Report

Parliamentary privilege: Evolution or codification?

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THE CONSTITUTION SOCIETY

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Executive Summary

- Parliamentary privilege is an essential element in the functioning of a modern, democratic Parliament (paragraph 11). The most widely acknowledged of Parliament's rights – free speech – is already codified in Article IX of the Bill of Rights 1689 (paragraph 12). For Parliament to justify privilege in the twenty-first century it is necessary to convince the public that it is a vital element in the functioning of a democratically elected body (paragraph 13).
- In the seventeenth century, free speech in Parliament was at the centre of the political demands being asserted by Parliament against the monarch and was given statutory expression in Article IX of the Bill of Rights (paragraphs 19-23).
- The reality in modern day Britain is that there is a perception that Parliament is threatened by an increasingly powerful senior judiciary rather than by an over-zealous monarch (paragraph 29).
- The judiciary has been greatly empowered as a result (in particular) of two significant pieces of legislation (the European Communities Act 1972 and the Human Rights Act 1998). Modern legislation of this kind can appear to threaten Parliamentary sovereignty (paragraph 30).
- Since the 1999 Joint Committee on Parliamentary privilege (1999 JC) recommended comprehensive codification there have been a number of important developments including the role of the European Court of Human Rights which may tend to reinforce the case for comprehensive codification (paragraphs 49-53).

- Contempts committed toward Select Committees include difficulties with recalcitrant or evasive witnesses; Parliament's power to deal with obstruction of its Committees' business is minimal and ineffective in the modern context (paragraphs 54-60).
- A number of Joint and Select Committees have recommended a comprehensive review of privilege in the context of a new statute (paragraphs 62-64).
- The provisions of the Australian Parliamentary Privileges Act 1987 are the comparative model for codification in the UK (paragraphs 65-70 and 77).
- The Government Green Paper is, however, limited in its recommendations. In particular, it does not recommend comprehensive codification (paragraph 71). Its recommendations are piecemeal and are principally concerned with tackling the public perception that Parliamentary privilege puts Members above the law (paragraph 72). This concern underpins the principal recommendation in the Green Paper which is to enable Parliamentary proceedings to be considered as evidence in cases of alleged criminality (paragraph 74).
- The fact that there is a degree of imprecision in the terminology of Article IX of the Bill of Rights has to be balanced against a number of factors (paragraph 86). The desirability of greater clarity in modern legislation – assuming that it stood alone as a potential reason for codification – is not necessarily decisive. It may, for example, be counterbalanced by arguments over the benefits of flexibility and the gradual evolution of a consensus between the courts and Parliament over historic concepts embedded in Article IX (paragraph 100).

- But definitional issues are not the only factors to consider when assessing the potential benefits of codification. The source of Parliamentary privilege is, essentially, functional; that is, it is a test that is applied by reference to the functions of Parliament (paragraph 106).
- Once the potential antagonist to Parliament is seen to be more an over-zealous judiciary rather than an over-mighty monarch or executive, the need for free expression within Parliament may be thought to need to accommodate third party (non-member) interests more than it currently does on a functional test of privilege (paragraph 109).
- If Parliamentary privilege is not modified to accommodate such third party interests this may lead to the courts (the common law arbiters of the extent of privilege) taking matters into their own hands (paragraph 111). Thus, arguments for the codification of Parliamentary privilege extend beyond definitional or syntactic considerations and include possible practical consequences and outcomes of relying on a purely evolutionary approach (paragraph 112).
- Three practical consequences and outcomes of reliance on a purely evolutionary approach are identified in this paper (see paragraphs 113-123 (Select Committees), 124-134 (criminal proceedings) and 135-147 (civil proceedings)).
- First, Select Committees are increasingly influential but need coercive powers in order to ensure that they can undertake their functions effectively (paragraph 114). However, coercive powers have the potential to infringe the legal rights of persons affected by the work of Select Committees (paragraph 115). It follows that coercive powers will need to be legislated for. Declaratory resolutions or standing orders are unlikely to prove immune from judicial control if they

result in an infringement of fundamental rights or a violation of EU law. Judicial intervention leading to interpretation of a declaratory resolution or standing order would be a far more serious intrusion on the Parliamentary process than interpreting a statute (paragraphs 119-121).

- Secondly, serious consequences may ensue from failing to legislate carefully in respect of criminal proceedings. There are three issues here: (a) whether MPs should always be protected by Parliamentary privilege even if they commit criminal offences in proceedings in Parliament; (b) whether Parliamentary privilege needs to be restricted so as to allow the defence in a criminal case to make use of Parliamentary materials and (c) whether there should be some relaxation on the scope of privilege so as to permit statements made in Parliament to be relied on derivatively so as to assist a police investigation even if such materials cannot be relied on in court as evidence (paragraph 125).
- Whether MPs ought to be accorded protection from prosecution if they commit criminal offences in proceedings in Parliament depends, in material part, on how broad is the definition to be accorded to Article IX of the Bill of Rights and, in particular, to the phrase *'proceedings in Parliament'* (paragraph 126). If this were the only issue there would be a case for leaving the situation as it is (paragraph 127).
- The most significant of these issues, however, is allowing the defence in a criminal trial to make unrestricted use of Parliamentary materials to support a defence. The unrestricted use of Parliamentary materials to assist a defendant may be crucial to whether or not an innocent person is convicted. The 1999 JC did not consider this issue. The Green Paper addresses the issue at paragraphs 149-150 and recommends that no safeguards should be needed before the defence is

allowed to make use of Parliamentary statements or other materials to support a defence to a criminal charge. It would allow the prosecution to deploy rebuttal evidence without further safeguards. This could, presumably, lead to witnesses being able to be cross-examined as to what they have said in Parliament, especially if previously inconsistent Parliamentary statements have been made. This may, however, be a small price to pay for a fair trial (paragraph 131).

- Thirdly, there may also be a need to ensure that a person is not disadvantaged in civil proceedings to the extent that (s)he has no legal redress against unlawful action. The proposition that the maker of a statement in Parliament should not, ordinarily, incur civil liability because of immunity conferred by Parliamentary privilege may need to be reconsidered having regard to the requirements of Article 8 of the European Convention (right to respect for private life). Assuming that a court injunction (whether 'super' or anonymised) has – striking a fair balance – operated to protect a person's privacy, such rights may, in the event that the fact or content of the injunction is disclosed in Parliament (thereby violating those rights), be sought to be enforced before the European Court of Human Rights in Strasbourg. Whether or not Parliamentary privilege would be viewed as a proportionate (and hence lawful) response to infringe such rights cannot be guaranteed (paragraph 140).
- It may be inappropriate to continue to apply a monolithic approach to Parliamentary privilege. Different situations may need to be approached differently, especially where the constraints on free speech by allowing Parliamentary statements to be impeached or questioned may be outweighed by the damaging effects on a person's fundamental rights by denying use of the statements (paragraph 147).

Part 1 - Introduction

1. Parliamentary privilege reflects the result of an historic relationship between the monarch and Parliament. Article IX of the Bill of Rights 1689 is the statutory formulation of that relationship and ostensibly provides Parliament with absolute immunity from interference outside Parliament (Parliamentary privilege).

2. The most significant modern privilege is that of free speech in Parliament.

3. Parliamentary privilege is given legal expression in Article IX of the Bill of Rights and also includes the older (and wider) common law principle of exclusive cognisance whereby Parliament is free to regulate its own internal affairs.

4. The courts are the ultimate arbiters of the scope of Parliamentary privilege as defined in law although Parliament may always legislate on it.

5. Whether or not Parliamentary privilege should be codified is a question on which different views have been expressed at different times. A Joint Committee on Parliamentary privilege reported in 1999 recommending that Parliamentary privilege should be comprehensively codified.[1]

6. The 1999 Joint Committee's recommendations have not been implemented. The 2009 expenses scandal led to a reconsideration of the extent of the protection afforded by privilege because a number of MPs and a peer charged

1 *Joint Committee on Parliamentary privilege report (session 1998-99) 3 vols HL Paper 43; HC 214. (cited as '1999 JC Report' and the committee itself as '1999 JC').*

with criminal offences claimed to be covered by it. The Government prepared a Green Paper recommending limited codification but generally inclining against comprehensive codification.[2] A new Joint Committee on Parliamentary privilege was set up in 2013 to consider the Government's recommendations in its Green Paper. At the time of writing this paper, the 2013 Joint Committee (2013 JC) has not yet reported although it has received evidence some of which is referred to in this paper.

7. This paper, commissioned by The Constitution Society, considers the developments that have taken place since the 1999 JC Report and addresses the issues surrounding codification (whether or not addressed in the Government Green Paper or elsewhere).

8. Part 2 of the paper examines the nature and background of Parliamentary privilege. Part 3 sets out the developments that have taken place since the 1999 Joint Committee Report (1999 JC Report) also introducing arguments for and against codification. Part 4 focuses on a number of substantive issues relating to codification. Finally, Part 5 considers some of the principal potential consequences of a failure to codify.

2 *Parliamentary Privilege April 2012 Command 8318 (cited as 'Government Green Paper').*

Part 2 – Background

Parliamentary privilege – preliminary observations

9. Parliamentary privilege – those rights and immunities enjoyed by Parliament collectively and by Members of each House individually – is a complex subject with a long history.

10. The House of Commons has asserted certain privileges since the Middle Ages. The broad context of the early history of privilege is the House's stand against executive interference in the person of the monarch; the later context is broadly that of Parliament's struggle with the courts over jurisdiction in this area of *privata lex* (the law of Parliament). While some understanding of the long sweep of the history of Parliamentary privilege is essential to any consideration of modern privilege issues, the focus of this paper is on the question of codification – whether or not it is desirable at this moment to enshrine the principles of privilege, wholly or at least in material part, in a new statute. That consideration is particularly pressing at this time since a Joint Committee of both Houses was appointed on 3rd December 2012 to examine the Government Green Paper on Parliamentary Privilege.

11. Before considering briefly some of the significant pointers that arise from the history of privilege, two important observations need to be made. The first is to remind ourselves of the purpose of Parliamentary privilege which, contrary to public perception, is not the preservation of exclusive rights no longer appropriate in twenty-first century Britain but is an essential element in the functioning of a modern, democratic Parliament.

The Resolution of the House of Commons of 1675 stated that purpose in the clearest possible terms when it said that privilege exists so that Members might freely attend the public affairs of the House, without disturbance or interruption.[3]

12. The second important matter to understand is that the most widely acknowledged of Parliament's rights – free speech – is already codified in Article IX of the Bill of Rights 1689. Throughout the modern period of the history of privilege, the courts have not hesitated to interpret provisions of that statute. Parliament eventually accepted that the parameters of privilege are indeed defined by the courts while the courts accepted that the internal working of Parliament (exclusive cognisance) was an area into which they would not venture.[4] Codification is therefore not a departure in the evolution of Parliamentary privilege – a statute is already its basis. What this paper will address is whether reliance on a three hundred years old statute is, necessarily, a good – or in any event the most effective – basis for the modern exercise of Parliamentary privilege.

Meaning and origins of Parliamentary privilege

13. The word 'privilege' in our modern, democratic society has awkward connotations. A specific right or advantage; an exemption from a rule or a norm which puts its possessor in a different position from everyone else sounds elitist,

3 Commons Journals (CJ) (1667-87) 342.

4 The boundary line between what is a matter for Parliament and what is a matter for the courts was set out in an authoritative pronouncement made by the then Attorney General in a memorandum laid in the Commons Library in 2009, DEP 2009/1081. The Attorney General's memorandum is also appended to the Report of the Committee on the Issue of Privilege (Session 2009-10) HC 62 Appendix IV.

exclusive and is therefore unwelcome to the majority of the public. For Parliament to justify privilege in the twenty-first century it is necessary to convince the public that it is a vital element in the functioning of a democratic Parliament. That objective can only be achieved if there is clarity about what Parliamentary privilege is and how it enables Members of both Houses to fulfil the mandate given to them, in the case of the Commons by those who have elected them.

14. Erskine May defines privilege in the following terms:

> *'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 the 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 in statute.'*[5]

15. Erskine May is thus making clear that these rights and privileges, the most important of which is freedom of speech, attach to individual Members of each House but they do so only because the Houses cannot effectively perform their functions without the unimpeded service of their Members. This underlying purpose of privilege may be shorthanded as the 'functionality principle'. It is the principal modern justification for a certain setting aside of the law in respect of the proceedings of Parliament. In the case of the House of Commons, what the principle suggests is that Members of Parliament derive their privilege only as a means to the effective discharge of

5 Erskine May *Parliamentary Practice* Twenty-fourth edition, (London, 2011) p.203.

the collective functions of the House – to scrutinise Government and approve public expenditure, to legislate and to air the grievances of their constituents. The rights and immunities enjoyed by Members arise so that they can carry out those functions; they are not free standing rights. By long standing resolutions both Houses have agreed not to create any new privilege.[6]

16. The Houses also retain certain powers collectively. Among these is, at least in theory, the power to punish contempts (a subject treated more fully below[7]). These powers derive from the historic nature of Parliament as a High Court; in modern times they are exercised extremely sparingly and only so that Parliament can function effectively and so that those who serve it (including those who come as witnesses before Parliamentary committees) can do so with impunity.

17. These powers are an expression of the unique authority that Parliament as a whole exercises and they place Parliament in a special category. When the rights or immunities of Parliament are attacked, a breach of privilege has occurred: in the House of Commons there are various ways in which Members can raise alleged breaches of privilege, the most regular being a written submission to the Speaker who rules on whether a debate is in order on the question of referring the matter to the Committee of Privileges.

18. While the Speaker's role is critical in deciding whether there appears to have been a *prima facie* breach, the substantive matter is settled by an inquiry by the Committee of Privileges. Each House retains the right to

6 Commons Journals (1702-04) 555, 560.

7 See below paragraphs 39 & 40.

punish contempts – that is actions that thwart the Houses in their business which may go wider than a breach of one of the defined privileges. What these powers actually amount to in the modern context will be discussed subsequently in this paper.

The core privilege – free speech in Parliament

19. Parliament, and in particular the House of Commons, had been asserting its right to debate and proceed free from royal interference from the Middle Ages. That right to freedom of speech had already grown up by the latter part of the fifteenth century as a matter of tradition rather than by virtue of a privilege sought and obtained. By the early sixteenth century the ancient tradition was being articulated in pleas by Speakers and by the House itself.

20. Nevertheless, while free speech became regarded as a right hallowed by tradition, it was also understood that respect and obedience to the Sovereign's wishes should temper the debates and decisions of Parliament. Where the borderline lay between Parliamentary freedom and sovereign control and on what basis privilege was claimed remained matters of controversy. Parliament's privileges were increasingly challenged by the Stuart monarchs from James I onwards. At a most simplistic level one can view the civil war of the mid-seventeenth century as an assertion of Commons privilege against encroachment by the monarch.

21. Eventually statutory expression was given to freedom of speech in the Bill of Rights of 1689.[8] The Preamble to the Bill of Rights tells us that it was introduced:

Because King James the Second, by the assistance of divers

8 In Scotland it was by the Claim of Right Act 1689.

> *evil counsellors, judges and ministers employed by him did endeavour to subvert and extirpate the laws and liberties of this kingdom.*[9]

22. The language of the Preamble reminds us that the Bill of Rights was an assertive, politically-motivated declaration. It is (like its predecessor Magna Carta) a jumble of contemporary complaints rather than a comprehensive, constitutional instrument. Nonetheless, free speech in Parliament was at the centre of the political demands being asserted by Parliament.

23. Freedom of speech is famously asserted in Article IX of the Bill itself which provides that:

> *The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*[10]

24. Considerable attention has been paid to the exact meaning of the words in Article IX. The phrases *'proceedings in Parliament'*, *'impeached or questioned'* and *'court or place out of Parliament'* have been the subject of learned and judicial pondering and ruling over the ages. It will be necessary to return to consider definitional issues later in this paper but it is, in the context of codification, important to note that the courts have never hesitated to consider the meaning of what are statutory provisions whatever view Parliament itself has taken of its privileges.

25. The struggle between Parliament and the courts reached its apogee in the mid-nineteenth century when the Commons gave up its right to determine the nature of privilege: that task was ceded to the courts. But the ambits

9 Bill of Rights 1689; Preamble paragraph 2.

10 Ibid. Article IX.

of privilege and the area in which the Houses maintained exclusive cognisance remained to be delineated and this came about in a series of cases, not always with complete clarity. Paradoxically most of these cases were settled on first principles, with only a glance at Article IX.

26. As time went on the courts were drawn into broader areas of public life so that they became less attached to a self-imposed rule which excluded their consideration, when interpreting statutes, of Parliamentary material, including debates relevant to the legislative history of a statute. A number of cases decided by the House of Lords in its former judicial capacity significantly varied this self-denying ordinance. In 1992 as a result of the decision in the case of *Pepper v. Hart*[11], the courts now feel freer to refer to Parliamentary material where legislation is considered to be ambiguous or obscure, or leads to absurdity. In such cases, Parliamentary material can be used to elucidate the meaning of statute.

27. Although it is true that the ruling in *Pepper v. Hart* has been applied with some caution in subsequent case-law, that decision and the examination which the courts now give to Parliamentary materials to determine the proportionality of a measure in terms of its compliance with fundamental rights imperatives mean that the courts are becoming increasingly familiar with looking at statements made in Parliament and with the Parliamentary process more generally.

28. Whatever the nuances of the words of Article IX, the principle of freedom of speech underpins it. That core principle enables a Member of either House to say

11 [1992] UKHL 3.

whatever he or she thinks fit in debate. However offensive or injurious those remarks might be to a named individual, that individual will have, as matters currently stand, no obvious recourse to the courts – at least to the British courts – since they will, amongst other things, not be able to take out any action for defamation. Within the House of Commons itself certain rules and conventions about decorum and the proper way of addressing Members themselves are enforced by the Chair. Nevertheless, as Enoch Powell reminded the House, the absolute nature of privilege protects an individual Member even when he or she is expressing opinions abhorrent to all of his or her colleagues.[12]

29. Free speech remains an essential part of the effective functioning of Parliament. However, the historical context of its provenance in the clash between the Commons and the monarch no longer applies. In modern day Britain the threat, real or imagined, is seen as coming from an increasingly powerful senior judiciary.

30. The judiciary has been greatly empowered as a result (in particular) of two significant pieces of legislation – the European Communities Act 1972 and the Human Rights Act 1998 – so significant that they have sometimes been termed 'constitutional statutes'. Modern legislation of this kind can appear to threaten Parliamentary sovereignty because modern judges at the highest level have the power (in EU law) to dis-apply legislation enacted by Parliament or (under the Human Rights Act 1998) to declare Parliament's laws to be incompatible with the European Convention on Human Rights ('ECHR').

12 See HC Deb. 2nd May 1978 Vol. 949 col. 43-44.

31. These new powers, the practical effects of which were almost certainly unforeseen when these statutes were given legal effect, have caused incipient and increasing tension between the courts and Parliament as to which organ of state prevails in the event of conflict. This latest tension between Parliament and the courts has not been articulated clearly when the question of codification of Parliamentary privilege arises. But it is the view of this paper's authors that it is the principal reason why codification of Parliamentary privilege is controversial. There would seem to be many who would oppose codification not because of principled objection but because they are concerned about letting the genie out of the bottle in terms of judicial activism over newly created laws. These concerns probably need to be grappled with and thought through if progress is to be made in terms of rationalising the scope and extent of Parliamentary privilege by codification or otherwise. In particular, it may be useful to consider whether there are possible legislative mechanisms for reducing the risk of unwelcome judicial intrusion into the affairs of Parliament. A simple legislative framework might, for example, consist of a statutory provision in any Parliamentary Privileges Act requiring any question of interpretation of the scope of Parliamentary privilege to be referred by the Lord Chief Justice to a specially convened Parliamentary committee for advice before making a final ruling.

Other privileges – freedom from arrest, favourable construction

32. Other earlier privileges were also historically important. Freedom from arrest was another part of the protection the Commons sought from action by the monarch against those who displeased it. As with other privileges it is based upon the absolute priority of Members to attend and to participate in the business of Parliament. But it is important to note that it has never been extended to protect Members from arrest on criminal charges (except in the Chamber when the House is actually sitting[13]), a principle clearly upheld by the courts in the recent case of *R. v. Chaytor* in which, significantly the Speaker did not intervene on behalf of the House.[14]

33. The privilege of freedom from arrest, in modern times, is very limited and there are a number of statutory provisions of detention which apply to Members notwithstanding any privilege;[15] other ancient privileges, such as asking the Sovereign to place a 'favourable construction' on the House of Commons' proceedings, have fallen into desuetude.

The Commonwealth context

34. The British concept of Parliamentary privilege is shared throughout the Commonwealth by those institutions which – in various ways – have developed from the Westminster

13 For an account of the arrest of Lord Cochrane (a Member of the House) in the chamber when the House was *not* sitting see Parl. Deb (1814-15). 30 cc 309, 336.

14 *R. v. Chaytor* [2010] UK SC 52. A similar policy of non-intervention was followed by the Clerk of the Parliaments in the case involving a peer.

15 For example under the Mental Health Act, 1983 where special provision is set out for Members detained under s. 141. Also see Erskine May, op.cit. p 245ff.

model. On the issue of privilege, the Commonwealth is a community, sharing and exchanging practice and precedent. For that reason Commonwealth precedents and practice in respect of privilege are cited in Erskine May.[16] However, unlike the UK itself, Commonwealth countries (New Zealand excepted) have codified constitutions and the protection of Parliamentary privilege is invariably cited in those constitutions as well as being set out in specific privilege statutes. Thus, codification in Commonwealth jurisdictions is entirely normal.

Publication and reporting of Parliamentary proceedings

35. The publication of Parliamentary proceedings in the Official Report (Hansard), the Votes and Proceedings (the official minutes of the House of Commons) and any other document ordered to be printed by Parliament is also protected; any reporting of proceedings by other bodies (principally the media) attracts qualified privilege as a matter of common law rather than Parliamentary law and which also applies to the reporting of court proceedings.

36. The principle behind this qualified protection is that there is an advantage to the public interest in the publication of facts which outweighs any private injury that it might cause with the proviso (which is an important one) that publication does not involve malice. So far as the reporting of Parliamentary proceedings in concerned, the protection is encoded in the Parliamentary Papers Act 1840 which followed a considerable trial of strength between Parliament and the courts in the cases around

16 For example the ruling of a breach of privilege by the Canadian Speaker in a case involving the refusal by the Executive to hand over confidential papers to a Parliamentary committee. See Erskine May, op.cit. p. 819.

Stockdale v. Hansard in the late 1830s. There has been some concern expressed recently about the obscurity of the wording of the Act and a call for its rewriting, a matter taken up in the Government Green Paper.[17]

Exclusive cognisance

37. Another area of Parliamentary privilege closely related to freedom of speech is that of 'exclusive cognisance' or exclusive jurisdiction over their internal affairs that both Houses claim. The most important of these is the regulation of business by rules (standing orders) and practices which, in the House of Commons, are interpreted and ruled on by the Speaker. These rules and practices are the property of the Houses, they can be changed by resolution but while extant they are binding on Members as they debate and take part in the proceedings of their respective Chambers and Committees.

38. In addition the internal jurisdiction of Parliament extends to control of the Parliamentary precincts (shared by the Houses) and the responsibility for security and access. In the Commons the Speaker's Protocol regulates the conditions upon which the police may enter the precincts in pursuit of criminal investigations.[18]

Contempts

39. When any of the rights or immunities of Parliament are attacked or disregarded, the offence committed is known as a breach of privilege which the Houses have, and continue

17 Report of Joint Committee on Parliamentary Privilege, HL 43; HC 214 (1998-99). See below paragraph 76.

18 See HC Deb (2008-09) 485, c1ff. Similar arrangements have been adopted in the House of Lords.

to assert, a right to punish. Each House also claims the right to punish contempts which, while not breaches of any specific privilege, in some way obstruct or impede Parliament in its proceedings. For a long time Parliament has adhered to the principle that its penal powers should be exercised sparingly; in the modern context that has become expedient since it is doubtful how in practice the Houses could exercise those powers.

40. An important aspect of the notion of contempt is that an action for which there has been no precedent may be treated as a contempt. A recent example has been the referral of phone hacking to the then Committee on Standards and Privileges, following a complaint by a Member of the House that hacking was inhibiting him in his Parliamentary work. While the novelty of the alleged contempt was not a barrier to the Committee's investigation, it was necessary for the Committee to establish in what way the hacking interfered with the Member's work so far as it related to the Chamber or Committees since correspondence with constituents and matters pursued locally, unless related to proceedings of the House, are not covered by Parliamentary privilege. The Committee's conclusion left the matter unresolved, suggesting that while the hacking might have amounted to a contempt, hacking was a criminal matter best dealt with by enforcement of the law.[19]

Codification of Parliamentary privilege – the key issues

41. The definitions and background considered so far bring us to the key issue of codification; that is, whether or not a

19 Committee on Standards and Privileges, Fourteenth Report, HC 268 (2008-09).

new and potentially comprehensive statute is needed. The principal arguments in favour of codification were set out in the report of the 1999 JC. [20]

42. The 1999 JC made the following principal points in recommending codification:

- An Act of Parliament would make it easier for the electorate to understand the importance of Parliamentary privilege by presenting a clear, accessible code in modern language.
- Such a Code would clarify what are ambiguous terms in the Bill of Rights 1689.
- Such a Code would maintain flexibility by stating principles.
- Such a Code would not increase the power of the courts which already determine the ambits of privilege.

43. By contrast, those who have argued against codification have made the following points -

- Codification would lead to renewed judicial interference in the affairs of Parliament upsetting the constitutional balance between Parliament and the judiciary.
- Codification would lead to a raft of cases in the courts arguing over provisions of a statute.
- The Bill of Rights is a statement of fundamental, constitutional significance which has stood the test of time: flexibility would be lost by the

20 Joint Committee on Parliamentary Privilege, op.cit. Paragraphs 379-385.

straitjacket of a modern statute.

44. In recommending codification, the 1999 JC emphasised that a restatement of Article IX would not entail putting aside the historic principles on which it is based. The 1999 JC envisaged a statute which would be composed of two broad sections. The first would be a clarification of key terms such as 'proceedings in Parliament'; 'place out of Parliament'; 'questioning' etc. The second part would deal with exclusive cognisance – Parliament's control of its internal affairs – and contain a definition of contempt.

45. Criminal offences – punishable by fines and imprisonment – would be written into the provisions of the statute. Other 'tidying up' measures – such as abolishing the privilege of freedom from arrest – would also be contained in the statute. To maintain flexibility principles would be stated with examples, thereby not precluding future developments from being covered by the provisions of the Act.

46. It should be noted that there are certain areas of action that Parliament could take itself by internal regulation which would not require codification.

47. For example, a right of reply by citizens who consider they have been defamed in Parliament could be embodied in a Standing Order as is the case in the Australian jurisdiction. Such a provision would mitigate some of the reservations which the European Court of Human Rights has expressed about the exercise of Parliamentary privilege in an age of human rights.

Part 3 - Developments since the 1999 Joint Committee's report

48. Since the Report of the 1999 JC there have been a number of developments that affect consideration of the question of codification.

A v. UK (2002)

49. In 2002 a case relating directly to words spoken by an MP was heard in the European Court of Human Rights (*A v. UK*).[21] There, a Member of Parliament, during a daily adjournment debate in the House of Commons, had been highly critical of one of his constituents describing her as a 'neighbour from hell' when advancing the grievances against her by other constituents of his. Supported by Liberty, an action was taken out by the aggrieved constituent claiming that the use of Parliamentary privilege in this case infringed Article 6 of the ECHR (namely that everyone is entitled to a fair hearing by an independent tribunal established by law) and Article 8 (respect of private and family life). The action was brought against the UK Government and, in recognition of the importance of the principle which was at stake, the UK was joined in defence by eight other European member states.

50. The European Court did not hesitate to hear the case despite the fact that it constituted an intrusion into the area of Parliamentary proceedings proscribed in the UK by Article IX of the Bill of Rights and by constitutional provisions in the cases of other member states. It

21 *A v United Kingdom* (Application 3537/97) (2002) 36 EHRR 917 ECHR and see Erskine May, op.cit. p. 301.

considered that its duty to consider complaints under the ECHR overrode any dismissal on grounds of a *prima facie* breach of Parliamentary privilege.

51. In the event, after careful examination of the evidence, the Court came to the conclusion that the use of Parliamentary privilege on that occasion was not a disproportionate restriction on the right of access to a court or in respect of private and family life and that therefore neither Article of EHCR had been violated.

52. However, although that decision was a vindication of Parliamentary privilege, the judges were not unanimous nor were they uncritical of the exercise of privilege without recognition of modern, human rights such as a right of reply by citizens who feel they have been libelled in Parliament.

53. Moreover, in handling the defence case counsel acting on behalf of the UK decided to rely upon a 'functionality' argument for privilege – namely that privilege is a necessary part of the way modern, democratic Parliaments must work, enshrined in the constitutional arrangements of most member states. Counsel did not judge it to be wise to rely on a statute as old as the Bill of Rights 1689. Furthermore, it became clear that the case would become a precedent showing that the European Court will hear matters it considers within its jurisdiction even where Parliamentary privilege is claimed.[22]

22 Another recent case considered by the Court involved statements made in the Greek Parliament: see *Konstas v Greece* (2011).

Select Committees: powers in the face of contempts

54. The second area to emerge since 1999 (although the 1999 JC had recognised it as problematic) is that of contempt and in particular, contempt committed towards Select Committees of the Houses.

55. Erskine May lists many sorts of examples of behaviour that might be considered as contempts towards committees.[23] They range from refusal to produce documents[24] to disorderly (even drunken) behaviour before Select Committees and evasion in answering questions on the part of witnesses. Disorderly behaviour of a physical sort can be dealt with by removal of persons causing disturbances by the Sergeant-at-Arms on instruction from the Chair.

56. However, under existing conventions, there is little a Committee can do with recalcitrant or evasive witnesses except to exert moral pressure or, failing that, to report the matter to the House itself. But the modern House of Commons has little power to act: the possibility of bringing people to the bar of the House and admonishing them would not be appropriate in the twenty-first century whereas the House last imposed a fine in 1666. The House of Lords, as a Court of Record, has the theoretical power to fine but the power has not been used since the nineteenth century.

57. Any *ad hoc* act of punishment by Parliament would no doubt receive a hostile public reaction especially if exercised in the name of 'privilege'. On the other side of the fence, good witnesses giving forthright evidence are only

23 Erskine May, op.cit. p. 251ff. and p. 817ff.

24 See footnote 16 above.

thinly protected from interference by others, including their employers, as a recent case involving the Minister for Justice has shown.[25]

58. This weakness in Parliament's ability to do its job properly has been widely recognised. The authors of a recent Constitution Society study state that the lack of coercive powers *'poses a threat to the legitimacy of Select Committees'*.[26] Select Committees themselves have struggled to get satisfactory evidence from witnesses.

59. In a recent prominent case the Treasury Select Committee came to the conclusion that the evidence of the principal witness in an inquiry *'fell well short of the standard that Parliament expects'*[27] yet neither the Committee nor the House has any real power to deal with that entirely unsatisfactory situation.

60. The present weaknesses – if they are to be remedied – can only be remedied by statute. An example is afforded by the Australian Parliamentary Privileges Act 1987. This gives Parliament the power to impose fines (on a stated scale) for those who commit contempts (the Act does not define contempts in terms but rather indicates the threshold for measuring them[28]) as well as the power to impose a prison sentence of up to six months (with a possibility of

25 Standard and Privileges Committee Fifth Report (2003-04).

26 See Richard Gordon QC & Amy Street, *'Select Committees and Coercive Powers – Clarity or Confusion?'* The Constitution Society, 2012. p.21.

27 Treasury Select Committee Second Report of Session 2012-13 'Fixing Libor: preliminary findings' HC 481-1: paragraph 144. For another recent example of such difficulties see Culture Media and Sport Select Committee Eleventh Report 'News International and Phone Hacking' HC 901-1 (2010-12).

28 See Australian Parliamentary Privileges Act 1987 (as amended) s.4 (Essential Element of offences) and paragraphs 65-70 below.

rescinding the decision).[29] Procedures for due process in the execution of these powers have been put in place.

Use of Select Committee evidence in court

61. During the decade and more since the publication of the 1999 JC Report there has, in practice, been increased questioning and reliance upon Select Committee reports and evidence in the courts, disturbing the principle of the separation of jurisdictions between the legislature and the judiciary. Such incursions, which go beyond the permissible examination of proceedings following *Pepper v. Hart*[30] (where recourse to Parliamentary proceedings is permissible to seek clarification of the meaning of statutory provisions), arise from a lack of clear guidance (in the form of a code) and necessitate repeated interventions by the Speaker of the House of Commons (and the Clerk of the Parliaments) which are not binding on the courts.

Committee reports since the 1999 Joint Committee

62. A number of other Committees have supported the introductions of a comprehensive Privileges Act. Examining the Parliamentary Standards Bill in 2009 (one of whose provisions created a new offence of providing false or misleading information for allowances claims) the Justice Select Committee considered it necessary for the whole area of privilege to be re-examined and warned against piecemeal reform.[31]

29 Ibid. s.7 (Penalties Imposed by Houses); s. 12 (Protection of Witnesses) and s. 13 (Unauthorised disclosure of Evidence).

30 See Erskine May op.cit. p. 231 ff & 297 ff.

31 Justice Committee Eleventh Report, HC 923 (2008-09) paragraph 95.

63. At about the same time the Joint Committee on the Draft Bribery Bill returned to the matter raised by the Joint Committee on Parliamentary Privilege on the possible use of Parliamentary proceedings in cases when Members were accused of bribery. The draft Bribery Bill of 2009 included a Clause laying aside Article IX by making it possible to admit words or conduct of MPs or peers in proceedings for a bribery offence where the MP or peer was a defendant or co-defendant. The Joint Committee recommended that proposed changes in the draft Bill be omitted since it would conflict with the provisions of the Parliamentary Standards Act and it suggested such evidential problems should be provided for in a Privileges Act.[32]

64. The Joint Committee on Human Rights drew attention to the implications of how the requirements of fairness under the Convention of Human Rights could be met in legislation.[33] The Committee on the Issue of Privilege suggested that a new Joint Committee should undertake a comprehensive review '*setting out to define and limit Parliamentary privilege in statute*.'[34]

Parallel developments – the Australian Parliamentary Privileges Act 1987

65. Of the three matters set out above which have arisen since the 1999 JC Report, two (namely Select Committee powers and the use of Parliamentary material in evidence) are addressed by provisions of the Australian Parliamentary

32 Report of the Joint Committee on Draft Bribery Bill, HL 115-I, HC 403 I (2008-09) paragraphs 224-225.

33 Joint Committee on Human Rights, Nineteenth Report, HL 124, HC 844 (2008-09).

34 Report of the Committee on Issue of Privilege, HC 162 (2009-10) paragraph 169.

Privileges Act 1987. In addition, the Australian Parliament has provided by internal regulation (in the form of Standing Orders) for citizens who consider they have been victimised by the use of Parliamentary privilege to present their views to a Parliamentary committee (the presiding officers acting as an initial filter).

66. The Australian Act is the principal comparative model for codification in the UK since it is in place in a Commonwealth country with a similar common law tradition.[35] The Australian Act begins with definitions (as envisaged by the Joint Committee on Parliamentary privilege in their recommendation) but it does so in a broad way to maintain maximum flexibility. Thus contempt or offences against the Houses are not defined in terms but rather the principle is stated and a threshold set. The Act states that conduct does not constitute an offence against the Houses *'unless it amounts, or is intended to amount to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance of a member of a member's duties as a member'*.[36]

67. The Act sets out penalties for committing contempts in the presence of the Houses or their committees. Fines range from A$5,000 for individuals to A$25,000 for corporations. There is also provision for imprisonment (and the release of anyone so imprisoned) by order of resolution of either House.

68. Other provisions of the Act deal with the reporting of proceedings with the defence of 'fair and accurate'

35 Other commonwealth countries considered as 'constitutional democracies' such as South Africa have discrete privileges statutes.

36 Australian Parliamentary Privileges Act 1987 (as amended) s.4.

reporting in actions for defamation against those reporting;[37] protection of witnesses from 'fraud, intimidation, force or threat';[38] unauthorised disclosure of evidence;[39] certain immunities from arrest and court attendance by Members.[40] However the application of Federal law in the precincts is re-asserted in case of doubt.[41] Members are not protected from criminal prosecution by Parliamentary privilege.

69. One of the most important sections of the Australian Act deals with Parliamentary privilege in the context of court proceedings.[42] The section begins with a declaration that the provisions of Article IX of the Bill of Rights apply to Parliament. The next subsection defines *'proceedings in Parliament'* as *'all words spoken or acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the House or of a committee*', and, *'without limiting the generality of the foregoing*', includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to the House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

37 Ibid. s. 10.
38 Ibid. s. 12.
39 Ibid. s. 13.
40 Ibid. s.14.
41 Ibid. s. 15.
42 Ibid. s. 16.

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of the House or a committee and the document so formulated, made or published.[43]

70. Further subsections prohibit the production of evidence, questions, statements, submissions or comments made in Parliament to be used in court or tribunal proceedings which either question proceedings or attempt to draw conclusions from them. Exceptions are provided for the use of such evidence so far as they relate to Section 57 of the Constitution (Disagreement between the Houses) as well as to the interpretation of an Act, following the principles established in *Pepper v. Hart*.

The Government Green Paper

71. Although the Government expresses concern that *'Parliamentary privilege is little understood outside Westminster'* [44] the Government Green Paper, including proposed draft clauses of a Parliamentary Privilege Bill, does not envisage a comprehensive statute. While suggesting that a review of Parliamentary privilege is long overdue the Green Paper states fairly baldly that the *'Government does not believe that the case has yet been made for codification of privilege in a Parliamentary Privilege Act'*[45] along the Australian model since in Australia, in contrast to the UK, 'there *was a clear view that privilege was being applied by the courts in a way contrary to the view of Parliament as to how it ought to operate*'[46]. The question

43 Ibid. s. 16 (2).

44 Parliamentary Privilege April 2012 Cm 8318 Foreword.

45 Ibid. paragraph 37.

46 Ibid. paragraph 38.

put out for consultation on this point is expressed in the negative, namely *'Do you agree that the case has not been made for a comprehensive codification of Parliamentary privilege?'*[47]

72. Instead the focus of the Government Green Paper is on various discrete points, the principal one of which is tackling the public perception that privilege puts Members above the law, especially as, in 2010, certain Members and a Peer attempted to invoke Parliamentary privilege to prevent criminal prosecutions for offences relating to Parliamentary expenses.

73. While acknowledging that these attempts failed, the Government's view remains that *'it is open to question whether it should be possible for Parliamentary privilege to prevent Members being successfully prosecuted for criminal offences'*.[48]

74. This concern leads to the principal recommendation in the Government Green Paper which is to enable Parliamentary proceedings to be considered as evidence in cases of alleged criminality. Clauses 1 to 3 of a proposed draft Bill address matters of the admissibility of evidence in relation to proceedings in Parliament, laying aside the absolute protection of privilege in such cases. The removal of that protection is qualified by a list of offences to which it shall not apply and the consent for use of such material is needed from the prosecuting authority (that is the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions).

47 Ibid. page 15, Q1.

48 Ibid. paragraph 5.

75. One discrete area in which the Government makes proposals in its Green Paper is the need for clarifying the position of lay Members of the Committee on Standards in respect of the protection of privilege in the matter of voting, something unclear in present circumstances since they are not Members of either House.[49]

76. The final set of proposals in the Green Paper are amendments to the Parliamentary Papers Act 1840 on the burden of proof in cases under Section 3 of the Act (pointed to by the 1999 JC Report) and measures rectifying inconsistencies between the treatment of print and broadcasting media. In so far as the burden of proof is concerned, the Government proposal inserts a new subsection in the 1840 Act stating that *'the extract or abstract shall be treated as shown to have been published bona fide and without malice unless the contrary is shown*'.[50] The other provision makes clear that proceedings in respect of broadcasts shall be stayed unless a claimant or the prosecution can prove malice.[51]

UK Bill of Rights

77. While the domestic Human Rights Commission considering the replacement of the Human Rights Act 1998 has stalled and therefore made the matter less urgent, indications from Government are that it may still pursue the objective of a new statute. As has already been shown in the consideration of the case of *A v. UK* (2002) there is a potential clash between any modern system of human rights and the current absolute freedom

49 Ibid. p. 59.

50 Ibid. p.75.

51 Ibid.

of Parliamentary privilege. Any new UK law would need to acknowledge Parliamentary sovereignty but, at the same time, Parliament might wish to consider a more modern approach to human rights by allowing, as is the case in the Australian jurisdiction, citizens to have a right to make representations when they consider they have been defamed or in another way harmed by the exercise of Parliamentary privilege. Such a complaint could be considered by the Committee of Privileges with clear restrictions (including considering cases only when an individual has been named) and the possible filter of the presiding officers.

The 2013 Joint Committee on Parliamentary privilege

78. A Joint Committee on Parliamentary Privilege was set up in 2013 (2013 JC) to examine the Green Paper recommendations. It received both oral and written evidence and is due to report later in the year. At the time of writing this paper, the authors have not seen the 2013 JC's Report but have read and considered the oral and written evidence given to the Committee (as well as giving evidence themselves to the Committee).[52] Some illustrative references are given below to questions put to some of the witnesses and to some of the evidence during the 2013 JC's inquiry.

52 Sir Malcolm Jack gave written and oral evidence and Richard Gordon QC put in written evidence.

Part 4 – Substantive issues on codification

Definitional issues - introduction

79. As foreshadowed above, Parliamentary privilege has two sources; one statutory, the other derived from the *lex Parliamenti* which became recognised as part of common law. Its statutory source is Article IX of the Bill of Rights. Its common law source is the Houses' claim to absolute control of internal jurisdiction or so-called exclusive cognisance. Definitional issues arise with respect to both Article IX and exclusive cognisance. Not the least of these is the overlap between the two and the uncertainty of application of each.

80. An important factor in the context of whether privilege should be codified is whether the problems of definition are outweighed by other considerations. As we have seen the 1999 JC Report[53] recommended a comprehensive Parliamentary Privileges Act along the lines of the Australian Parliamentary Privileges Act 1987.

81. This view has been challenged in recent years although articulation of the disadvantages of codification has not always been as precisely expressed as perhaps it might have been. For example, giving evidence before the 2013 JC Lord Chief Justice Judge observed that *'[u]nless you are dissatisfied with the way in which your privileges operate, I would leave this well alone'*.[54]

82. What follows is an attempt to evaluate with more clarity

53 See above paragraphs 5, 42, and 44 to 47.

54 Uncorrected transcript 5 March 2013 Q239.

the ways in which to *'leave this well alone'* have potential disadvantages as well as possible advantages. Ultimately, in deciding whether or not to codify Parliamentary privilege Parliament will, amongst other considerations, be required to make a judgment on the risks attached to the legislative process itself as opposed to allowing matters to evolve more gradually.

Article IX of the Bill of Rights – relationship between definition and codification

83. Article IX of the Bill of Rights stipulates that *'the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'*

84. The assertion here of the right of freedom of speech in Parliament is unequivocal but its precise scope and boundaries are less than clear, given the different language and usage of the late seventeenth century when it was drafted. Such imprecision of wording gives potential for judicial intervention in the affairs of Parliament, something that indeed has taken place throughout the nineteenth and twentieth centuries.[55]

85. An important issue in terms of codification is not whether a constitutional entitlement to freedom of speech in Parliament should, in general, be preserved but, rather, whether the best means of preserving it in a modern setting but with a minimum of judicial intervention is by

55 The Claim of Right Act 1689, passed by the Scottish Convention, was phrased differently and, it may be thought, at least for practical purposes more precisely. It provided that *'for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be frequently called and allowed to sit, and the freedom of speech and debate secured to the members'*.

codification of the privilege or by leaving Article IX in its present form.

86. In terms of drafting precision this question can, it is suggested, only properly be addressed by evaluating (and balancing) the following considerations: (i) the current degree of imprecision in Article IX, (ii) the practical consequences of that imprecision and (iii) the benefits and dis-benefits of a greater degree of precision. In assessing the benefits and dis-benefits of greater precision there are two particular matters to consider. These are, first, the likely consequences of clearer definitions and, second, the wish (or need) clearly to amend the scope of freedom of speech in Parliament in conditions very different to those prevailing when Article IX was enacted.

Imprecision in Article IX

87. The 1999 JC Report noted the imprecision in Article IX. It commented on the uncertainty that remained despite *'many legal decisions'* on two basic points, namely: (i) what is covered by the phrase *'proceedings in Parliament'* and (ii) what is meant by *'impeached or questioned in any court or place out of Parliament'*.[56]

Practical effects of imprecision

88. Two practical consequences flow from this imprecision. First, unless the meaning of a statutory phrase is clear the phrase will have to be applied to new situations. Since the interpretation of statutes is, pre-eminently, a matter for the courts it is inevitable that where interpretation is needed the courts will be invited to adjudicate. An ambiguously

56 Op. cit. at paragraph 37.

phrased statute gives rise to greater need of interpretation than one that has been clearly drafted.

89. Secondly, to the extent that the courts are, as far as judicial interpretation is concerned, the arbiters of the meaning of Article IX it follows that the courts may interpret and have interpreted Article IX in a manner that expands or contracts what Parliament considers to be the scope of, and protection afforded by, Parliamentary privilege. The scope for such expansion or contraction of Parliamentary privilege is correspondingly less likely if legislation is unequivocal.

Benefits and disadvantages of greater clarity

90. The benefits of greater clarity are, at least in theory, twofold. Both are foreshadowed above. First, the clearer the drafting, the less need will there be for recourse to the courts for interpretation of the meaning of a particular phrase. Second, the clearer the drafting, the more the prospect is removed of the judiciary cutting down the scope of the Parliamentary privilege intended by Parliament.

91. These – perhaps obvious – benefits are enhanced by a further consideration. If it were desired to strengthen aspects of Parliamentary privilege as, for example, by strengthening the powers of Select Committees in respect of proceedings before such committees then the only way in which this could be achieved effectively would be by primary legislation. The difficulties of achieving this in any effective way by standing orders or by a declaratory resolution of Parliament are considered later. However, if the sole method of achieving what Parliament might consider to be desirable improvements to the current

scope of Parliamentary privilege is, in fact, by legislation then improved clarity in such legislation (compared to that in the Article IX of the Bill of Rights) would be a necessary priority.

92. Potential dis-benefits lie not so much in the issue of clarity of drafting as in the fact that the arguments for greater clarity drive the debate for codification of privilege and may be thought to beg the question of whether codification might lead to problems worse than those already created by imprecise legislative drafting in the Bill of Rights.

93. A potentially adverse consequence of codification that might be anticipated is that of unwelcome judicial intervention in the affairs of Parliament flowing from modern legislation providing for a comprehensive set of rules relating to privilege. Thus far, this concern has not been articulated forcefully in any formal manner although, as noted below, real tensions appear to be surfacing in Westminster about the scope for what is seen as unconstitutional judicial activism if Parliamentary privilege were to be codified.

94. Both the 1999 JC Report and the Government Green Paper trod carefully in the respective ways in which they addressed the constitutional relationship between the courts and Parliament. The JC Report, after welcoming the expansion of judicial review, observed that *'[t]he courts must be vigilant to ensure that judicial processes are not used for political ends in a manner which interferes with Parliament's conduct of its business.'*[57] However, the 1999 JC appears to have taken the view that judicial review is (uniquely) exempt from the prohibitions in Article IX

57 JC Report 1999 paragraph 54.

(whilst recommending that all court proceedings in which a Government decision is material should be exempt from Article IX).[58]

95. This view, as suggested later, is not correct and derives from an incorrect assumption being drawn from the fact that Parliamentary materials have sometimes been used before courts in judicial review proceedings. It was assumed from the fact of Parliamentary materials being used in applications for judicial review in very limited circumstances that judicial review was an exception to the application of Article IX of the Bill of Rights.[59] However, in fact, judicial review has never been treated by the courts as an exception to Article IX.

96. Given that the 1999 JC considered that, with only limited exception (that being, essentially, judicial review proceedings where Article IX was thought not to apply and certain other court proceedings where a Government decision was under scrutiny) codification of Parliamentary privilege should continue to protect Parliamentary proceedings from being impeached or questioned in any court[60], it is perhaps less than clear how the 1999 JC would have responded to current apprehension of judicial activism (which would, in fact, be most likely to arise in the context of judicial review challenges) had it appreciated that Article IX applies to all court proceedings including judicial review.

97. Concern over judicial activism if Parliamentary privilege were to be codified in legislation has, thus far, not been stated in clear terms. Although the Government

58 Ibid. paragraph 55.

59 Ibid. paragraphs 46-55.

60 Ibid. paragraphs 88-90.

Green Paper refers to adverse consequences flowing from codification (to achieve greater drafting precision) it does so in somewhat oblique terms. For example, at paragraph 59, after referring to ambiguity in Article IX in respect of what is meant by *'proceedings in Parliament'* it observes (without identifying any reason for the suggested problem) that *'...by making statutory provision, the determination of whether any particular material was subject to privilege or not would be considered by the courts as a matter of modern statutory interpretation, which may have the unintended effect of eroding or weakening Parliamentary privilege'*. The relationship between ambiguity and the need for improved drafting in new legislation is explored at some length in the Green Paper[61] but at no stage is it suggested that there is a risk of judicial activism – were privilege to be codified – which may outweigh the benefits of clearer drafting (and, hence, of codification).

98. However, concerns over judicial activism in the event of codification have surfaced informally but at an authoritative level. The most recent indications are, indeed, to be found in many of the questions put to, and answers given by, witnesses to the 2013 JC. Detailed examples are not given here but can be located in the written record of oral evidence on the 2013 JC website. An example of the 'tone' of some of the exchanges is to be found in the (at the time of writing uncorrected) evidence of Michael Carpenter (Speaker's Counsel) in the question posed by Mr William Cash MP:

> *'Q 214 Mr Cash: What mischief, if any, in your opinion, results in the courts questioning Parliamentary proceedings?*

61 See, generally, paragraphs 50-88.

> *Michael Carpenter: Simply, they are being drawn into political questions. They immediately put their own judicial impartiality in issue if they start doing that. They start assuming the function of another branch of the state – they start assuming a legislative/political function – just as there are problems when a Select Committee, speaking at the House of Commons, engages in a lengthy discussion of the rights and duties of a third party and seeks to make determinations about that, and is therefore intruding on the judicial domain. Each side, in a spirit of comity, needs to stick to its constitutional functions.'* [62]

99. The concern that, by being afforded the opportunity for increased statutory interpretation (in the event of codification of privilege) judges will stray into impermissible activism that distorts the constitutional balance is a real one and is felt by many at Westminster. It is, as explained above, rarely articulated but the tone of the Select Committee exchanges reinforces the experience of the authors of this Paper that a strong feeling exists among many MPs and Peers that the senior judiciary ought not to be given a free rein to interpret statutes in the arena of Parliamentary privilege because this would only serve to accentuate an increasing trend of judicial activism already triggered by 'constitutional' statutes such as the Human Rights Act 1998. The undesirability of this kind of judicial activism without any form of Parliamentary scrutiny over judicial appointments is, perhaps, heightened by a potential 'democratic deficit' reflected in the current lack of diversity in the senior judiciary. This lack of diversity

62 Uncorrected transcript Tuesday 12 February 2013 (David Beamish, Michael Carpenter, Peter Milledge and Sir Robert Rogers KCB). See, also, uncorrected transcript 5March 2013 Q 245 from Bernard Jenkin MP '*[b]ut, bluntly, the judges appear to be the winners, and Parliament appears to be the loser*'.

and its link to the need for some form of Parliamentary examination of judicial appointments at the most senior level was commented upon in a recent authoritative report from CentreForum.[63]

100. It is, therefore, suggested that (here as in much else in the arena of codification of privilege) a careful balancing exercise is required in terms of evaluating the benefits and dis-benefits of codification in terms of the drafting arguments. The desirability of greater clarity in modern legislation – assuming that it stood alone as a potential reason for codification – is perhaps not decisive. It may, for example, be counterbalanced by arguments over the benefits of flexibility and the gradual evolution of a consensus between the courts and Parliament over historic concepts embedded in Article IX. Moreover, assuming that drafting was the sole issue, it may be thought that (if it were justified) the risk of a distortion of the constitutional balance by judicial activism could outweigh the advantages of precision. This, in turn, would require some consideration of the scope that there might be for judicial activism in any event if the drafting were sufficiently clear.

Codification issues in relation to exclusive cognisance

101. A number of points arise in respect of exclusive cognisance; that is, the right of Parliament to regulate its own internal proceedings free from intervention by the courts.

63 See Professor Alan Paterson OBE and Christopher Paterson '*Guarding the Guardians – towards an independent, accountable and diverse senior judiciary*' (CentreForum, March 2012). The need for greater judicial diversity was also commented on by the House of Lords Constitution Committee in its 25th report '*Judicial Appointments*' 7th March 2012.

102. It may appear that Parliament itself is the sole arbiter of the scope of its internal jurisdiction However, this is very far from being the position. In *R v. Chaytor*[64] the overlapping relationship between Article IX of the Bill of Rights and exclusive cognisance was elucidated. The following points should be noted from the judgment of the Supreme Court:

- Exclusive cognisance (sometimes known as exclusive jurisdiction) predates Article IX of the Bill of Rights[65] and is, therefore, a species of the common law as opposed to being statutory.
- Although Parliament has the exclusive right to determine matters falling within its exclusive jurisdiction, it cannot bring a matter within its exclusive jurisdiction simply by declaring it to be so.[66]
- Thus, (as in the case of the scope of Article IX of the Bill of Rights) the decision as to the scope of exclusive cognisance is ultimately one to be made by the courts rather than by Parliament.[67] But unlike Article IX (which cannot be waived), each House of Parliament is entitled to waive its exclusive cognisance.[68]

103. It is easy to see that, in principle, the internal proceedings of Parliament are, in terms of their regulation, essentially

64 *R v. Chaytor* [2010] UK SC 52.

65 *Chaytor* at paragraph 13.

66 *Chaytor* at paragraph 14; *Stockdale v. Hansard* (1839) 9 Ad & E 1, 147-148. See, most recently, Judge LCJ's answer to the 2013 JC (uncorrected transcript 5 March 2013 at Q248).

67 *Chaytor* at paragraph 15.

68 *Chaytor* at paragraph 63.

a matter for each House. Nonetheless, as with Article IX of the Bill of Rights, the boundary of what is a matter for Parliament is imprecise. In the *Chaytor* case, internal arrangements of the House regulating Members' allowances, but not deemed to be closely connected to proceedings, were the subject of questioning in the courts.

104. It may be that Parliamentarians have not always understood the consequences of such imprecision. There appears to be a perception that, at least in the arena of exclusive cognisance, Parliament is immune from the intervention of the courts provided that it does not legislate. Thus, in questioning by the 2013 JC Bernard Jenkin MP observed[69] that *'[w]e are trapped in an oxymoron: what is in our exclusive cognisance as a result of the status quo is unchallengeable by the courts or anyone seeking to use the courts. As soon as we legislate to extend our exclusive cognisance, we are inviting the courts to adjudicate on that question because of statute.'*

105. This observation does not, however, reflect the true position in law. The scope and ambit of exclusive cognisance may be determined at any time by the courts if raised as an issue before the courts in a case. *R v. Chaytor* is an illustration of this. The fact that a *status quo* has subsisted without challenge (and, therefore, without prior judicial adjudication) does not render that *status quo* immune from judicial adjudication; nor does the fact that there is no statute under consideration.

69 Q 247 – uncorrected transcript 5 March 2013.

The problem of non-members

106. Whether it is located in statute or in the common law, the source of Parliamentary privilege is, essentially, functional; that is, it is a test that is applied by reference to the functions of Parliament. Whether the appropriate reference point is that of '*proceedings in Parliament*' (Article IX) or that of *the internal arrangements of the House* (exclusive cognisance) neither reference point looks to the impact of those proceedings or those arrangements upon individuals or bodies that are not themselves part of the internal arrangements of Parliament but are, nonetheless, affected by them.

107. The increasing impact of what happens in Parliament on third parties is left untouched by a purely functional test of Parliamentary privilege. A functional approach seems coherent where what is, essentially, at stake is free speech in Parliament itself. It is also entirely rational to seek to ensure that Parliament is not distracted or deterred from undertaking its democratic functions by concern over unnecessary judicial intervention.

108. Thus, the historical reasons for needing a strong form of Parliamentary privilege to protect Parliament from an all-powerful monarchy undoubtedly supported a free speech rationale and still does in regimes where the executive seeks to stifle Parliamentary debate. Although the monarchy is no longer all-powerful in that historical sense a free speech imperative continues to be important to ensure that Parliament is able to do its work effectively. However, in more modern times it is, as the earlier cited comments tend to suggest, what many see as an over-strong judiciary that perhaps threatens to inhibit Parliament in the discharge of its necessary functions.

109. Once the potential antagonist to Parliament is seen to be more an over-zealous judiciary rather than an over-mighty monarchy or even executive, the need for free expression within Parliament may be thought to need to accommodate third party (non-member) interests more than it currently does. This is because the courts often determine proceedings brought by or against third parties who are, in some way, materially affected by what is said, done or not done in Parliament.

110. Examples of this are given in the next sections. It should be borne in mind here that if, and to the extent that, third parties' interests are adversely affected by not being able to use Parliamentary materials in court because of Parliamentary privilege constraints such a situation may result in great unfairness. This is a relatively new dynamic which was not obviously an issue at the time that the Bill of Rights was enacted or over the long period when the Houses asserted their rights to determine their internal arrangements. That unfairness could be ameliorated by codifying Parliamentary privilege and making necessary and specific exceptions to the scope of that privilege. In other words, if there is a need for a more finely tuned doctrine of Parliamentary privilege, the meeting of that need may only be achieved by some form of codification.

111. To this should be added the material consideration that if Parliamentary privilege is not modified to accommodate third party interests this may lead to the courts (the common law arbiters of the extent of privilege) taking matters into their own hands and declaring, in individual (and possibly extreme) cases, that Parliamentary privilege does not prevent the questioning of proceedings in Parliament.

Part 5 – Potential practical consequences of a failure to codify

112. It follows from the above that arguments for the codification of Parliamentary privilege extend beyond definitional or syntactic considerations and include possible practical consequences of relying on a purely evolutionary approach. The principal potential consequences and outcomes of a failure to codify are considered below.

Select Committees

113. The incremental growth and influence of Select Committees have greatly improved the scrutiny of the House over the formulation and implementation of Government policy. As Erskine May observes: *'increasingly this scrutiny work has become the most widely recognised and public means by which Parliament holds government Ministers and their departments to account.'*[70]

114. It is, though, not always understood that there is a material relationship between the need for the efficient discharge of the functions of Select Committees and the correlative scope of Parliamentary privilege. On the one hand, Select Committees require clear and effective coercive powers to ensure that witnesses attend before them and give truthful and complete evidence as we have already considered.[71] Many now believe that Select Committees do not possess effective coercive powers. This absence of clear or effective power has been extensively considered in a recent paper commissioned by The Constitution Society.[72]

70 Erskine May op. cit. at p. 799.

71 See above paragraphs 51 to 60.

72 Richard Gordon QC and Amy Street op. cit.

115. On the other hand, although it is axiomatic that witnesses appearing before and providing information to Select Committees are protected in the evidence that they give by Parliamentary privilege, this protection, as illustrated below, does not afford either sufficient protection to the witness concerned or, indeed, sufficient protection to third parties who may be affected by the conduct or result of Select Committee proceedings.

116. In order to reconcile these imperatives (the need for stronger coercive Select Committee powers with adequate protection for witnesses and third parties affected by what happens before Select Committees) it may be necessary both to strengthen Select Committee powers whilst at the same time according sufficient protection to those affected – either directly or indirectly – by the conduct and outcome of proceedings before Select Committees. This would mean that there may have to be some modifications made as to the scope of Parliamentary privilege. It would be surprising if this could be effected other than through legislation.

117. As explained in the above-mentioned Constitution Society paper:

> '*In the modern state, political power can only be exercised through institutions one of which is the courts. For a variety of reasons, what happens in Parliament can no longer necessarily be divorced, as perhaps it once could, from the scrutiny of the courts, from the operation of supra-national systems of law or, in consequence, from the legal rights and interests both of witnesses appearing before Select Committees or, in some instances, the legal rights and interests of third parties who are affected by the publication of evidence given to Select Committees. If and to the extent that legal issues arise with respect to Select*

> *Committee proceedings in the context of enforcement powers which may be created it is likely that courts will be required to adjudicate on them. This may lead to Parliamentary privilege being narrowed by court rulings.*
>
> *The creation of enforcement powers of Select Committees by legislation may, thus, itself help to shape the future of the scope of Parliamentary privilege if that doctrine comes to be tested before the senior judges."*[73]

118. Rather than waiting for the courts to intervene to protect witnesses who (for example) claim that their fundamental rights have been affected by the conduct of particular Select Committee proceedings it may be desirable to anticipate real problems that are likely to arise in practice.

119. If Select Committees were to be granted coercive powers this could, in procedural terms, be achieved either by a declaratory resolution of the House or by modification of current standing orders. The difficulty with these options is that neither alters the law as applied by the courts.[74] In practical terms it would be likely to have the effect of exacerbating as opposed to solving the potential issue of court intervention.

120. Expressed shortly, if Select Committees need greater clarity and coerciveness in their range of powers but merely legislate internally to achieve this it is not easy to see how the prospect of judicial intervention in the affairs of Parliament is not thereby increased. Issues may, for example, surface as to whether or not a standing order or a declaratory resolution in Parliament are, necessarily, immune from challenge in circumstances in which

73 Ibid. Pp. 17-18.

74 See, for example, Judge LCJ in evidence to the 2013 JC, uncorrected transcript of evidence March 5 2013 in answer to Q248 (p. 4).

Select Committee procedures or outcomes are claimed to violate EU law or Convention rights under the ECHR. If the courts (whether in the UK or in Luxembourg or Strasbourg) were to adjudicate on such matters it may be thought that there would be a far more serious erosion of Parliamentary privilege than if Parliament were to enact primary legislation that could be interpreted and applied by the courts in the usual way.

121. An important further aspect of this is that even if Parliament were to do nothing internally but seek to rely, instead, on a gradualist approach to Parliamentary privilege, there is arguably increasing unfairness and potential for legal challenges in the present un-codified state of affairs.

122. It is beyond the scope of this paper to detail individually the various issues having the potential to lead to judicial intervention that have already arisen with respect to Select Committee proceedings. The following three scenarios are illustrative rather than exhaustive:

- The findings of Select Committees can have potentially adverse and sometimes devastating consequences for those affected by them following a procedure that affords no obvious legal safeguards unless some form of due process comes to be guaranteed by the courts. The following is cited from an email to Richard Gordon QC in 2012 which (whether well founded or not) gives a flavour of the difficulties:[75]

75 This e-mail has been anonymised in order to protect the identity of its author.

'the ... Culture Media and Sport Select Committee used a report [in 2011] to publish serious, damaging but baseless allegations of corruption against ... the Qatar 2012 Bid Committee. I can't think of any other institution which would have been able or prepared to act in such an unmeasured way... I have significant concerns that Select Committees are in danger of migrating from their proper role as fact finders at large to mini Star Chambers with no recognisable due process. That may be good fun for their members and a good way to deliver on political agendas, but it cannot be good for the majesty of Parliament in the longer term. Ultimately, if they carry on like this, Strasbourg may have something to say on the SC procedures which would probably occasion something of a constitutional crisis.'

- On October 31 2012 the Comptroller and Auditor General ('C&AG') gave evidence to the Public Accounts Committee ('PAC') in which he was questioned by the Committee at some length after indicating that he considered that observance of his statutory duties made it impossible to disclose material to the Committee because of statutory confidentiality constraints.[76] The question at issue was whether the existence of Parliamentary privilege meant that he was bound to provide such material to the Committee or whether his statutory responsibilities prevented or at least excused him from making disclosure to the Committee. This would appear to be an arena in which the courts could become embroiled if, for example, (i) the C&AG had made disclosure and been

76 See uncorrected transcript of oral evidence to be published as HC 385-iii, October 31 2012.

the subject of judicial review for having made disclosure in ostensible breach of the statutory requirements or (ii) the PAC had insisted on disclosure and sought to hold the C&AG in contempt of Parliament if the material was not disclosed.

- When Rupert and James Murdoch did not accept the Culture, Media and Sport Select Committee's invitation to attend and give evidence, the Committee ordered them to attend.[77] They then agreed to attend but, before this happened, there was significant uncertainty and speculation as to what powers could be exercised against them if they continued to fail to comply. Moreover, had they applied to a court to protect them from having to appear on the footing (for example) that they could not be compelled to appear and to answer questions if such questions breached their common law privilege against self-incrimination it is by no means obvious either that either a domestic court or the European Court of Human Rights in Strasbourg would not have heard their applications and decided in their favour.

123. There are likely to be many more instances where the courts (whether domestic or international) could be invited to decide questions of law. The most obvious are where there is a contradiction between the legal obligations imposed by statute and obligations sought to be imposed by a select committee on witnesses giving evidence before it. Similar

77 For an account of the matter see Culture, Media & Sports Committee Eleventh report HC 903-i (2010-12) paragraph 4.

considerations would attach to other Parliamentary enquiries such as the recent Commission on Banking Standards.

Criminal proceedings

124. The relationship of codification of Parliamentary privilege to criminal proceedings is complex and may involve different considerations depending on what aspect of actual or putative criminal proceedings is under scrutiny balanced, always, against the imperatives of free speech in Parliament. However, it is precisely because different considerations may be engaged in whether privilege should apply that codification may be thought to be important.

125. There would seem to be at least three relevant aspects of criminal prosecutions or potential prosecutions that raise questions. These are:

- Whether MPs should always be protected by Parliamentary privilege even if they commit criminal offences in proceedings in Parliament.
- Whether statements made or evidence given in proceedings in Parliament should (where it currently applies) be protected by Parliamentary privilege or whether there is a case for exemptions without qualification where use of such statements or material is needed to assist the defence in criminal proceedings.
- Whether a person may legitimately be investigated by the police for possible criminal offences by reference to statements made or

evidence given in Parliament but on the footing that such statements or evidence cannot be used in any criminal prosecution that may be brought.

126. Whether MPs ought to be accorded protection from prosecution if they commit criminal offences in proceedings in Parliament depends, in material part, on how broad is the definition to be accorded to Article IX of the Bill of Rights and, in particular, to the phrase *'proceedings in Parliament'*. In *R* v. *Chaytor* it was because the Supreme Court gave Article IX a narrow construction that it was able to hold that MPs making fraudulent expenses claims were not protected by Parliamentary privilege. The policy arguments, in this area, for interpreting Article IX narrowly are strong and were examined in *R v. Chaytor.* Moreover the decisions of the courts accorded with the ancient practice of Parliament that privilege did not provide Members with immunity from criminal prosecution.

127. In terms of the codification of Parliamentary privilege in a criminal context, if the only issue that arose was Members' immunity from prosecution by reference to the scope of the privilege, there would be much to commend leaving the situation well alone. This was certainly the view of both the present Clerk of the House of Commons Sir Robert Rogers and David Beamish, Clerk of the Parliaments, who gave strong oral and written evidence to the 2013 JC on this point.

128. The Government Green Paper (see paragraph 94) observes that *'[i]t can be argued that it is wrong in principle to deny the courts access to any relevant evidence when the alleged act is serious enough to have been recognised as a criminal offence'*. With that in mind the Green Paper sets out draft

clauses that would waive Article IX in the case of certain criminal offences.

129. David Beamish's written evidence (4th February 2013) is especially emphatic in opposing this suggestion although he (like Sir Robert Rogers) focuses solely on the dangers of eroding Parliamentary privilege so as to support a criminal prosecution. Against that concern he suggests (see paragraph 15 of his written evidence) that reform in the form of such draft clauses would *'remedy a hypothetical mischief [the commission of criminal offences in the House without remedy] by inflicting very real and serious damage on a fundamental constitutional protection'*.

130. This is a value judgment and may be well founded. But the other issues that arise in relation to Parliamentary privilege and criminal proceedings appear to raise more potential challenges.

131. First, the unrestricted use of Parliamentary materials to assist a defendant may be crucial to whether or not an innocent person is convicted. The 1999 JC did not consider this issue. The Government Green Paper addresses the issue at paragraphs 149-150 and recommends that no safeguards should be needed before the defence is allowed to make use of Parliamentary statements or other materials to support a defence to a criminal charge. It would allow the prosecution to deploy rebuttal evidence without further safeguards. This could, presumably, lead to witnesses being able to be cross-examined as to what they have said in Parliament, especially if previously inconsistent Parliamentary statements have been made. This may, however, be a small price to pay for a fair trial and compliance with the State's obligations of due process under Article 6 of the European Convention on Human Rights.

132. Secondly, specific considerations may be thought to attach to whether to permit the use of incriminating Parliamentary statements or other material derivatively in a police investigation provided that no reference to such statements could be made at any trial. Recent history suggests that reliance may be sought to be placed on Parliamentary privilege by those making incriminating statements in the House and that it may be unfair to allow such materials to be used in subsequent police investigations. On the other hand, there would not seem to be inevitably legitimate conflict with free speech considerations provided that legislation made clear that: (i) statements and other Parliamentary information could not be use to support a criminal prosecution in court but that (ii) such information could be used by the police in order to garner independent and free-standing information to support a prosecution.

133. The present position in respect of Parliamentary privilege is that it excludes any use of materials involving impeaching or questioning what is said in Parliamentary proceedings. That somewhat monolithic effect of Parliamentary privilege may be thought to require some modification in the light of particular problems that may occur in criminal investigations and trials even if the central premise (that persons should not be liable to be prosecuted for what they say in Parliament) remains unaffected by other modifications.

134. The short point is that unless no modifications are considered necessary to the scope of Parliamentary privilege so as to accommodate the needs of a fair trial, some form of legislation may be thought to be needed in the context of criminal proceedings in order to discriminate between the respective classes of situation

where Parliamentary privilege does and does not apply. Without such distinction there is a real prospect of judicial intervention where Parliamentary privilege results in evidence otherwise helpful to a defence being excluded as inadmissible.

Civil proceedings

135. As with criminal prosecutions, issues as to the desirable scope of Parliamentary privilege affect civil proceedings. Some of the problems have been considered by the 1999 and 2013 JCs but others are more subtle and potentially more difficult to resolve.

136. The following issues are the most likely to arise in practice in relation to codification questions:

- Whether Parliamentary privilege should be modified so as not to continue to protect blatant disregard of injunctions granted by the courts by statements made in the House.
- Whether persons adversely affected by statements in the House may or should be able to obtain legal redress in respect of such statements.
- Whether a claimant or a defendant to civil proceedings should be able to use Parliamentary statements in aid of their case provided that use of such statements could not be used to impose civil liability upon the maker of the statement.

137. The relationship between the making of court 'anonymity' and 'super' injunctions and (deriving from Parliamentary privilege) immunity from civil liability for breaching

them by statements publicising them in Parliament is well known.[78] The underlying premise is that an MP (or any other person) cannot incur civil liability for committing a breach of the civil law in proceedings in Parliament.

138. Thus, some MPs have been bold enough to make statements in the House disclosing the names of parties who have been granted court injunctions with the aim of circumventing the intended effect of the injunction. The alleged dumping of toxic waste by Trafigura is a notable recent example of a court injunction breached in proceedings in Parliament (see paragraph 164 of the Green Paper). Such actions erode the comity that should exist between the courts and Parliament and threaten also to subvert the legitimacy of this aspect of Parliamentary privilege. There have been a number of high-profile investigations into this aspect of Parliamentary privilege but with no clear result.[79]

139. The Government Green Paper (see paragraph 167) does not recommend legislation in this area. It considers that internal Parliamentary procedures (as opposed to legislation) should be invoked if court orders were routinely to be breached in proceedings in Parliament. This view, supported by the evidence before the 2013 JC, is understandable. To legislate to cure this problem would be at once to provide exceptions to the core principle

78 Mr Dodd (Legal Editor of the Press Association) explained the difference succinctly. An anonymised injunction prevents publication identifying the parties; a 'super' injunction prevents publication even of the fact of the injunction being granted.

79 Culture, Media and Sport Select Committee, Second Report of Session 2009-10, *Press Standards, Privacy and libel*, HC 362-1, 24 February 2010; Report of the Committee on Super-Injunctions, *Super-Injunctions, Anonymised injunctions and Open Justice*, 20 May 2011; Joint Committee on Privacy and Injunctions, Report of Session 2010-12, *Privacy and Injunctions*, HL 273/HC 1443, 27 March 2012.

that Parliamentary privilege operates to prevent the imposition of criminal or civil liability on Members and others appearing before the House and to draw MPs and others more closely into the processes of the courts.

140. However, the problems are greater than when the 1999 JC reported because of the entry into force of the Human Rights Act on 2nd October 2000. The proposition that the maker of a statement in Parliament should not, ordinarily, incur civil liability because of immunity conferred by Parliamentary privilege may need to be reconsidered having regard to the requirements of Article 8 of the European Convention (right to respect for private life). Assuming that a court injunction (whether 'super' or anonymised) has – striking a fair balance – operated to protect a person's privacy may afford to the protected persons Convention privacy rights which may be sought to be enforced before the European Court of Human Rights in Strasbourg. Whether or not Parliamentary privilege would be viewed as a proportionate (and hence lawful) response to infringe such rights cannot be guaranteed.

141. Moreover, whether internal regulation could remedy breaches of court injunctions by reference in Parliamentary debate is politically sensitive. Senior members of the judiciary have expressed concern about the flouting of court orders (particularly of 'anonymised' injunctions) The problem here is that a single member of either House can interfere directly with the judgment of a court, arrived at after careful and detailed consideration of evidence.

142. The Procedure Committee of 1996, having said that the onus lies with Members individually and collectively to maintain high standards, went onto to say that some restriction of freedom of speech in this respect (analogous

to that in the self-denying principle of the sub-judice rules) would be acceptable.[80] However, the Joint Committee on Privacy and Injunctions stood back from any proposal to prevent reference in Parliament on the grounds that so far breaches have been too infrequent to justify the imposition of a restriction on freedom of speech.[81]

143. It is unclear how self regulation could be achieved as the Chair could normally only act when the reference had already been cited by a Member and the breach of the court order thereby made. Expunging the record in the age of modern technological communication is, arguably, meaningless.

144. This issue merges with the second and third issues, namely whether a person adversely affected by statements made in Parliament should be deprived of all rights to legal redress. If it is the maker of the statement who is sought to be made legally liable then considerations of free speech in Parliament plainly arise. It may be that the European Court of Human Rights would, in a particular case, decide that redress ought in principle to be available even given the importance of Parliamentary freedom of speech.

145. It is even easier to envisage a situation (not obviously contemplated by the Government Green Paper or in the evidence given to the 2013 JC) in which the making of a statement in Parliament may enable a person to rely on its truth in court in order to mount or to defend a civil case not against the maker of the statement but against a third party. For example, there was a debate as to whether or not Brodie Clark, the former head of the UK Border Force,

80 Select Committee on Procedure Second Report HC 252. (1995-96).

81 Joint Committee on Privacy and Injunctions 'Privacy and Injunctions' HL 273 HC 1443 (2010-12) paragraphs 210-231.

could rely on statements made before a Select Committee by Theresa May MP in any claim for unfair or wrongful dismissal.[82]

146. Although issues of hearsay may arise (and need to be legislated for) reasons for denying use of such material in the civil courts are not necessarily the same as those which would operate to prevent the maker of the statement from being liable in those courts for the making of the statement. Put another way, the 'chilling effect' on free speech in Parliament may be thought to be less compelling in circumstances in which no civil liability is sought to be imposed upon the maker of the statement. Conversely, refusing to allow such statements to be used in those kinds of civil proceedings may be considered by a court (especially the European Court of Human Rights in Strasbourg) to infringe due process entitlements under Article 6 of the ECHR even if Parliamentary privilege might legitimately be defended before that court to prevent the maker of a statement in proceedings in Parliament from being liable.

147. The relevance of these points to the codification debate is that it may be inappropriate to continue to apply a monolithic approach to Parliamentary privilege. Different situations may need to be approached differently, especially where the constraints on free speech by allowing Parliamentary statements to be impeached or questioned may be outweighed by the damaging effects on a person's fundamental rights by denying use of the statements.

82 See Head of Legal Blog www.headoflegal.com Carl Gardner, November 10 2011. This example is cited in *Select Committee Powers – Clarity or Confusion* fn above at p. 60.

Report

Parliamentary privilege: Evolution or codification?

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Parliamentary privilege is essential to the functioning of a modern, democratic Parliament. Free speech in Parliament is as crucial now as it was when the Bill of Rights was enacted in the seventeenth century. However if Parliament has an 'adversary' in the twenty-first century it is no longer an over-powerful monarch but may be an over-powerful judiciary.

While its constitutional importance remains paramount, the modern context of Parliamentary privilege has changed. Moreover, the word 'privilege' in our modern, democratic society has negative, elitist connotations. If the Houses are to justify privilege in the twenty-first century it is essential to convince the public that it remains a vital element in the functioning of Parliament in a democratic age.

This paper examines whether this is best achieved by leaving things alone or by principled legislation. It considers the Government's Green Paper on Parliamentary privilege and asks how real is the danger of judicial activism in the affairs of Parliament and whether that danger is increased or diminished by a new statute.

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