.

[28] Goldsworthy, *Sovereignty of Parliament*.

[29] He likewise defends 'legislative sovereignty' in *Parliamentary Sovereignty: Contemporary Debates*. Cambridge: Cambridge University Press, 2010, ch. 3.

[30] Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*. Cambridge: Cambridge University Press, 2010, , ch. 2.

[31] Jeffrey Goldsworthy, 'Parliamentary Sovereignty and Popular Sovereignty in the UK Constitution'. *Cambridge Law Journal* 81(2) (2022), pp. 273.

[32] *R. (Jackson) v Attorney General* (2006) 1 AC 262.

[33] Goldsworthy, 'Parliamentary Sovereignty', p. 291. Professor Goldsworthy was refuting Rivka Weill who in her article ('Constitutionalism Reborn', *Columbia Journal Transnational Law* 60 (2021) 132, pp. 198-9) was citing *R. (Jackson) v Attorney General* (2006) 1 AC 262, [102] (Lord Steyn); [104], [107], [126] (Lord Hope); [159] (Baroness Hale).

> *assertion at [126] that the principle was 'created by the common law', if he means judge-made law.*[34]

As proof of these strong assertions, Goldsworthy cites his chapters on 'The Philosophical Foundations of Parliamentary Sovereignty', and 'Defining Parliamentary Sovereignty'.[35] In each of these chapters he fails to discuss? how members of the House of Lords sat as judges, the supreme court of England, at the Glorious Revolution, which he recognises created the principle of parliamentary sovereignty.

Alan Cromartie, instead, describes the new parliamentary authority in the 1640s as 'an adjudicative supremacy'.[36] A parliamentary vote used curial language to explain parliamentary authority to Charles I:

> *When the Lords and Commons in parliament which is the supreme court of judicature in the kingdom nation shall declare what the laws of the land is, to have this not only questioned and controverted, but contradicted, and a command that it should not be obeyed, is a high breach of the privilege of parliament.*[37]

As in the Middle Ages, described above, Parliament furthered its sovereignty by acting as a court. The *Nineteen Propositions of Both Houses of Parliament*, given on 19 May 1642, were even more juridical as Cromartie notes:

> *… if the question be whether that be law which the Lords and Commons have once declared to be so, who shall be the judge? (T)he king's judgement (is) in his highest court, though the king in his person be neither present nor assenting thereunto.*[38]

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[34] Goldsworthy, 'Parliamentary Sovereignty', 129.

[35] Goldsworthy, *Sovereignty of Parliament*, chs. 10, 2.

[36] Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642*. Cambridge: Cambridge University Press, 2006. ('Cromartie').

[37] Edward Husbands, *An exact collection of all remonstrances, declarations, votes … betweene the Kings most Excellent Majesty and his high court of Parliament*. London: publisher not stated, 1643, p. 195 ('Husbands'); cf Cromartie, *Constitutionalist Revolution*, p. 264.

[38] Husbands, *Collection*, 206-7; cf Cromartie, *Constitutionalist Revolution*, p. 264.

At this time, the king's legislative judgment bore the authority of the Crown. However, it is submitted that Charles was not content for the Crown to remain the transcendent authority that united Parliament, the common law courts, and the executive branch itself. Two advisors gave the more famous *Answer to the Nineteen Propositions of Both Houses of Parliament*,[39] to establish the executive power as part of the positive, law-making, supervisory structure of Parliament:

> *What concerns more the Publike, and is more (indeed) proper for the high Court of Parliament, than the making of Laws, which not only ought there to be transacted, but can be transacted no where else; but then you must admit Us to be a part of the Parliament, … and most unreasonable it were that two Estates, proposing something to the Third, that Third should be bound to take no advice, whether it were fit to passe, but from those two that did propose it.*[40]

AF Pollard regarded the doctrine of the three estates as grafted onto Parliament comparatively late, and imperfectly, partly as a political convenience for foreign relations.[41] His scholarship has recently been reviewed, upon the centenary of his founding the Institute of Historical Research in Britain.[42] Paul Cavill recounts how Pollard related the powers in Parliament to the Crown, and discounted assertions of parliamentary independence from the Crown as fortunately mistaken, given the failure of Parliaments on the Continent where sovereignty was not a common project.[43] Cromartie similarly casts the monarchy's claim to be one of the three estates, as a political step down; 'inexplicable'[44] except as a reaction to Parliament's 19 May

[39] *Joyce Lee Malcolm, The Struggle for Sovereignty: Seventeenth-Century English Political Tracts (Vols 1 and 2)*, '1642: Propositions made by Parliament and Charles I's Answer'. Indianapolis: Liberty Fund, 1999 (*'Lee Malcolm')* pp. 146-7.

[40] *Malcolm, Struggle for Sovereignty*, pp. 163-4.

[41] See Paul Cavill, 'AF Pollard', *Parliamentary History*. London: Parliamentary History Yearbook Trust, 2021, p. 52, fn 53 ('Cavill').

[42] Cavill, 'AF Pollard', p. 52. G.R. Elton, an intellectual heir of Pollard, had Pollard's 'bad and misleading book', *The Evolution of Parliament*, removed from Cambridge University reading lists (see Cavill).

[43] Cavill, 'AF Pollard', p. 52.

[44] Cromartie, *Constitutionalist Revolution*, p. 265.

declaration. The revival of the estates of King, Lords and Commons was a 'startingly sudden revival of an obsolete idea'.[45] Professor Vile addresses this period in detail, upon the following political premise: 'In England the acceptance of the idea of a single source of sovereign power led to the concept of parliamentary supremacy'.[46] However, it is submitted that Coke was leading the common lawyers including parliamentarians to curially differentiate the Crown's power from the Crown's forums of power, ultimately its High Court of Parliament.

Before the Interregnum, the King was politically superior to the Lords and Commons, being the Executive. Therefore, it was disingenuous for the monarchy to assert that the three were merely equal. Even more importantly, the Lords and Commons were juridically superior to the Executive. They formed a single 'supreme court – legislature' that curially reviewed and defined the politically superior Executive itself; an archetype of the Crown's juridical definition of Crown power in the Crown's courts at large. The three estates did not produce political balance in the seventeenth century. Charles himself would be tried and executed, and the monarchy and House of Lords abolished in 1649, the monarchy restored in 1660, followed by the bloodless or 'Glorious Revolution' of 1688.[47] Curial jurisprudence, not political jurisprudence, would embody parliamentary privilege as Article 9 of the Bill of Rights.

As discussed below, the new 'parliamentary state' recently described by Martin Loughlin[48] was the success of the 'supreme court – legislature', in juridically fortifying the Executive, by requiring that the executive power act ultimately inside the High Court of Parliament, outside the executive branch. The contest between the three estates was instead merely political. In *Leviathan*,[49] Hobbes referred to sovereign power but not to Bodin, nor to the central project of English lawyers in the seventeenth

[45] Cromartie, *Constitutionalist Revolution*, p. 265.

[46] Vile, *Constitutionalism*, p. 46.

[47] However, Warren Johnston disputes that it was bloodless. *English Historical Review*, 125 (2010) No. 515, 994-7; reviewing Steve Pincus, *1688: The First Modern Revolution*. New Haven: Yale University Press, 2009.

[48] Martin Loughlin, *Foundations of Public Law*. Oxford: Oxford University Press, 2010, ch. 9.

[49] Thomas Hobbes, *Leviathan*, (ed JCA Gaskin). Oxford: Oxford University Press, 1996.

century, requiring supreme power to act through autonomous courts.[50] His jurisprudence was political rather than curial.

The *Answer* was hastily retracted by the monarchy. As indicated above the *Answer* was written by two advisors, one of whom later pleaded inadvertence.[51]Yet it introduced a new form of 'political jurisprudence' to England. Bodin had not juxtaposed his 'sovereign power' against autonomous English courts. In the years after the *Answer*, the separation of legislative, executive and judicial powers came to the forefront of political theory.[52] Professor Vile describes the doctrine as rehabilitating the older doctrine of mixed government, to balance the constitution.[53] However, both the separation of powers doctrine and the model of three estates were neglectful departures from the common lawyers' juridification of public debate, in which the Crown and other political powers were features of the Crown's judicial, administrative

[50] Instead, Hobbes criticised 'Some Foolish Opinions of Lawyers Concerning the Making of Lawes'. We saw that in *Prohibitions*, Coke referred to the 'artificial reason' of lawyers (*Prohibitions*, p. 65). Hobbes, however, identified sovereignty with the political supremacy of the Commonwealth, an artificial legal person whose artificial Reason is superior to that of 'the subordinate Judge'. Hobbes then failed to differentiate the Crown from the Executive, and said: 'In all Courts of Justice, the Soveraign (which is the Person of the Common-wealth,) is he that Judgeth: The subordinate Judge, ought to have regard to the reason, which moved his Soveraign to make such Law, that his Sentence may be according thereunto; which then is his Soveraigns Sentence; otherwise it is his own, and an unjust one'.

[51] Malcolm, *Struggle for Sovereignty*, pp. 146-7. Lee Malcolm concludes that the king may not have actually read the reference to the three estates, and that in important respects it does not reflect Charles' earlier or later views (pp. 146-7).

[52] Vile, *Constitutionalism and the Separation of Powers*, ch. 2, 'The Foundation of the Doctrine', sets out this area in detail. In 1648, Sir Charles Dallison took a more robust stance against Parliament, asserting that where 'the Supremacy, the Power to Judge the Law, and the Authority to make new Lawes' are unified, the known Law 'is vanished, instantly thereupon, and Arbitrary and Tyrannical power is introduced' (*The Royalists Defence*. London: [Publisher not stated] 1648, p. 80.) It fell to George Lawson to note the 'judicatory' power in the Lords, and divide government power into three: 'There is a threefold power civil, or rather three degrees of that power. The first is legislative. The second judicial. The third executive' (*An examination of the political part of Mr. Hobbs his Leviathan*. London: Francis Tyton, 1657, p. 8). Perhaps even more importantly, it is submitted here, Lawson also narrowed the 'Power of Jurisdiction' to the 'administration of justice', and included that in the executive power, alongside the right of appointing officers. Judicial authority thus began to acquire its modern, substantive sense of judicial power, in juxtaposition against legislative and executive power rather than as a supervisory jurisdiction.

[53] Vile, *Constitutionalism* ch. 3. He notes (p. 59) that the royalist *Answer* referred to the 'judicatorie' power of the House of Lords, but it is submitted that they perhaps sought to undo the joint 'supreme court - legislature', and so obscure that joint forum's definition of the Executive.

and legislative courts. Decades after the *Answer*, in his *Two Treatises of Government*,[54] John Locke systematised this political abstraction of jurisprudence away from the juridical, pre-1642 model. Goldsworthy delineates the transition to a Lockeian philosophy.[55] In the sixteenth century the removal of papal supremacy in Britain transferred supreme authority over the English church to secular authority. This absorption of ecclesiastical authority by a renaissance King in Parliament, assisted by Low Church reformers endorsing legislative power to oppose High Church policies,[56] disembodied ecclesiastical criticism of the king. Religious questions came to be rendered a largely spiritual matter, removed from the ongoing exercise of Crown power through Crown courts including the High Court of Parliament. Goldsworthy charts how, in the seventeenth century, John Locke could seize what had now become an abstract theological restraint and couple it to community authorisation, to then manifest it as the consent of the governed with religious overtones.[57]

Like the monarchy in 1642, Locke reduced the Crown's curial, supervisory jurisdiction to a political jurisprudence. Locke needed a juxtaposition or 'separation' of powers against each other, to prevent tyranny, because he identified legislative, executive and treaty-making or 'federative' powers[58] as unmediated, having neglected the Crown's curial jurisdiction. More systematically than the monarchy or pamphleteers who followed the *Answer*, Locke reduced the Crown's curial jurisdiction to political power which he juxtaposed against the parliamentarians' political power. In accordance with Bodin's sovereign power before its English juridification, and Hobbes' sovereign power after its juridification, Locke describes a clash of mere political power. He neglected the new, curial jurisprudence that distinguished the old political jurisprudence, and encompassed it within the new requirement, that power act through autonomous courts. He neglected how Coke had characterised Crown power as a feature of the Crown's jurisdiction, a power that was required to act through the Crown's specialist judicial courts, administrative courts, and its dualistic High Court of Parliament as

[54] *Two Treatises on Government*. London: Awnsham Churchill, 1679-81.

[55] Goldsworthy, *Sovereignty of Parliament*, chs. 4-7.

[56] Goldsworthy, *Sovereignty of Parliament*, p. 55.

[57] Goldsworthy, *Sovereignty of Parliament*, p.151 ff. As to Locke's own religious beliefs see Diego Lucci, *John Locke's Christianity*. Cambridge: Cambridge University Press, 2020.

[58] Locke, *Two Treatises*, ch. XII.

lawful authority. Locke emphasised democratic power, yet he neglected the rule of law as founded by Coke's requirement that power, whether monarchical, aristocratic or legislative, act through autonomous courts.

Medieval and early Stuart jurisprudence characterised sovereignty as requiring that even supreme power act through a mediating court. Instead, Locke vested sovereignty directly in the people's consent through their spiritual patriarch, Adam,[59] as expressed in a legislative supremacy[60] with overtones that were private and spiritual rather than public and ecclesiastical. A century before Locke, philosophers were enamoured of the Great Chain of Being that was said to harmonise the whole world, reaching up to the heavens and ultimately to God.[61] Locke merely sought 'a defensible theology',[62] to relieve the confines of a much more limited view of human understanding: 'We shall not have much reason to complain of the narrowness of our minds, if we will but employ them about what may be of use to us; for of that they are very capable'.[63] After Locke, Montesquieu's separation of powers to prevent tyranny;[64] Austin's supreme,

[59] Locke, *Two Treatises* , ch. III. Of Adam's title to sovereignty, IV; Of Adam's title to sovereignty, by donation, Gen. i. 28; V. Of Adam's title to sovereignty, by the subjection of Eve; VI. Of Adam's title to sovereignty, by fatherhood; VII. Of fatherhood and property considered together as fountains of sovereignty; VIII. Of the conveyance of Adam's sovereign monarchical power; IX. Of monarchy, by inheritance from Adam; X. Of the heir to Adam's monarchical power.

[60] Locke, *Two Treatises* ch. XI 'Of the Extent of the Legislative Power' (para 134): '… the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it…'

[61] Daly, 'Cosmic Harmony', argues that the Reformation sharply restricted what human reason could know about the universe, and encouraged one 'to see law, even natural law, as pure Will, having no ultimate meaning beyond the power which promulgated it' (p. 22).

[62] John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government*. Cambridge: Cambridge University Press, 2012.

[63] John Locke, *An essay concerning humane understanding*, ch. 1, 'Introduction'. London: Thomas Basset, 1690, Section 5.

[64] 'When legislative power is united with executive power in a single person in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically' (Baron Montesquieu, *The spirit of the laws*. Cambridge: Cambridge University Press, 1989, 157.

uncommanded commander;[65] and HLA Hart's hierarchical 'rule of recognition' which derived from Austin[66] — each can be traced to Locke's restrictive neglect of the Crown's curial architecture that strove for justice by requiring that all power act through autonomous courts. This view tends to assert the political supremacy of the two political Houses of Parliament, rather than the curial authority of a forum of which the supreme court was still part.

The 'political jurisprudence', which followed the reductionist *Answer* of 1642, was ineffectual. It did not resolve the political conflict of the seventeenth century that characterised the Stuarts as merely juxtaposing monarchical power against aristocratic and democratic power. We will address the Revolution shortly. Recent scholarship has shown that Locke wrote *Two Treatises of Government* between 1679 and 1681, rather than in response to the Revolution of 1688 as previously thought.[67] He was reacting to the Exclusionary Crisis caused by Bills purporting to exclude the future James II.[68] In 1690, however, Locke commented on the Glorious Revolution. In what has been designated *A Call to the Nation for Unity*,[69] Locke made a partisan demand for allegiance to the new king on a *de jure* rather than *de facto* basis. He feared that assent to the mere fact of William's kingship might allow Tories to backslide and betray what

[65] John Austin, *The Province of Jurisprudence Determined*. London: John Murray, 1861. Daly defines law in early Stuart harmonism, as a 'concord reflecting intrinsic relationship' (p. 22), in contrast to the Legal Positivism that Austin systematised centuries later: 'That was what law was – not an arbitrary command representing power, but the expression of an intrinsic necessity, springing from the nature of things, and governing their harmonious operation' )

[66] Austin, 'The Province of Jurisprudence Determined', pp. 6-7.

[67] Mark Goldie, 'John Locke on the Glorious Revolution: A New Document' *History of Political Thought* (2021) 74.

[68] John Dunn, *John Locke*, argues: 'What is clear is that at some point in 1681 at the very latest Locke set himself to provide a systematic refutation of absolutist theory … In short it was a theoretical proclamation of the ultimate right of revolution' (48).

[69] See Goldie, *John Locke*. That was the title both applied to it in a 1922 auction, and used by Peter Laslett, *John Locke, Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press, 1965) p. 59 fn 5. Referring to a parliamentary friend of Locke's, Laslett remarked that the *Call for Unity* 'was sold with other Clarke papers at Sotheby's in 1922 and seen in the 1940's (*sic*), but it has now been lost sight of' (ibid). However, Mark Goldie impugns rather than admires the rhetorical quality of that title, to then dispute Laslett's designation, precisely because the paper is fiercely partisan rather than unifying, and says it is 'without textual warrant' (Goldie, *John Locke*, 74).

Whigs called 'Revolution principles'[70] by denying the right to kingship. Instead, the High Court of Parliament and William's kingship there could have been addressed in curial or political terms, because it was both. The supreme court did not become a specialist court, separate from the legislature, until the nineteenth century as we shall see. Until then, at least, the monarch was defined by a 'supreme court – legislature', permitting lawful allegiance on the basis of right or fact. Yet Locke's separation of powers doctrine provided for the later separation of the supreme court, in the nineteenth century, to be regarded as isolating the supreme court from the legislature. He obscured the joint authority of the 'supreme court – legislature', and hence how each House constitutes part of the High Court of Parliament and so participates in parliamentary privilege.

## A REVOLUTIONARY, CURIAL JURISPRUDENCE

The late medieval author 'Fleta' wrote 'The king has his court in his council in his parliaments…'[71] The Revolution of 1688 restored and entrenched that ancient, curial distribution of lawmaking power across the executive branch and the High Court of Parliament, ending the Stuarts' tumult. James I claimed for the Sovereign a prerogative outside of Parliament, such that he could even sit as a common law judge. Advisors to Charles I similarly obviated the jurisdiction of the High Court of Parliament, by instead focusing solely on the powers that acted there. In 1672, Charles II issued the Declaration of Indulgence that disapplied parliamentary legislation, to give religious freedom to Catholics.[72] Stuart courts subsequently upheld the monarch's prerogative

[70] Goldie finds that Locke feared that such betrayal could provide cover to Jacobitism, and later introduces Locke's actual text by concluding: 'There is a touch of Robespierre about the philosopher of the Glorious Revolution' (88).

[71] Pollard, *Evolution of Parliament*, pp. 23-5.

[72] See Alfred F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II'. *Law Quarterly Review* 66(1) (1950) 62, 72-5.

to dispense with the operation of a statute.[73] At the Glorious Revolution,[74] parliamentarians extruded the executive power from the executive branch, thereby differentiating the Executive from the Crown. They required the new monarch to participate in the Crown's prerogative lawfully, as the Crown, inside the autonomy of the jurisdiction or sovereignty of the High Court of Parliament. Parliamentary committees had weakened the Executive during the Interregnum,[75] and parliamentarians undid the Executive by replacing James II with William III. However, parliamentarians established the new 'parliamentary state' that Martin Loughlin describes as a product of a stable aristocratic club.[76] The 'supreme court – legislature', rather than political doctrines such as the three estates or the separation of powers, fortified the political supremacy of the Executive, by establishing the 'executive power in the High Court of Parliament', separately from the executive power in the executive branch. Parliamentarians now participated in the sovereignty of the Crown, as the sovereignty of Parliament, a court with jurisdiction over even the Executive. That is not to say that parliamentarians were always wise or careful in doing so; we come shortly to *Stockdale v Hansard*.[77] Instead, parliamentarians defined the Executive curially and so participated in its exercise of the Crown's prerogative.

The parliamentary court enacted the legislation known as *The Act 1688*, which affirmed that the Lords Spiritual and Temporal and Commons convened at Westminster 'are the Two Houses of Parlyament', despite any formal defect in any writ of summons. The *Bill of Rights* then fortified the right, prerogative or privilege of the Crown in Parliament to suspend laws, dispense with laws, and levy money.[78] Article 9 likewise asserts the Crown's freedom of speech in Parliament, as against supreme political power, which parliamentarians themselves had just established as the monarchical Executive:

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[73] See *Thomas v Sorrell* (1674) Vaughan 330 and *Godden v Hales* (1686) 11 St. Tr. 1165; cf Tom Spencer, 'An Australian Rule of Law'. *Australian Journal of Administrative Law* 98 (2014) 21 ('Spencer').

[74] For the historical details of both the Revolution and the *Act of Settlement 1700* (Eng), see Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence'. *Oxford University Commonwealth Law Journal* 1(2) (2001) 253.

[75] See Roberts, *Responsible Government*, p. 120-1.

[76] Loughlin, *Public Law*, pp. 265-6.

[77] *Stockdale v Hansard* (1839) 9 A & E I ('*Stockdale*').

[78] Articles 1, 2 and 4 respectively.

> *Freedom of Speech: 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament'.*

Article 9 excluded the Stuart courts that had supported the Executive prior to the Revolution. However, it did not exclude the jurisdiction of the supreme court which was part of the defining 'supreme court – legislature' that enacted Article 9. Subsequent legislation such as the *Crown and Parliament Recognition Act 1689* (Eng) confirmed the authority of the new king and queen, and the Acts of the new 'High Court of Parlyament', independently of James II. The *Act of Settlement 1700* (Eng) similarly established the Crown's prerogative to remove judges, in law, by requiring an address of both Houses of Parliament at section 3.[79] To reiterate, parliamentarians fortified the political supremacy of the monarchical Executive, in the executive branch, and then established parliamentary privilege as a Crown immunity, in Parliament, from that supremacy.

We must note, here, that Maitland found only a political basis for the Revolutionary Convention and the Parliament it became: 'We cannot work it into our constitutional law'.[80] However, he neglected the participation of the supreme court of England in the Convention and Parliament. The participation of the supreme court in both offered a basis for common law courts to remain independent from the political supremacy of the Executive in the legislature. When accepting legislation as superior to their own precedents, they could have been presumed to be deferring to a court of which the supreme court was part.

[79] Section 3: 'That after the said limitation shall take effect as aforesaid, judges commissions *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them'. ('During their good behaviour'.)

[80] F.W. Maitland, *The Constitutional History of England*. Cambridge: Cambridge University Press, 1908, pp. 285. Sir William Wade held similarly, as did de Smith and Brazier. See H.W.R. Wade, 'The Basis of Legal Sovereignty'. *Cambridge Law Journal*, (1955) p. 172, 188; Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*. London: Penguin, 1998, p. 70, 72. In America, Richard S Kay states his book *The Glorious Revolution and the Continuity of Law* 'aims to show how the distortion of legal concepts necessary to accomplish the Revolution influenced the actions, the institutions, and the rhetoric of the new settlement'. Washington DC: Catholic University of America, 2014, p. 2.

The Revolution is perhaps best understood as the triumph of curial jurisprudence over political jurisprudence. It fortified the political executive branch, through curially extruding executive power from that branch, and requiring that it act ultimately inside the dualistic High Court of Parliament instead. The Revolution differentiated political power from curial authority, by encompassing the politically supreme yet arbitrary Executive, within the lawful jurisdiction or sovereignty of Parliament. As for the morality of the Revolution, parliamentarians and other common lawyers in the seventeenth century succeeded in juridifying Bodin's 'sovereign power', and his Renaissance definition of the sovereignty of God. Pollard argues that the Revolution 'robbed the crown of liberty of conscience and imposed upon it a whole decalogue of prohibitions'.[81] Instead, the medieval conscience and private morality of monarchs was now fortified by the public requirement that they act ultimately through an autonomous 'supreme court – legislature', the High Court of Parliament.

## POLITICAL JURISPRUDENCE STRIKES BACK

AF Pollard has been cited at length in this paper, because he articulated the curiality of the dualistic High Court of Parliament. He also identifies, with regret, the political division of the High Court of Parliament into the Commons and Lords after the Glorious Revolution. The Commons sought to participate in the Lords jurisdiction as the supreme court, while the Lords sought to participate in the Commons taxing power, before each accepted the other's ability to reject its own claim:

> *Both houses were, in fact, appropriating the effects of a languishing monarchy, and they agreed to divide the spoil. The divergence of parliament into two houses prevented the common enjoyment of the fruits of parliamentary triumphs; and the lords acquiesced in the commons' control of taxation, while the commons accepted the claims of the lords to the sole exercise of appellate jurisdiction.*[82]

[81] Pollard, *Evolution of Parliament*, p. 179.

[82] Pollard, *Evolution of Parliament*, p. 310.

It is submitted that this political divergence has had extensive consequences for parliamentary privilege. It obscures the participation of the supreme court in the High Court of Parliament, and hence the 'supreme court – legislature'. Privilege has come to be founded upon political jurisprudence, Parliament's representative and other political claims, rather than upon curial jurisprudence which included the supreme court in the High Court of Parliament.

In 1832, parliamentarians instituted a parliamentary executive power that required a Commons majority, as responsible government. The *Representation of the People Act 1832* (UK), or the 'Great Reform Act' abolished the patronised 'rotten' and 'pocket' boroughs, to draw the Executive from the legislature rather than the monarch's Council.[83] This was the opposite of the aristocratic club whose stability allowed political organisations to form in the eighteenth century. Less than a decade later, in *Stockdale*, the Commons' private printers were sued for defamation.[84] Prison inspectors had criticised the publishers of an illustrated treatise on reproduction found circulating among prisoners. The Commons ordered Hansard to plead its own privilege in defence. The Court of Queen's Bench rejected Hansard's plea as beyond privilege, and awarded the plaintiff damages. Jeffrey Goldsworthy characterises the case as a contest as to which of the Commons or Queen's Bench 'had superior jurisdiction to judge the existence and extent of the House's privileges',[85] and states it was 'fortunately defused'[86] when the Court acquiesced in the House imprisoning the two sheriffs who executed the Court's judgment, for contempt. Parliament then legislated to confirm its privilege.[87]

The two sheriffs may not have seen the defusing as fortunate, likewise Stockdale and his solicitor, committed in subsequent litigation.[88] De Smith and Brazier instead note

[83] Stevens, *House of Lords*, pp. 23–34. Also Spencer, 'Rule of Law', pp. 101-2.

[84] See Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*. London: Penguin, 1998, pp. 331-3.

[85] Goldsworthy, *Sovereignty of Parliament*, pp. 242.

[86] Goldsworthy, *Sovereignty of Parliament*, pp. 242.

[87] Goldsworthy, *Sovereignty of Parliament*, pp. 242.

[88] See *Howard v Gossett* (1845) 10 QB 359, 411; de Smith and Brazier, *Constitutional and Administrative Law*, pp. 331.

the courts' refusal to award *habeas corpus* to the Sheriff and release him from arbitrary detention -

> *It was supported by precedent and was defended on grounds of principle; but the court had chosen to blind itself to notorious reality, and to countenance injustice.*[89]

It is submitted that the resolution was not fortunate, but the court could not have done otherwise. The supreme court had not yet separated from the legislature. Therefore, when courts deferred to the legislature, they could still be presumed to be deferring to a curial body that was not differentiated from the supreme court whose rulings bind them under the doctrine of precedent.

The High Court of Parliament originated a distinctly legislative function only in the 1640s, well after it was a supreme court. Likewise, supreme courts were established without legislatures in Australasia in the early nineteenth century.[90] At Westminster the supreme court became specialised and separated from the legislature in 1844.[91] Daniel O'Connell had been convicted in relation to his political activism. He appealed to the judicial House of Lords on a technicality. The professional judges who 'assisted' the Lords on judicial matters held for his release. The Lords themselves disagreed and sought to overrule the judges, but eventually conceded the superior juridicality of the specialists and finally left the House, never to return on judicial business.[92]

Specialisation separated the British judiciary from the Executive in the legislature in 1844, as it had separated the English judicature from the executive branch in

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[89] De Smith and Brazier, *Constitutional and Administrative Law*, pp. 332.

[90] See Supreme Court of New South Wales, Charter of Justice. Accessed at: <https://www.supremecourt.nsw.gov.au/about-us/history/charter-of-justice.html.> Also, 'The Supreme Court of Tasmania', 'History'. Accessed at: <https://www.supremecourt.tas.gov.au/the-court/history/>. Likewise, Courts Administration Authority of South Australia. Accessed at: <https://www.courts.sa.gov.au/court-history/>.

[91] *O'Connell* (n 3); Stevens, *House of Lords*.

[92] In *Bradlaugh v Clarke* (1883) 8 App Cas 354, Lord Denman, 50 years a barrister and son of a former Chief Justice, offered his vote. It was ignored. In 1905, Earl Spencer said: 'Probably I am the only lay peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals. Happily that state of things has passed away; it was certainly open to objection, and the doing away with it was in my opinion one of the best of reforms' (*In Re Lord Kinross* [1905] AC 468, 476.)

*Prohibitions* in 1607, and again in *King's Council* in 1365. The supreme court continued to be a form of the Crown's High Court of Parliament, after 1844. The judicial House of Lords, later the 'Appellate Committee of the House of Lords', continued to be a parliamentary body after *O'Connell*. In 2002, Lord Bingham cited s 4 of the *Appellate Jurisdiction Act 1876* (UK) and referred to it as 'Her Majesty the Queen in Her Court of Parliament',[93] before its repeal by the *Constitutional Reform Act 2005*.[94] In 1842, the Privy Council held in *Kielley v Carson*[95] that the Commons exercised by 'ancient usage and prescription'[96] the functions of the High Court of Parliament. That was different from colonial legislatures which exercised analogous functions on the basis of necessity.[97] Their Lordships recalled that Parliament possessed its privileges by acting as a court, yet noted that the political division of Parliament into two Houses had been recognised as dividing that curiality. The decision can be distinguished as preceding the *O'Connell* separation of the supreme court. The Westminster legislature, like colonial legislatures created separately from supreme courts, cannot be presumed to be a court, since *O'Connell* separated the supreme court from the legislature.

In *Green v Mortimer*,[98] just 17 years after *O'Connell*, Lord Campbell held a statute to be absurd because it was impossible to perform: 'There must be the same power in the defendant to encumber his life-estate as if the Act had never passed…'.[99] In *British Railways Board v Pickin*,[100] Lord Morris distinguished *Green*, when holding that fraud was not a basis for judicial review of parliamentary proceedings:

> *It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the*

[93] *Grobbelaar v News Group Newspapers Ltd* [2002] WLR 3024 [25].

[94] Schedule 17 of the *Constitutional Reform Act 2005* (UK), Part 2, clause 9, provides 'The Appellate Jurisdiction Act 1876 ceases to have effect'.

[95] *Kielley v Carson* (1842) 4 Moo PC 63.

[96] *Kielley v Carson* (1842) 4 Moo PC 63,89.

[97] *Kielley v Carson* (1842) 4 Moo PC 63, 70.

[98] *Green v Mortimer* (1861) 3 LT 642.

[99] *Green v Mortimer* (1861) 3 LT 642, 643 (emphasis added).

[100] *British Railways Board v Pickin* (1974) AC 765.

> *internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.*[101]

However, his Lordship did not sit in the High Court of Justice. The *Supreme Court of Judicature Act 1873* (UK) remade the High Court of Justice by recasting the King's Bench, Common Pleas, Exchequer, and Chancery, and added the new Probate, Divorce and Admiralty division.[102] It was under the *Appellate Jurisdiction Act 1876* (UK) that the role of the judicial House of Lords 'as the highest court of appeal in the land was finally placed on a proper judicial footing'.[103] It became the Appellate Committee of the House of Lords in 1948.[104] His Lordship sat in the judicial House of Lords in the High Court of Parliament, not the High Court of Justice. However, Lord Denning MR had in the Court of Appeal held that whether the Act of Parliament was improperly obtained is a triable issue, such that the legislature 'could put the matter right, if it thought fit, by passing another Act'.[105] Further:

> *In so doing the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament, and, I might add, in aid of justice.*[106]

This juncture of curial and legislative authority recalls the sovereignty of the High Court of Parliament, as a Crown forum that is independent of the monarchical, aristocratic, democratic or other political powers acting through such forums.

The legislature and supreme court formed a single body, the 'supreme court – legislature', which exercised parliamentary privilege at the passage of Article 9. The supreme court was part of the forum described since in terms of an 'exclusive

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[101] *British Railways Board v Pickin* (1974) AC 765, 790. The Appellate Committee held unanimously for the Board. Lord Simon concluded that 'If the respondent thinks that Parliament has been misled into an enactment inimical to his interests, his remedy lies with Parliament itself, and nowhere else' (800).

[102] UK Parliament, The Judicature Acts of 1873 and 1875. Accessed at: <https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicatureacts/>.

[103] UK Parliament, The Judicature Acts of 1873 and 1875. Accessed at: <https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicatureacts/>.

[104] House of Lords, Library Note: The Appellate Jurisdiction of the House of Lords. Accessed at: <https://researchbriefings.files.parliament.uk/documents/LLN-2009-010/LLN-2009-010.pdf>.

[105] *Pickin v British Railways Board* (1973) QB 219.

[106] *Pickin v British Railways Board* (1973) QB 219, 231.

cognisance' or 'exclusive jurisdiction'[107] that pits the legislature against the courts. Despite the Revolution of 1688, and his opposition to the royalists, Locke entrenched the political jurisprudence of the royalist *Answer* of 1642, by theorising a separation of all three powers. This separated the supreme court from the legislature conceptually. In 1832, responsible government completed the fusion of legislative power and executive power. In 1844, *O'Connell* separated the supreme court from the legislature in practice. Legislatures have come, thus, to be associated with the executive power and hence the executive branch. This has occurred under Dicey's doctrine of 'legislative supremacy',[108] first published less than a decade after s 4 of the *Appellate Jurisdiction Act 1876* (UK) described the judicial House of Lords as 'Her Majesty the Queen in Her Court of Parliament'. However, the sovereignty of Parliament and specifically parliamentary privilege derives from the legislature acting as part of a court, the High Court of Parliament. The question is then: How can legislatures be regarded as part of the High Court of Parliament, even after the creation of specialised and separate supreme courts, at Westminster and elsewhere?

## PRACTICALITIES

In 2021, UK Prime Minister Boris Johnson explored natural justice as the basis for reviewing procedures in the House of Commons.[109] The Leader of the House Jacob Rees-Mogg also used the phrase repeatedly. They abandoned that plan shortly afterwards, amid claims that their party had acted improperly. A new model of natural justice was not forthcoming from the Westminster legislature. It can come instead from the Westminster Supreme Court and other supreme courts. Section 1 of the *Constitutional Reform Act 2005* (UK) specifies that the Act does not adversely affect the existing constitutional principle of the rule of law. The history of the supreme court

[107] *R v Chaytor* (2011) 1 AC 684, 697 [13] (Lord Phillips).

[108] A.V. Dicey, Introduction to the Study of the Law of the Constitution. Macmillan, London, 1920 (originally 1885), p. 68.

[109] See T. Spencer, 'Natural Justice in Parliament: A Courageous Proposal, Prime Minister', U.K. Const. L. Blog (15th Nov. 2021). Accessed at: <https://ukconstitutionallaw.org/2021/11/15/tom-spencer-natural-justice-in-parliament-a-courageous-proposal-prime-minister/>.

indicates that the new Court continues to be part of the 'High Court of Parlyament', as at the passage of the *Bill of Rights*. Further, *Erskine May* records that parliamentary privilege derives from each House of the legislature constituting part of the High Court of Parliament. Like Australian Federal, State and Territory legislatures, the House of Commons and the House of Lords can no longer be presumed to constitute courts in themselves. Yet to exercise parliamentary privilege as guaranteed by Article 9, they are required to constitute part of the High Court of Parliament.

Parliamentarians' freedom of speech derives from their participation in the privilege of the Crown, in the High Court of Parliament since 1688. Throughout the seventeenth century and finally at the Revolution of 1688, the Stuart dynasty asserted its own political power as the basis of sovereignty. The sovereignty of the High Court of Parliament was the contrary claim that the Crown is ultimately a forum, a "supreme court – legislature" through which the Crown's power is required to act. The Executive was not immune from the supervisory jurisdiction of the Crown's High Court of Parliament, of which the supreme court was part. Such immunity threatened to reduce the Crown-ness or lawful *sovereignty* of the Executive in Parliament, to a mere assertion of its own political supremacy. Since *Stockdale* however, legislators have asserted their own political supremacy as founding their privilege. A curial basis for natural justice and specifically parliamentary privilege, today, would allow legislators to again participate in the curial authority of the parliamentary court that founded the sovereignty of Parliament. Also, it must be reiterated that the High Court of Parliament did not assert a political supremacy over the monarchical Executive in 1688, let alone a political immunity for itself from a supreme court; the supreme court of England was part of "Parliament". In *Kirk v Industrial Relations Commission*,[110] the High Court of Australia established that a State Supreme Court was not to create "islands of power immune from supervision and restraint".[111] The High Court did not cite *Kirk*, in *Crime and Corruption Commission v Carne*,[112] when considering whether the Commission had privileged a report by preparing it for its supervising Committee in the Queensland

[110] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

[111] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 [99].

[112] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737.

Parliament. Instead, Gordon and Edelman JJ[113] recalled *R v Richards; Ex parte Fitzpatrick and Browne*:

> *(I)t is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.*[114]

They concluded: 'once it is accepted that the privilege exists, and that the Parliament has determined the occasion of its exercise, nothing further falls to be determined'.[115] This binary is based on a sequel to *Stockdale*, which Dixon CJ cited in *Richards*.[116] However, we saw that *Stockdale* preceded the *O'Connell* separation of the supreme court from the legislature. Following *O'Connell*, legislatures can no longer be presumed to be courts. Therefore, courts can no longer both defer to the democratic claims of legislatures and yet remain independent of political influence, since *O'Connell*. Courts were similarly unable to defer to the monarchical claims of the Stuarts and yet remain independent of political influence, after *Prohibitions* separated the common law courts from the executive branch. In *Carne*, Kiefel CJ, Gageler and Jagot JJ held that the appellant Commission's preparation of a report was for itself alone, despite a parliamentary Committee statutorily certifying 'that the Report was prepared for and presented to the Committee for its purposes'.[117] Justices Gordon and Edelman likewise held that the Commission was not the agent of the Committee, despite holding it to be 'unnecessary and inappropriate to determine the metes and bounds of parliamentary privilege in this case'.[118] The Clerk of the Queensland Parliament, Neil Laurie, later took issue with the decision.[119] He argued that 'Parliamentary privilege is an effective ouster

[113] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 756 [113].

[114] *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162.

[115] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 756 [113].

[116] *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162. His Honour followed the *Sheriff of Middlesex'* case (1840) 11 A. & E. 273, where the court dismissed the Sheriff's claim for habeas corpus. See de Smith and Brazier, *Constitutional and Administrative Law*, pp. 331-2.

[117] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 745 [40].

[118] *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737, 756 [114].

[119] Neil J. Laurie, 'Mount Erebus to Ann Street', (Conference Paper, Australasian Study of Parliament Group, 29 September 2023).

from jurisdiction',[120] that the Court chose facts that did not trigger the statute applying the privilege and ignored other facts, and said it is now 'very incumbent'[121] on Parliaments to ensure that statutes as to permanent Commissions 'reflect their precise intention'.[122]

The creation of Loughlin's 'parliamentary state', in 1688, shifted the forum of political debate from the executive branch to the legislature. It is submitted that founding parliamentary privilege upon natural justice, as articulated ultimately by independent, specialist courts, would invest the legislature with curial authority, rather than legislators having to politically assert their privilege against the courts as currently. The courts could more readily entrust control over parliamentary privilege to legislators, with the confidence that legislators were adjudging 'the occasion and of the manner' of the exercise of their privileges, in conjunction with the courts rather than against them. Parliamentary privilege would again be a shield against external powers such as the Executive, rather than against the supreme court - the former partner of the legislature. A duty to act judicially, complementing political authority, offers a broader rationale for the freedom of speech and debate, 'right-of-reply' submissions, the sub-judice convention, greater consistency as to who has a 'voice' in the legislature and in committee inquiries, and legislatures' social licence.

The discussion above explains that throughout important points in the development of the English Parliament, Article 9 guaranteed a new Crown immunity, the privilege of the Crown inside Parliament, against the fortified executive branch. The Executive in Parliament and other parliamentarians participated in the 'supreme court – legislature', a forum that required an externally originating political power to act judicially in the High Court of Parliament. This conception of an immune, free zone of political communication closely coincides with the High Court of Australia's articulation of free political communication that must not be burdened.[123] Parliamentarians can again fortify political power, their own right that speech and debate be free and frank in the public interest, by expressly founding the privilege of the Crown in Parliament

[120] Neil J. Laurie, 'Mount Erebus to Ann Street'.

[121] Neil J. Laurie, 'Mount Erebus to Ann Street'.

[122] Neil J. Laurie, 'Mount Erebus to Ann Street'.

[123] See e.g. *McCloy v New South Wales* (2015) 257 CLR 178.

upon a duty to act judicially. Legislating shield laws for journalists on the same basis could affirm parliamentarians' own commitment to natural justice, under the joint authority of the High Court of Parliament, a 'supreme court – legislature' that since *O'Connell* is both a specialist, independent court and a legislature.