STRENGTHENING THE RULE OF LAW:
REFORMING THE SCOPE OF PARLIAMENTARY PRIVILEGE

'*Be you never so high, the law is above you*'[1]

> *John Hemming (Birmingham, Yardley)*: With about 75,000 people having named Ryan Giggs on Twitter…
>
> *Mr Speaker*: Order. Let me just say to the hon. Gentleman—although I know that he has already done it—that occasions such as this are for raising the issues of principle involved, not for seeking to flout orders…
>
> *The Attorney-General*: It is our duty as parliamentarians to uphold the rule of law.[2]

Introduction

When, in May 2011, John Hemming MP named Ryan Giggs as the holder of a privacy injunction, he was doing more than adding a sensational moment to widespread public irritation at the scope of the current law of privacy: he was using the privilege of Parliament in a way that undermined the rule of law, separation of powers and an individual's human rights.

This essay is not about privacy but about why and how the law of parliamentary privilege ("privilege") should be reformed better to suit the constitutional arrangements of the 21st century United Kingdom. This is not a proposal for the sake of constitutional neatness, but a reform urgently needed practically to protect individuals who have legitimately obtained a court order from having that order intentionally undermined by an MP[3] who disagrees with it. Currently, neither the individual nor the state has redress against the breach.

This essay argues that, while privilege should remain an essential and necessary part of our constitution, it should be reformed in scope so as better to protect the rule of law by enabling ordinary court proceedings to be brought against MPs for offences, limited to those related to respect for the court, committed in the course of parliamentary proceedings.

---

[1] *Gnomologia*, Dr Thomas Fuller, 1733, 943, quoted by Lord Denning MR in *Gouriet v. Union of Post Office Workers* [1977] QB 729 at 762
[2] HC Deb 23 May 2011 col 638
[3] While this essay refers to "MPs", the principle applies equally to members of the House of Lords. Indeed it was in the House of Lords that Sir Fred Goodwin was similarly named: HL Deb 19 May 2011 col 1490

Concepts: the rule of law; parliamentary privilege

The rule of law

The rule of law, a concept embodied in statute since 2005[4] but arguably of centuries' standing, was defined by the late Lord Bingham of Cornhill as:

> " … all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts"[5].

Statutory privilege: Article 9 of the Bill of Rights 1689

Since 1689, MPs have enjoyed a statutory exception in the Bill of Rights to the principle of equality before the law in that:

> "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[6]

Common law privilege: exclusive cognisance

Closely related to this statutory privilege of freedom of speech is the common law privilege of the "exclusive cognisance" of both Houses over their own proceedings. Blackstone observes that:

> "the whole of the law of parliament has its original form from this one maxim; 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates and not elsewhere'."[7]

Exclusive cognisance can be waived or relinquished by Parliament,[8] as it has done with ordinary criminal offences.[9] In the most recent court examination of privilege, the criminal proceedings about the abuse of MPs expenses, Lord Rodger described the relationship between article 9 and exclusive cognisance: "article 9 cannot be intended to apply to any matter for which Parliament cannot validly claim the privilege of exclusive cognisance."[10] This conclusion resulted in the trial of three MPs and one member of the House of Lords for false accounting contrary to section 17(1)(b) of the Theft Act 1968 in relation to expenses claimed from Parliament and arising from their parliamentary duties.[11]

---

[4] Constitutional Reform Act 2005, s1
[5] *The Rule of Law*, Tom Bingham, 2010, p8
[6] Bill of Rights 1689, Article 9
[7] *Blackstone's Commentaries on the Laws of England*, 17th Ed (1814), pp158-9
[8] *Erskine May's Parliamentary Practice*, 23rd Ed (2004), p105
[9] Op cit p116; *R v Chaytor* [2010] UKSC 52, paragraph 85
[10] *R v Chaytor* [2010] UKSC 52, Lord Rodger of Earlsferry, paragraph 102
[11] 2011 Crown Court convictions of David Chaytor, James Devine, Elliot Morley and Lord Hanningfield

The same judgment however also explains why an MP is protected from court proceedings in relation to his actions: if (a) the Houses assert exclusive cognisance, and (b) the action falls with the scope of article 9. Lord Rodger contrasted an "ordinary crime" (such as murder or fraud) with "a crime which a Member of Parliament committed by saying something in the exercise of his freedom of speech in the House".[12] The reason why Parliament would not waive its exclusive jurisdiction in relation to the latter, he suggested, was "… to protect the privilege of freedom of speech and debate of the House itself and, simultaneously, the particular Member's exercise of that privilege".[13] Whatever uncertainly remains as to the law of privilege, it is at least clear that it protects MPs from action in the courts for whatever they say in the course of debate in the Chamber or in committees. This is why MPs cannot be prosecuted for offences capable of being committed through speech: whether contempt of court (e.g. for the breach of a court order or injunction), an offence such as "inciting racial hatred"[14], or defamation.

How privilege protects MPs

Before considering the arguments for reform, it may help to illustrate these abstract concepts with examples of MPs using the protection of privilege to say what might otherwise have exposed them to court proceedings and sanction.

Protection from defamation proceedings is the most frequent. While the media may focus on sensational examples (e.g. the 1955 naming of Kim Philby as a Soviet spy[15] and the 1963 revelations about the social life of John Profumo[16]), in practice protection from actions in defamation daily safeguards the adversarial political system and the ability of Parliament robustly to hold Government to account. This essay proposes no change to that protection.

The other way in which privilege has been used, and the concern of this essay, is deliberately to subvert the rule of law. The most recent examples relate to privacy injunctions, but consider also the 1978 naming of 'Colonel B' by four MPs[17] at a time when contempt of court proceedings had been instituted against others for doing the same; and the 1996 flouting

[12] *R v Chaytor* [2010] UKSC 52, Lord Rodger of Earlsferry, paragraph 113
[13] Ibid
[14] Public Order Act 1986, s18
[15] HC Deb 25 October 1955 col 28-9
[16] HC Deb 21 March 1963 col 725
[17] HC Deb 20 April 1978 col 679

of privacy injunctions by MPs relating to a case where a child's welfare was at stake[18]. If the reader has little sympathy with Ryan Giggs, he should perhaps consider these cases before rejecting reform. If MPs do not like the law of injunctions, privacy, official secrets or any other area they should debate and reform that law by statute, not undermine the courts' application of that law in individual cases.

Arguments for reform

The mischief addressed by Article 9

In Lord Phillips's mind, Article 9 was enacted due to "… events in the reign of Charles I, and in particular the acceptance by the Court of the King's Bench that parliamentary privilege did not protect against seditious comments in the Chamber".[19] Lord Browne-Wilkinson considered that the "plain meaning" of article 9 in its historical context was "to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said, and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to discuss".[20] Article 9 was thus enacted to give MPs the freedom to discuss any issue they chose and to say what they liked in those debates. This essay does not propose to limit that freedom. Indeed, debating reform of the law, including privacy, is the fundamental role of the legislature. Those debates do not, however, require the deliberate undermining of the rule of law. The Speaker recognised this in his response to Mr Hemming's breach of a privacy injunction by reminding him that "occasions such as this are for raising the issues of principle involved, not for seeking to flout orders for whatever purpose"[21].

When an MP uses privilege to protect what he says, knowing that what he says is not necessary to advance his argument on a particular topic, he is acting beyond the mischief which the Bill of Rights was intended to remedy. Indeed, ironically, he is using a statute intended to protect the rule of law[22] to subvert it. The law should be reformed to prevent privilege being abused and so undermining the principle which it was created to protect.

[18] HC Order Paper, early day motions, 29 January 1996
[19] *R v Chaytor* [2010] UKSC 52, Lord Phillips of Worth Matravers, paragraph 28
[20] *Pepper v Hart* [1992] AC 593, Lord Browne-Wilkinson p638
[21] HC Deb 23 May 2011 col 638
[22] *The Rule of Law*, Tom Bingham, 2010, p24

The separation of powers

Whether or not one believes in a separation of powers in the British state, the notion that "Parliament makes the laws, the judiciary interpret them"[23] is essential to our constitution because "the safety of the whole depends on the balance of the parts"[24]. Lord Neuberger, in his recent report on super injunctions, said that Parliament's *sub judice* rules[25] are "an instance of the proper separation of powers and support the rule of law through ensuring that Parliament does not undermine the efficacy of court judgments, which enforce and vindicate legal rights – not least rights provided by Parliament… [it is] of particular concern to all that the sub judice rules are neither inadvertently or deliberately subverted. Those rules exist to uphold the constitutional balance between Parliament and the courts to secure the rule of law, and breaches of those rules risk undermining the fabric of our constitution and our commitment to the rule of law".[26] Thus, MPs have already acknowledged the principle that they should protect the separation of powers and the rule of law and have done so in practice through their *sub judice* rules. It is simply that the current restriction offers inadequate protection.

Human rights

"All are equal before the law and are entitled without any discrimination to equal protection of the law"[27] proclaims the Universal Declaration of Human Rights. Parliamentary privilege creates an exception to this rule of equality before the law by protecting MPs (and Parliament itself) from action in the courts and, as a corollary, denying others the protection of the law. The European Court of Human Rights, in *A v. UK*[28], established that states could be granted a wide margin of appreciation for laws on freedom of speech in their legislatures; but the judges also considered that those laws should reflect principles of fairness, raising the question of access to redress by those who have been defamed, or whose privacy has been breached. For that reason, the UK should adopt a more proportionate approach to freedom of speech in Parliament than the blanket protection currently afforded by Article 9.

[23] *Duport Steels Ltd v Sirs* [1980] 1 All ER 353, Lord Diplock p359
[24] *Works of Lord Bolingbroke*, Viscount Bolingbroke, Vol I p335 (London, 1841)
[25] The *sub judice* rules are resolutions of the two Houses which, in limited circumstances, restrict members' rights to discuss cases currently before the courts.
[26] Report of the Committee on Super-Injunctions, 20 May 2011, paragraph 5.4
[27] Universal Declaration of Human Rights, General Assembly of the United Nations, 1948, Article 7
[28] 36 EHHR 51

A practical law reform

The appropriate scope of privilege

As the ECHR noted in *A v. UK*, Article 9 exists for good reason and similar laws exist across the signatory states. It would be inappropriate to abolish it.

It is proportionate for privilege to continue to protect MPs from defamation proceedings on practical grounds. Parliamentary proceedings, particularly in the Commons, are based on party politics and are inherently adversarial. If MPs were liable for defamation, it would materially affect the nature of proceedings and could suppress the function of Parliament to hold the Government to account. MPs could also be faced with a large number of actions, which, even where unwarranted, would take time and money to defend. That said, even this protection might be revisited if the law of defamation were to be reformed to limit the protection it provides to reputation.

It is also proportionate for privilege to protect MPs from prosecution for offences committed through words, such as inciting racial hatred[29]. While an exception to equality before the law, this protection remains necessary for freedom of debate in the legislature. It can be distinguished from the subversion of court orders because it protects the freedom of MPs to debate any topic and express any opinion. It must though be recognised that it is close to an unjustifiable exception to equality before the law, especially when Parliament itself created the offences.

It is however unreasonable that neither individuals nor the state have redress against an MP who breaks a legitimately made court order (e.g. an order for anonymity, privacy, or reporting restrictions), when others could be prosecuted for contempt of court. It is not a justified exception to equality before the law because the breaches intentionally subvert the rule of law by making the court impotent. This should change.

Options for reform

Sir Stephen Sedley, following the disclosure in the Commons of the names of individuals protected by privacy injunctions, noted that "in spite of protests from members of both Houses who understand very well what is at stake, neither Speaker appears at present to have

[29] Public Order Act 1986, s18

taken any steps against the offenders"[30]. This remains the case. In the face of inaction from Parliament, the Government should propose reform.

The lightest touch approach would be that proposed by Lord Neuberger, who suggested administrative changes to ensure that the two Houses' *sub judice* rules are not inadvertently subverted in respect of injunctions. This does not, however, prevent what the Lord Chief Justice has described as the "very serious issues"[31] of the deliberate subversion of those rules. A firmer reform is necessary.

An alternative would be an Act which required Parliament to impose sanctions against MPs who abuse privilege to protect them from what would otherwise be a criminal or civil offence. This is undesirable because it does not uphold the principle of equality before the law as administered by the courts.

The best option for reform is a short Act to limit the scope of Article 9. The scope of privilege has already been limited by the two Houses - in the form of section 13 of the Defamation Act 1996 and the *sub judice* rules. Rather than amending Article 9 itself, one could take the approach of the Defamation Act, which disapplies the protection for a particular purpose. In this case, the clause would disapply the protection for civil contempt of court for the breach of an injunction and for listed statutory offences of contempt of court. A further provision could protect Parliament by enabling the two Houses to disapply the Act in a particular case. A clause might read:

(1) The protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament shall not apply to the prosecution of the offences listed in sub-section 2 and to proceedings for civil contempt of court for the breach of an injunction made by a superior court.

(2) The offences relevant to sub-section 1 are offences under:

(a) sections 1 (strict liability rule), 4 (orders postponing or prohibiting publicity), 8 (jury disclosure) and 11 (publication of matters exempted from disclosure in court), Contempt of Court Act 1981;

(b) Section 8 (publicity of committal proceedings), Magistrates' Court Act 1981

(c) Section 4(5) (anonymity of complainants in sexual cases), Sexual Offences (Amendment) Act 1976 and section 5, Sexual Offences (Amendment) Act 1992;

[30] London Review of Books, 16 June 2011
[31] Lord Judge 20 May 2011: http://www.judiciary.gov.uk/Resources/JCO/Documents/110520-superinjunctions-transcript.pdf

(d) Section 12 (report of proceedings of court sitting in private), Administration of Justice Act 1960;

(e) Section 11 (reports of preparatory hearings), Criminal Justice Act 1987

(f) Section 37 and 38 (publicity of preparatory hearings), Criminal Procedure and Investigations Act 1996;

(g) Section 39 (order prohibiting the identification of a young person), Children and Young Persons Act 1933;

(h) Section 49 (prohibition on publicity of Youth Court proceedings), Children and Young Persons Act 1933.

(3) This section shall not apply in a particular prosecution or court proceeding if both Houses of Parliament resolve that the section shall not apply to that individual case. Such a resolution may only be resolved between the date on which the application for an order of committal is made and the start of the hearing.

Other than the last two offences in subsection (2), each requires the consent of the Attorney-General to prosecute - a further safeguard.

While undoubtedly a controversial reform, such a provision would not limit the sovereignty of Parliament: what Parliament does (and it would have to impose this restraint on itself), Parliament can undo, in this case by repealing the Act if it wished no longer to constrain its privilege. This would be a proportionate response to the deliberate abuse of privilege; it would rebalance the rule of law and enable practical redress for those who currently suffer at the hands of privilege in a way never intended by the authors of the Bill of Rights.

2,996 words

Daisy Ricketts
GDL student (City University)
17 October 2011