Parliament—additional material

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8.10 Parliamentary privilege

This discussion considers Article 9 in detail, but also goes on to consider the other main aspects of parliamentary privilege.

8.10.1 Introduction

Parliamentary privilege is a collection of rules which enables Parliament and its members to assert their independence against outside interference. It is set out in *Erskine May* as follows:

> Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.[1]

This shows that parliamentary privilege is a unique and specialist part of the law. As *Erskine May* states above, parliamentary privilege forms part of the 'law and custom of Parliament', which is the right of each House of Parliament to individually and collectively organise its own affairs.[2] This is a different source of law to statute or the common law as it is based largely on resolutions of each House of Parliament or custom. This includes the rules of procedure that each House adopts. Theoretically, Parliament can enforce these privileges as the High Court of Parliament, although referring to Parliament in its modern form as a court is perhaps misplaced as it bears very little sense to reality today. Yet this terminology does reflect how it is for Parliament and not the ordinary courts to enforce any breach of its privileges. It is open to Parliament, in an exercise of its supremacy, to place aspects of privilege on a statutory basis, the most notable example of this is Article 9 of the Bill of Rights.

'Privilege' is in many ways a misnomer, as privilege indicates some form of higher status not shared by others. A better phrase is arguably 'rights and immunities',[3] as this gives a better indication of the nature of these rules. The rationale behind the rules is that they protect the independence of both Houses of Parliament and its members, allowing them to scrutinise the executive and represent the interests of their constituents.

The privileges of the House of Commons and House of Lords are very similar, meaning that to avoid unnecessary repetition, this section focuses on the privileges of the House of Commons. One key difference is that the Commons is required to 'claim' their privileges from the Crown at the start of each Parliament. For this reason, on being appointed as

[1] Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usages of Parliament* (24th edn, LexisNexis 2011) 203. Subsequently called *Erskine May*.

[2] This is sometimes referred to by the Latin, *lex et consuetudo parliament*.

[3] Select Committee of the House of Commons on Parliamentary Privilege, *Report* (HC 1967–8, 34) para 14.

Speaker of the House of Commons, they must immediately 'claim' the privileges of the House, in a ceremony in the House of Lords, these includes the:

> freedom of speech in debate, to freedom from arrest, and to free access to Her Majesty whenever occasion shall arise, and that the most favourable construction shall be put upon all their proceedings.[4]

Whilst the privileges are 'most readily' conferred,[5] the ceremony serves as a reminder that historically the House of Commons has had to fight for its privileges.

Out of the four privileges claimed for, two now lack any real significance, these are the right of access to the monarch and the need for the most favourable construction. These reflect the time when the 'attitude of monarchs towards petitions by the House of Commons was unpredictable and sometimes intemperate'.[6] From the four privileges claimed this leaves the freedom of speech and the freedom from arrest. Other important privileges include the right of each House to regulate their own composition, the right of each House to have the 'exclusive cognisance' regarding their own internal proceedings, and the power to punish any breach of privilege or contempt of the House. Each of these privileges will be considered in turn.

8.10.2 Article 9 —Freedom of speech

In practice, this is the privilege which is most significant. This is the rule that no action can be brought in the courts against a member for what they have said or done in Parliament. This allows members to challenge the executive without fear or favour, 'if a person speaking in Parliament believes a fact or opinion needs to be raised in a debate, that person should not be deterred from raising it by fear of a criminal or civil liability'.[7]

This is now guaranteed by Article 9 of the Bill of Rights 1688 (referred to in the rest of this section as 'Article 9'), which states that:

> the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

This is an important constitutional principle, which underpins the relationship between Parliament and the courts, as it means that the courts cannot question what has been said in Parliament. In the *HS2* case, the Supreme Court took the view that this principle is of such fundamental constitutional importance that it may even override any obligations that arise from the UK's membership of the EU and the requirement of supremacy of EU law.[8]

With this right, Members are also placed under a responsibility to use this right with care. As the Speaker, John Bercow stated in 2010:

> [Article 9] is at the very heart of what we do here for our constituents, and it allows us to conduct our debates without fear of outside interference, but it is a freedom that we need to exercise responsibly in the public interest, and taking into account the interests of others outside this House. I would encourage any Member to research carefully and to take advice before exercising this freedom in sensitive or individual cases.[9]

To some extent, this right is restricted by self-regulation. First, it is the established practice under the *sub judice* rule, that Members should not refer to a case which is active before the courts in Parliament. The practical reason for this is the risk of prejudicing the case, with the possibility that a jury or judge is influenced by what has been said in Parliament. The risk is that the losing party in the case may feel (however unlikely it may or may not be) that they lost their case because of what was said in Parliament. Parliamentary debates can be reported by the media and, statements by a government minister, could be taken as expressing the view of the government on a particular case.

[4] HL Deb, 14 June 2017, vol 783, col 3.
[5] Ibid col 4.
[6] Colin R Munro, *Studies in Constitutional Law* (2nd edn, Butterworths 1999) 219.
[7] HM Government, *Parliamentary Privilege* (Cm 8318, 2012) para 3.
[8] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3. This case is discussed in more detail in 4.6.
[9] HC Deb, 19 May 2010, vol 510, col 9.

These factors risk compromising the independence of the judiciary. As the former Law Lord, Lord Nicholls stated: 'It is essential, if that role of the judiciary is to be discharged properly, that the judiciary should not only be, but also be seen to be, the only constitutional body for determining issues which come before the courts'.[10] In other words, the integrity of the court process would be compromised by members exercising their freedom of speech. This also reflects the spirit of comity between the legislature and the judiciary, in that the *sub judice* rule means that the resolution of individual disputes is left to the courts and Article 9 leaves the business of legislating to Parliament. The effect of these two rules is to foster mutual respect between these two parts of the constitution.

Other self-imposed restrictions include provisions of the MPs Code of Conduct, which states that MPs are not allowed to act as paid advocates for a particular cause or accept bribes.

In addition to being important that members have the freedom of speech, within a democracy, it is also important that what is said in Parliament can be reported in the media. This was the key issue in the case of *Stockdale v Hansard*.[11]

Case in depth: *Stockdale v Hansard* (1839) 12 ER 1112

By the order of the House of Commons, Hansard printed a report prepared by the Inspectors of Prisons into Newgate Prison. This report stated that a book published by Stockdale contained content described as 'indecent and obscene in the extreme' was being circulated around the prison. Stockdale sued for defamation. Hansard argued that he acted under an order of the House of Commons, which was the sole judge of its privileges and further the House had passed a resolution that its privileges could not be questioned. The court rejected these arguments on the basis that the House had no privilege to order the publication of defamatory information and that it could not create a new privilege by passing a resolution. The law could only be changed with the approval of both Houses of Parliament and the monarch.

The effect of this case meant that if anyone reporting the activities of Parliament published defamatory information, they themselves could be subject to a claim in defamation for repeating the statement. However, the member making the statement would be protected by Article 9. Consequently, this decision led to the Parliamentary Papers Act 1840, which makes any publication ordered by either House absolutely privileged and protected against any civil or criminal proceedings. Secondly, any extracts or abstracts of parliamentary proceedings is protected by qualified privilege, meaning that they are only protected if the extracts are bona fide and published without malice. This means that the official report of debates in both Houses and papers ordered to be published by either House are both absolutely privileged.

Generally, this does not cover most media reports of Parliament, which go beyond merely reporting what is recorded in Hansard and it is likely to include some comment or analysis. The Act also leads to the situation where members speaking in the House have the benefit of the protection offered by Article 9; however if they repeat what has been said in a television interview, Article 9 no longer offers any protection. These perverse situations have led some to argue that the Act needs replacing, with the law reflecting how Parliament is reported in the media today.[12]

The scope of protection afforded by Article 9 arose in the following case.

Case in depth: *Makudi v Triesman* [2014] EWCA Civ 179

The Culture, Media and Sport Committee conducted an inquiry into the governance of football in England. Lord Triesman, the former Chairman of the Football Association and part of England's bid

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[10] House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons* (HC 2004–05, 125) [13].

[11] (1839) 12 ER 1112.

[12] AW Bradley, KD Ewing, and CJS Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 222–3.

to host the 2018 FIFA World Cup gave evidence. Lord Triesman's evidence contained revelations that some members of the FIFA Executive Committee, responsible for choosing the successful bid, were accepting bribes in return for their votes. The Football Association then conducted their own inquiry into the allegations. The claimant argued that when Lord Triesman referred to these claims as part of the FA's inquiry, he was no longer protected by Article 9 and could be sued for defamation.

The Court of Appeal dismissed the claimant's argument. The purpose of Article 9 is to enhance the integrity of the democratic process. Consequently, Article 9 will protect extra-parliamentary speech when there is a public interest in that member repeating or referring to what he said in Parliament and secondly that there is 'so close a nexus between the occasions of his speaking, in and then out of Parliament',[13] so that it would be reasonably foreseeable by the member that he would be so required to repeat or refer to the statements again outside Parliament. However, the Court of Appeal emphasised that this was not intended to be a 'hard and fast rule' and that the common law in this area will proceed on a case-by-case basis.[14]

The issue of reporting parliamentary proceedings became an issue with the emergence of 'super injunctions'. These are court orders with the effect that in addition to issuing an injunction, the very existence of the injunction cannot be revealed. The difficulty is that such a level of secrecy is difficult to maintain in the era of social media, which is largely outside the scope of the regulators of traditional media such as radio, television, and newspapers. The existence of super-injunctions became entangled with the issue of reporting on Parliament with the Trafigura affair.

The mining company Trafigura, had been granted a super injunction preventing the publication of a report regarding allegations of toxic waste being dumped in the Ivory Coast. An MP tabled a parliamentary question about this injunction. The following day, the *Guardian* published a story on its front page detailing how it was unable to report on this parliamentary question. Carter-Ruck, lawyers acting for Trafigura, had informed the *Guardian* that it would be in breach of the super-injunction if it published details of the MP's question. This clearly called into question the ability of the press to report the proceedings of Parliament and raised issues relating to freedom of speech. The complexity of the situation was clear when Carter-Ruck wrote to the Speaker, stating that it was never intended that the super-injunction should have the effect of preventing the publication of a matter arising in Parliament. Yet, the terms of the injunction were such that it appeared that 'the Order would indeed have prevented The Guardian from reporting on the Parliamentary Question which had been tabled for later this week'.[15] Given the publicity that was caused, particularly on the internet, by the tabling of the parliamentary question, Carter-Ruck and Trafigura withdrew the super-injunction.

There are two lessons to learn from this affair. First, that it clear that Article 9 protects members should they choose to discuss matters subject to a super-injunction. This is also the case with anonymised injunctions, which prevent the disclosure of the identity of the person who sought the injunction. This is shown when John Hemming MP disclosed that Ryan Giggs had sought an anonymised injunction when seeking to prevent the publication in the media of a story regarding an affair.[16] Although Hemming was not subject to any punishment as he was protected by Article 9, the decision whether to reveal information subject to an injunction in Parliament is a matter for the individual member to decide and one that they should decide carefully.[17]

The concern is mainly about the reporting of such disclosures made by members. The Joint Committee on Privacy and Injunctions was particularly concerned about this, recommending that the Parliamentary Papers Act 1840 is amended so that broadcasters are

[13] [2014] EWCA Civ 179 [25]. [14] Ibid [26].

[15] Letter from Carter-Ruck to The Speaker (14 October 2009), House of Commons Library Deposited Paper 2009/2523, quoted in Oonagh Gay and Hugh Tomlinson, 'Privilege and Freedom of Speech', in Alexander Horne, Gavin Drewry, and Dawn Oliver, *Parliament and the Law* (Hart 2013) 54.

[16] HC Deb, 23 May 2011, vol 528, col 638.

[17] On immediately naming Giggs, Hemming was warned by The Speaker that the focus of debates in the House should be on the principles involved, rather than seeking to undermine a super-injunction by taking advantage of Article 9: HC Deb, 23 May 2011, vol 528, col 638.

protected in a similar manner to printed reports. However, to date, this recommendation has not been implemented. This means that the media could find itself in contempt of court when reporting parliamentary proceedings which disclose information which is protected by an injunction.

Meaning of proceedings in Parliament

The text of Article 9 refers to what has been said in Parliament. Article 9 is also clear that it equally applies to proceedings in Parliament. Freedom of speech and debates clearly overlap and refer to the 'oral business of the Houses and their committees, and protect not only members and officers, but also for example, members of the public giving evidence before a committee'.[18] Yet it is not immediately clear what is meant by 'proceedings in Parliament'. This was the issue in *R v Chaytor*.[19]

Case in depth: *R v Chaytor* [2010] UKSC 52

This is a case which arose out of the MPs expenses scandal.[20] A group of MPs and a member of the House of Lords were prosecuted for making false statements to officials about their expenses and claimed for expenses which were not incurred, this was contrary to the Theft Act 1968. They argued that the system of parliamentary expenses and their claims were 'proceedings in parliament' for the purposes of Article 9.

A nine-member panel of the Supreme Court unanimously rejected this argument. Lord Rodger stated that 'there is nothing in the allegations against the appellants which relates in any way to the legislative or deliberative processes of the House of Commons or of its members, however widely construed'.[21] The charges faced include the 'ordinary crime' of false accounting, the system of MPs expenses was merely the setting for the allegations, and consequently, the ordinary process of the criminal law not excluded by Article 9. Lord Phillips took the view that this was an entirely predictable result given that Article 9 is primarily directed towards the freedom of speech and debate in Parliament.[22] Consequently, the meaning of 'proceedings in Parliament' is considerably closer to the core functions of Parliament than the appellants argued.

Use of parliamentary debates in the courts—*Pepper v Hart*

It used to be the view that because of Article 9, under no circumstances could the courts refer to parliamentary debates as an aid to the interpretation of the statutes. This approach was explicitly rejected in the following case.

Case in depth: *Pepper v Hart* [1993] AC 593

In a tax case, an employee of an independent school took advantage of a scheme that allowed them to have their sons educated at the school for 20 per cent of the ordinary fee. This is a benefit and it was disputed as to whether the value of this benefit should be taxed at the actual costs to the school of educating the son (which would be zero because the son was merely taking up a spare place), or on a share of the costs incurred in educating all pupils at the school (which would be the cost to the school of educating any individual child). When the legislation was debated in Parliament, these exact circumstances (and other similar examples) were discussed, with the Minister clear that the actual costs to the school in educating the son would be the amount used for tax purposes.

Lord Browne-Wilkinson, giving the leading judgment for the House of Lords, held that the rule on using parliamentary debates to interpret legislation should be relaxed, with parliamentary debates only being referred to when the legislation is ambiguous or obscure and the statement is a statement of a minister and is sufficiently clear. When the courts refer to parliamentary debates in this manner, they are not questioning what was said in Parliament, rather ascertaining its true intention. This means that Article 9 is not contravened.

[18] Colin Munro, *Studies in Constitutional Law* (2nd edn, Butterworths 2000) 228.
[19] [2010] UKSC 52.
[20] This is discussed in more detail in 8.10.8.
[21] [2010] UKSC 52 , [122].
[22] Ibid [46].

While the case raises broader constitutional questions about separation of powers,[23] the case emphasises that the scope of Article 9 is for the courts to determine rather than for Parliament itself.

8.10.3 Freedom of arrest

Freedom of arrest is an ancient privilege based on the principle that members should be allowed to attend Parliament at all times. However, members have never had an immunity from arrest under the criminal law (a point re-emphasised in *Chaytor* discussed above). Historically, this privilege was of greatest importance when debtors were sent to prison as a means of enforcing debts. Yet, in modern times the freedom from civil arrest has little practical application as imprisonment for unpaid debts has all but been abolished. A rare exception is non-compliance with a court order requiring maintenance payments to be made, for example following a divorce. In *Stourton v Stourton*,[24] the issue was whether these were criminal or civil proceedings, with the court finding that although cases such as this depend on their facts, the peer in this case had not fulfilled a civil obligation, meaning that the privilege of freedom from arrest applied.

It remains odd that the freedom of arrest applies, even in these limited circumstances. Consequently, the Joint Committee on Parliamentary Privilege recommended that this privilege was abolished, but that this would require legislation and is unlikely to be a priority for the government in near future.[25]

Yet, there are still particular considerations which apply should a member be arrested. Should a member of either House be arrested, the House must be informed of this as soon as possible, with the Speaker informing the House when practical.

Damian Green Affair

The lack of protection from arrest is highlighted by the Damian Green Affair. During 2007 and 2008, the Home Office was increasingly concerned that information was being leaked to the media. After attempting to identify the source of the leak, the Home Office requested assistance from the Cabinet Office, who in turn requested help from the Metropolitan Police. The source of the leak was identified as a civil servant within the Home Office, who was arrested, and admitted to passing information to the Shadow Home Secretary, Damian Green MP. Green was then arrested at his home. More concerning, was that the police searched Green's office in Parliament, seizing a computer, documents, and other materials. There was no warrant issued. Instead the police required that the Serjeant at Arms (the parliamentary official responsible for the security of the House of Commons) signed a consent form agreeing to the search.

In the end, charges against both the civil servant and Green were dropped, however the search of Green's office within Parliament and the seizure of property from the office of an MP caused alarm. As Bradley queries: 'is it fanciful to ask whether our MPs might need some protection against the possibility of vexatious or politically motivated prosecutions? Was the Green affair an instance of a politically motivated investigation?'[26] The fundamental issue, is that while Parliament is not a haven from the criminal law, is there some way in which criminal investigations can proceed which respect the independence of Parliament without it unduly interfering in an investigation? The compromise reached is that no search of an MPs office should take place without a warrant, and that the Speaker must be informed about the warrant, who will 'consider it' after taking advice. The Speaker affirmed that responsibility for ensuring that the House in fulfilling its functions is not 'unnecessarily hindered' rests with them.[27]

[23] For example, see Aileen Kavanagh, 'Pepper v Hart and Matters of Constitutional Principle' (2005) 121 *Law Quarterly Review* 98.

[24] [1963] 1 All ER 606. Although the case technically regarded a privilege of peerage rather than a privilege of Parliament, the issues apply equally to the privilege of freedom from arrest.

[25] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (2013–14, HL 30, HC 100).

[26] Anthony Bradley, 'The Damian Green Affair—All's Well that Ends Well? [2012] *Public Law* 396, 405.

[27] House of Commons Committee on Issue of Privilege, *Police Searches on the Parliamentary Estate* (HC 62, 2008–09) 145.

8.10.4 'Exclusive cognisance'

The issue that the Green Affair touches on is the ability of both Houses of Parliament to regulate their own proceedings. This is a matter over which each House is said to have 'exclusive cognisance'. This means that any questions regarding the procedure or the internal affairs of either House is solely a matter for that House to resolve and not the courts. This is one reason why the courts refuse to hear arguments that challenge the legality of statutes based on procedural irregularities within Parliament.[28] This privilege supplements the protection afforded by Article 9 in the Bill of Rights. As Lord Phillips stated in *Chaytor*, the phrase 'exclusive cognisance':

> describes areas where the courts have ruled that any issues should be left to be resolved by Parliament rather than determined judicially. Exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament.[29]

This judicial view of exclusive cognisance shows not only that each House is independent from the courts, but also from each other. For example, in *Bradlaugh v Gosset*,[30] Bradlaugh was elected as a Member for Northampton, and was prevented from taking the oath and taking his seat in Commons because of a resolution previously made by the House, which stated that Bradlaugh should be excluded 'from the House until he shall engage not further to disturb the proceedings of the House'.[31]

Bradlaugh went to the court attempting to overturn the order made by the House of Commons. This attempt was unsuccessful. Lord Coleridge CJ held that what 'is said or done within the walls of Parliament cannot be inquired into in a court of law' and that the 'jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive'.[32] Even if the decisions of either House cause injustice, the remedy 'lies, not in actions in the court of law . . . but by an appeal to the constituencies whom the House of Commons represents'.[33] In other words, the matter is for the House of Commons to resolve, if the electorate disagrees with how the House has dealt with the matter, they can cast their verdict at an election.

A similar case is *Re McGuinness's Application*.[34] Martin McGuinness was elected for Sinn Féin. However, he did not take his seat in the House of Commons because that would require him to swear an oath or affirm allegiance to the monarch as required by the Parliamentary Oaths Act 1866. It has been the policy of Sinn Féin to refuse to accept that the British Monarch has any role as regards Northern Ireland. This means that any Sinn Féin candidates elected as MPs refuse to take up their seats in the Commons.

The Speaker decided to withdraw from those members certain facilities which are only available to members who took their seats. McGuinness sought a judicial review of this decision, on the basis that it ran contrary to the freedom of expression. The application was dismissed partly on the basis of Article 9 of the Bill of Rights, but even if that did not apply, it was held that the decision of the Speaker related to internal matters within the House of Commons and was not amenable to judicial review.

As indicated in the *McGuinness* case, there is overlap between what is covered by the exclusive cognisance of the House and the protection offered by Article 9. However, exclusive cognisance is significantly broader than Article 9 and goes beyond acts in the Commons chamber or its committees. This conclusion is supported by *R v Graham Campbell, ex p Herbert*.[35] An action was brought against members of the Kitchen Committee of the House of Commons complaining that alcohol was being sold without the required licence in breach of licensing laws. The claim failed as Lord Hewart CJ considered that because the statute did not expressly apply to Parliament, the issues raised by the actions should properly be regulated by the House and not the courts. The consequence of this decision is that to this day, 'the House is free to open its bars any time of day or night'.[36]

[28] See, for example, *Pickin v British Railways Board* [1974] AC 765.
[29] [2010] UKSC 52 [63]. [30] (1884) 12 QBD 271. [31] Ibid 271–2. [32] Ibid 275.
[33] Ibid 277. See also *Burdett v Abbott* 14 East 150. [34] [1997] NI 359. [35] [1935] 1 KB 594.
[36] Hilaire Barnett, *Constitutional and Administrative Law* (12th edn, Routledge 2017) 413.

Pause for reflection

As the Joint Committee on Parliamentary Privilege has stated, the *Herbert* case has led to several other statutes being held not to apply to Parliament as they relate to matters which fall within the exclusive cognisance of each House. This includes statutes that relate to employment, data protection, health and safety. This has led some to describe Parliament as a 'statute-free zone'.[37] Whilst these laws have been applied to Parliament voluntarily, it remains odd that the legislature is exempt from the legislation it makes and applies to everyone else. Consequently, the Committee recommended that the privilege of each House to regulate its own affairs in its precincts applies only to activities 'directly and closely related to proceedings in Parliament'. In addition, it has been recommended that there should be a presumption that a statute applies to Parliament unless it relates to proceedings in Parliament.[38]

8.10.5 Contempt of the House

Separate to the concept of privilege is the power of each House to punish someone of committing a contempt of the House. Unlike privilege which is dependent on a series of rules, contempt is a broader concept. *Erskine May* defines contempt as follows:

> Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even through there is no precedent of the offence.[39]

This is a wide-ranging definition, making it impossible to give a complete list of the types of conduct that can give rise to contempt. Broadly the following types of behaviour are all contempts of the House.[40]

Disobedience to the rules or orders of either House or of a committee

Clearly, if a member deliberately disobeys an order or rule of the House, then they can be held in contempt of the House. As regards the public, this is most likely to apply if they refuse to attend the House or a committee when they have been summoned. Usually, a select committee informally invites a witness to attend a committee hearing and the vast majority of witnesses comply. However, if a witness is less compliant, then select committees have the power to issue a summons to a witness, signed by the chair, compelling their attendance.

This power is exercised rarely, but in 2011, this was exercised by the Culture, Media and Sport Committee to compel Rupert and James Murdoch to attend a hearing as part of their inquiry into phone-hacking by one of the newspapers that the Murdochs' owned through their company, News International. Had they failed to answer this summons and give evidence to the committee, the Murdochs would have been found to have been in contempt of the House.

Misconduct in presence of either House or a committee

Disorderly or disrespectful conduct in the presence of either House or a committee. This can be on the part of a member of the public, who interrupts or disturbs proceedings. Similarly, if a witness to a parliamentary committee misleads a committee, then they are guilty of contempt. A bizarre example also relates to the Murdochs' appearance before the Culture, Media and Sport Committee, when towards the end of the hearing, a member of the public hit Rupert Murdoch in the face with a 'foam pie', a paper plate covered in

[37] Geoffrey Lock, 'Statute and Case Law Applicable to Parliament' in Dawn Oliver and Gavin Drewry (eds), *The Law and Parliament* (Butterworths 1998) 55.
[38] Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (2013–14, HL 30, HC 100) para 250.
[39] *Erskine May*, 251.
[40] These categories are provided by *Erskine May*, Ch 15.

shaving foam. Although ultimately dealt with through the criminal law,[41] one member of the committee described the incident as a 'contempt of Parliament'.[42]

Deliberately misleading the House

In many ways this is self-evident, if a member makes a misleading statement then it can be treated by the House of Commons as a contempt. This most famously happened when John Profumo, misled the House in relation to his affair with Christine Keeler. As well as resigning as a minister (see Chapter 7), he also resigned as an MP because he misled the House. Again, a more recent example can be found in relation to the phone hacking inquiry of the *News of the World* newspaper. The Culture, Media and Sport Committee found that several witnesses had misled the Committee, with the Privileges Committee finding that they were in contempt of Parliament.[43]

Corruption or impropriety

Members accepting a bribe to influence their conduct as a member is a contempt. This includes accepting a fee or compensation for promoting or opposing a Bill. Anyone who offers such a bribe is also in contempt. Following the creation by both Houses of Codes of Conduct for their members, these would now be a breach of the Code of Conduct and would be investigated using the procedures that apply to the Code, rather than being considered as contempts.

Unauthorised publication or disclosure of committee proceedings

As the Privileges Committee has stated, the 'unauthorised disclosure of committee papers may constitute a substantial interference in the work of the committee concerned'.[44] This means that publishing or disclosing the contents of a committee report before it is due for release or agreed by the committee can also be a contempt.

In a recent case, the Public Accounts Committee published a report, *Regulating Consumer Credit*.[45] One of the companies involved in the investigation was the 'pay-day loans' company, Wonga. A member of this committee had been in contact with a former employee of Wonga and passed a copy of the committee's draft report to them. The member admitted doing this and apologised. After being investigated by the Parliamentary Commissioner for Standards, the Privileges Committee found the member guilty of contempt and recommended that he made an apology to the House and be suspended from sitting for two days.[46]

8.10.6 Regulating members and punishing a breach of privilege or contempt

As we can see, parliamentary privilege is a complex area of law. It is based on the fundamental requirement that Parliament is independent from external pressure (other than of course the electorate). In addition, as we have seen, the Law and Custom of Parliament is an independent source of law for which Parliament or each House individually is primarily responsible for its enforcement. This means that in principle, Parliament, or more precisely each House, regulates itself. Yet this principle of self-regulation inherent in the idea of privilege has come under increasing pressure.

[41] The wielder of the 'foam pie' was sentenced to prison for six weeks. See, BBC News, 'Murdoch shaving foam attack: "Jonnie Marbles" jailed' (BBC News, 2 August 2011), http://www.bbc.co.uk/news/uk-england-london-14370398.

[42] John Plunkett and Jane Martinson, 'Rupert Murdoch attacked at phone-hacking hearing' *The Guardian* (19 July 2011), https://www.theguardian.com/media/2011/jul/19/rupert-murdoch-attacked-phone-hacking-hearing.

[43] House of Commons Committee on Privileges, *Conduct of witnesses before a select committee: Mr Colin Myler, Mr Tom Crone, Mr Les Hinton and News International* (HC 2016–17, 662).

[44] House of Commons Committee on Privileges, Unauthorised disclosure of a draft Report of the Committee of Public Accounts (HC 2016–17, 672) [3].

[45] Committee of Public Accounts, *Regulating consumer credit* (HC 2013–14, 165).

[46] House of Commons Committee on Privileges, Unauthorised disclosure of a draft Report of the Committee of Public Accounts (HC 2016–17, 672) [12].

MPs' Code of Conduct and Standards Committee

During the mid-1990s the 'cash for questions' affair erupted, which involved some MPs receiving money in return for asking questions in Parliament. Amongst other scandals occurring at a similar time, this gave an overall impression of 'sleaze' and 'that corruption and questionable behaviour generally had become increasingly common in British public life'.[47] This led to the creation of the Committee on Standards in Public Life, chaired by Lord Nolan ('Nolan Committee'). The Committee developed the seven general principles of public life (which are selflessness, integrity, objectivity, accountability, openness, honesty, and leadership) and recommended that all public bodies (including Parliament) develop codes of conduct reflecting these principles with a mechanism of independent scrutiny ensuring that these principles are upheld.

The House of Commons responded by creating a Code of Conduct and the Parliamentary Commissioner for Standards who would investigate any allegations that an MP has breached the Code of Conduct. The Code of Conduct contains provisions which include general duties to uphold the law,[48] 'behave with probity and integrity',[49] and observe the seven general principles of conduct outlined by the Nolan Committee.[50] The general aim is to avoid a conflict between a member's private interests and their role as an MP. More specific rules include a ban on acting as a paid advocate in the House or accepting bribes and being required to register financial interests in the Register of Members' Financial Interests.[51] Amongst many other requirements, this means that gifts over £300, earnings of over £100, or shareholdings of more than 15 per cent in a company must all be declared in the register.[52] The Parliamentary Commissioner can investigate a failure to declare an interest that should have been declared.[53]

Should an MP be alleged to have breached the Code, the Parliamentary Commissioner for Standards will investigate and pass their report on to the Committee on Standards ('Standards Committee'), a committee of MPs.[54] This Committee then considers the report from the Commissioner and then makes a recommendation to the House. Clearly, the intention is that reports of the Parliamentary Commissioner for Standards will be persuasive on the Standards Committee and then on the whole House. To further the independence of the process, seven lay members have been added to the Standards Committee. While they cannot vote, they can add their own comments to a report if they disagree with the Committee's conclusions.

Privileges Committee

If there has been a breach of parliamentary privilege or a contempt of Parliament, then if it does not involve the MPs' Code of Conduct, it will be referred to the Committee of Privileges. This Committee will consider the allegation and, if they find a breach of privilege or a contempt, then it will recommend a sanction.

Sanctions

The difficulty is establishing what sanctions the Standards Committee or the Privileges Committee can impose. For members, they can be made to apologise to the House or could be suspended and potentially expelled.[55] The real difficulty is determining the penalties for non-members, for example for a refusal to cooperate with a Select Committee inquiry. In theory, it could imprison non-members for a contempt of the House or could fine a non-member, although this power was last used in 1666 and may have lapsed.

[47] Michael Rush, 'The Law Relating to Members' Conduct' in Dawn Oliver and Gavin Drewry (eds), *The Law and Parliament* (Butterworths 1998) 106.

[48] House of Commons, *The Code of Conduct* (HC 2014–15, 1076) [4].

[49] Ibid para [7]. [50] Ibid para [8]. [51] Ibid paras [11], [12] and [13].

[52] Ibid para [12]. [53] Ibid paras [17] and [18].

[54] Formerly, the Committee on Standards and Privileges would hear allegations involving privilege, contempts, and breaches of the Code of Conduct. Since 2013, this Committee has effectively been split in two, creating the Committee on Standards, which considers breaches of the Code of Conduct and the Committee of Privileges, which considers issues regarding privilege and contempts.

[55] Although under the Recall of MPs Act 2015, discussed in 8.4.1, any suspension of more than ten days would trigger its provisions and a recall petition would be opened in the members' constituency.

Arguably as far as either House can go would be to summon a non-member to the House to be reprimanded by the Speaker although this power was last used in 1957. The difficulty is that any use of the penal jurisdiction of either House is likely to give rise to a challenge under Article 6, which requires that anyone charged with a criminal offence has the right to a fair trial by an 'independent and impartial tribunal'. This is fundamentally inconsistent with the process of self-regulation.

8.10.7 MPs' expenses scandal—the creation of IPSA

For several decades, MPs have been able to claim allowances or expenses for the costs they incur in their capacity as an MP. This included costs for travel between Westminster and their constituency and employing staff in their office both at Westminster and in the constituency. Most controversially an 'additional costs allowance' allowed MPs to claim for rent or mortgage interest, furnishings, utility bills for a second home, and a food allowance of up to £400 a month.

Concern about the system was raised in the High Court in a freedom of information case, upholding the decision of the Information Commissioner that public interest was in favour of details of claims being released under the 2000 Act. The Commissioner found that the allowances system was open to misuse, with a risk that public money was being misspent.[56] The system underwent further public scrutiny when the *Daily Telegraph* published details of expenses claims not already in the public domain under the Freedom of Information Act. This disclosure was shocking, revealing that while many claims were within the rules, the scope of the claims was very wide. Some claims took advantage of the rules, for example changing which residence was designated as their second residence to increase their allowances. Other claims were clearly outrageous (the most eye-catching including a claim for a duck-house for an MP's garden and another claim for cleaning a 'moat' surrounding another MPs' property) which clearly went beyond recouping costs incurred by MP in exercise of their duties as an MP. This caused several ministers to resign from the government and many MPs decided that they would not stand for re-election at the next election. Even the Speaker, Michael Martin, was forced out of office for his poor handling of the crisis.

Immediate action was necessary. The Parliamentary Standards Act 2009 (which was hastily enacted only to be heavily amended a year later) created the Independent Parliamentary Standards Agency (IPSA). IPSA is independent from Parliament and is responsible for the payment of salaries and expenses to MPs. IPSA is required to establish a scheme for MPs' allowances, after consulting the Speaker, the Committee on Standards in Public Life, the Leader of the House of Commons, and others.[57]

Although not initially legislated for, amendments made to the 2009 Act have made the Compliance Officer a key figure within the scheme. Claims are initially made to IPSA who will refuse it if they believe that it falls outside the scope of the allowances scheme. Should an MP wish to challenge a decision made by IPSA, they can appeal to the Compliance Officer, who reconsiders the claim.[58] The Compliance Officer can investigate claims made by an MP, particularly if an overpayment has been made.[59] The Compliance Officer can also the require the repayment by a member of any overpayment of any claim.

Each year, IPSA is required to lay a report before Parliament. The members of IPSA, though appointed by the monarch, are chosen by the Speaker's Committee for the Independent Parliamentary Standards Authority, which is formed of eight MPs and three non-MP members.[60] Given that the Compliance Officer may request the repayment of expenses, they have to be 'demonstrably independent of the House of Commons'.[61] This means that the Compliance Officer is appointed by IPSA itself rather than the Speaker's Committee.

[56] *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin); [2008] ACD 71 [14]–[15].

[57] Parliamentary Standards Act 2009, s 5.

[58] Ibid s 6A. Should an MP wish to appeal the Compliance Officers' decision, they can appeal to the MP Expenses Tribunal.

[59] Parliamentary Standards Act 2009, s 9.

[60] Ibid Sch 1, para 2.

[61] Committee on Standards in Public Life, *MPs' expenses and allowances: Supporting Parliament, safeguarding the taxpayer* (Cm 7724, 2009), para 13.38.

As Parliament has traditionally been self-governing, this significant incursion into that principle means that IPSA has remained controversial for many MPs. However, given that the expenses scandal still looms over Parliament nearly a decade later, even a minimal return to the old approach appears inconceivable.

8.10.8 Summary

As can be seen from this section, parliamentary privilege is a complex area of the law, which raises fundamental questions about the role of Parliament and its relationship with the courts. However, recent challenges caused by the behaviour of MPs has led to inroads being made into the scope of privilege as self-regulation has given way under public pressure to greater external scrutiny. This is most clearly seen with the creation of IPSA in the wake of the MPs' expenses scandal, but can also be seen with the MPs' Code of Conduct, and the presence of non-MPs on the Standards Committee. Yet, it remains the case that Article 9 of the Bill of Rights is a fundamental constitutional principle protected both by the courts and Parliament itself. Whilst it is still the case that Parliament requires independence to effectively hold the government to account, it remains to be seen for how much longer this approach to Article 9 can be sustained.