Parliamentary Privilege: a dignified or efficient part of the Constitution?

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The word “privilege” in our modern, demotic society has awkward connotations. A specific right or advantage; an exemption from a rule or norm which puts its possessor in a different position from everyone else sounds elitist, exclusive, undemocratic and therefore unwelcome. In an age when Ortega y Gasset’s revolt of the masses has already taken place, it is not thought proper that one section of society, however distinguished, should not be subject to the same restrictions as anyone else. To argue, in the Aristotelian way, that the different treatment of unequals may be just and proper, now falls on deaf ears.

In this lecture I am concerned with a very particular, technical kind of advantage or privilege – that private law (the privata lex) which applies to the proceedings of Parliament and its Members. However venerable and even arcane the subject might appear, I will want to argue that it is vital to understand it if one is to understand the workings of parliamentary democracy. Too little is known about it outside restricted circles of the cognoscenti. There is no justification for keeping it secret or hidden.

While I shall show that the raison d’être of this privilege is as defensible as ever in modern, parliamentary systems, parliamentary privilege has not escaped some of the suspicion that lingers over the very word in the public imagination. For in common usage, “privilege” tends to be thought of as an advantage over others gained by someone because of his or her position or status. That is bad enough but when the public became convinced that Members of Parliament were not behaving as they should, the suspicion hardened into hostility. The bad behaviour of a few made all Members seem unworthy of any special protection or immunity from rules which no one else was exempt from. On the
other hand, in 2009, the then Government, intent on appeasing public opinion after the expenses scandal, very nearly blundered into serious error in respect of its legislation setting up the new statutory authority dealing with Members’ pay and allowances, something just averted at the eleventh hour. I might also observe, in passing, that in other countries (I am thinking of some of our European partners in particular) distrust of the political class as a whole, has reached seriously damaging levels – damaging that is to the very functioning of parliamentary democracy.

But before going any further let me try to give a clear definition of what I am talking about before turning to its origins, a consideration which is essential in any attempt to understand the function of privilege in modern, democratic parliamentary systems.

*Erskine May*, the acknowledged “bible” of Parliament defines privilege in this way:

*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 Houses 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.*

So *Erskine May* is explaining that certain rights or privileges, such as freedom from arrest or, more importantly, freedom of speech belong to the 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. I shall shorthand this argument in defence of privilege as the “functionality principle” henceforth. It is certainly the core of a modern justification for a certain setting aside of the law in respect of the proceedings of Parliament. What the principle suggests is that Members of Parliament derive their privilege *only* as a means to the effective discharge of the collective functions of the House – to scrutinise Government, to air grievances, to legislate. The rights and immunities enjoyed by Members are not free standing.
But there are other rights and immunities – for example the power to punish for contempt (something which I shall return to, particularly in the context of select committee activities) - which belong to each House as a collective body. These powers derive from the historic nature of Parliament as a High Court as the definition in Erskine May states; in modern times they are exercised to ensure that Parliament can function effectively and to protect Members of the Houses and those who serve them, as well as witnesses before committees. They are an expression of the unique authority that Parliament as a whole exercises and they place Parliament in a category different from other institutions in the land.

Erskine May goes on to consider what happens when parliamentary rights and immunities are attacked, or in the technical language of procedure, a “breach of privilege” has occurred. There are various ways in which Members in the House of Commons can raise alleged breaches of privilege – the most regular by an appeal to the Speaker whose decides whether the matter warrants an immediate debate on the question to refer it to the Committee on Privileges, which the House has just recently decided to separate from that on Standards, a wholly welcome development. While the Speaker’s role is critical at that point, the actual decision for referral and, in due course, any recommendations that might emanate from the Privileges Committee are matters for decision by the House itself. Each House retains the right to punish contempts – that is actions that in one way or another thwart the Houses in their business and which go wider than an actual breach of one of the defined privileges. How that punishment should be dealt with in the modern context of human rights is another matter I shall return to in the course of my lecture.

So what exactly are these privileges? I have already named two, the most important of which is freedom of speech (the other less important freedom from arrest) but there are more arcane and remote privileges possessed by the House of Commons – namely freedom of access (to the monarch) and freedom of construction. Let me begin with freedom of speech, by far the most important privilege in the modern context.

Parliament, and in particular the Commons, had been asserting its rights to debate and proceed free of royal interference from the early Middle Ages. I certainly do not want to get embroiled in the arguments surrounding the
causes of the civil war of the mid-seventeenth century but, most simplistically, we can regard it as an assertion of Commons privilege against the Crown. Eventually statutory expression was given to freedom of speech in the Bill of Rights of 1689. The Preamble of the Bill of Rights tells us it was introduced

*Because King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him did endeavour to subvert and extirpate the laws and liberties of this kingdom.*

The language of the preamble reminds us that the Bill of Rights was a politically-motivated document, as most documents heralding constitutional reform are. It is a jumble of various contemporary complaints rather than being a comprehensive, constitutional instrument.

The liberty of freedom of speech is asserted in Article IX which famously 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.*

I can feel a frisson of delight among those of you present who are lawyers at the contemplation of the possibilities of dispute over the meaning of each of these phrases and words – “proceedings in Parliament”; “impeaching”, “questioning”, “court or place out of Parliament”. And indeed all these phrases and words have been the subject of much learned and judicial pondering and ruling over the ages. The Courts have never hesitated to consider what are, after all, words in a statute whatever view Parliament itself has taken about its privileges.

An important point to notice here is that parliamentary privilege long predates anything that we might recognise as a democratic, parliamentary system which only reached fruition in the case of the House of Commons with universal suffrage in the twentieth century and some would say, has never reached the House of Lords. Nevertheless, I shall want to argue that parliamentary privilege, hallowed and ancient, is essential to the running of a modern, democratic system even if it long predated it. I am reminded of François Mitterand’s aphorism when he became President of the French Republic in 1981 in which he said that while the institutions of the Fifth Republic were not actually made
according to his design, they nevertheless worked quite well for him. Privilege predates the kind of democracy we now consider legitimate but it is well adapted to it.

A second matter I would wish to emphasize is that privilege is shared throughout the Commonwealth by those institutions which, in various ways, have developed from the Westminster model. For the purpose of privilege, the Commonwealth is a community, sharing and exchanging precedent and practice. In the current, twenty-fourth edition of *Erskine May* (which I edited and which was published last July) an egregious example of the importance of this connection can be found on page 819 where a recent ruling in the Canadian House of Commons is cited. A special Committee on the Canadian Commission in Afghanistan investigated the Government’s refusal to hand over vital papers relating to Afghan detainees to a parliamentary committee on the grounds that to do so would endanger national security. The Committee concluded that the refusal amounted to a *prima facie* breach of privilege. At some moment when presumably the Government Whips were caught napping, the Canadian House of Commons itself adopted the Committee’s special report. However, the Government still refused to hand over the papers. It was at this point that the Canadian Speaker, Mr. Milliken, made his ruling to the effect that the Government itself had committed a *prima facie* contempt. Arrangements were put in hand to negotiate the handing over the documents to the Committee. vi There is no recent British precedent that so clearly establishes the right of a parliamentary committee to force the production of papers from a reluctant administration; the Canadian Speaker’s ruling is there to be cited in future wrangles at Westminster.

But let me get back to freedom of speech. Put simply it enables a Member of either House to say whatever he or she thinks fit in debate. However offensive or injurious those remarks may be to a named individual they will have no recourse to the Courts – at least to the British courts – since they will not be able to take out any action for defamation.

The publication of parliamentary debates and proceedings in Official Report (Hansard) is also protected; any reporting of them which is fair and accurate in the media attracts qualified privilege a matter of common law rather than parliamentary law and which also applies to the reporting of court
proceedings. 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 is concerned, the protection is afforded by the Parliamentary Papers Act, 1840 which followed a considerable trial of strength between Parliament and the Courts in the cases around Stockdale v. Hansard in the late 1830s. However, in a recent public pronouncement, the Attorney General has warned that the freedom to report is not set in stone. While he acknowledged that fair and accurate reporting (certainly of Hansard) probably is covered by the Act, he warns about lack of context in which such reports are made. Some of the doubt surrounding this matter results from the obscure wording of the Act itself; there is a case for rewriting it in clearer, modern language as the Joint Committee on Privacy and Injunctions has just reported.

I qualified my remarks on absolute (parliamentary) privilege not being challenged in the British courts because the situation in Europe is different: in 2002 a case relating directly to the words spoken by an MP was heard in the European Court of Human Rights. A Member of Parliament, during one of the daily adjournment debates (which incidentally are invaluable opportunities for airing constituency problems) had been highly critical of one of his constituents describing her as a “neighbour from hell” when advancing the grievances against her from another of his constituents. Supported by Liberty, an action was taken out by the aggrieved constituent claiming that this use of parliamentary privilege infringed Article 6 of the European Convention (namely that everyone is entitled to a fair hearing by an independent tribunal established by law) and Article 8 (respect for private and family life). The action was against the UK Government and, in recognition of the importance of the principle at stake, the UK was joined in defence by eight other Member states. The European Court did not hesitate to hear the case (unlike any British court) but came to the conclusion that the use of parliamentary privilege did not impose a disproportionate restriction on the right of access to a court or in respect of private and family life and therefore that neither Article of the Convention had been violated.
While this ruling was a vindication of the absolute nature of parliamentary privilege, not all the judges concurred. What is more, the presiding judge also made comments which were not uncritical of the exercise of privilege without recognition of modern, human rights. The shared view of the judges was that a system of redress for citizens who felt unfairly treated should be incorporated into the procedures of national parliaments. This has not so far been done in the UK (although a Commonwealth parliament – the Australian – has such a mechanism) but it is something that I believe needs addressing. I had to deal with the case of A v. UK Government myself from the Commons and the budding, and in the event triumphant, young QC acting for us told me that he would rely more on what I have called the “functionality argument” (i.e. that privilege is a necessary part of the way parliaments must work) than on citing Article IX of the Bill of Rights, 1689. Venerated in the UK, Counsel’s view was that an antique statute, in obscure language, was less likely to impress European judges than the functionality argument: a modern statute or constitutional provision, free of late seventeenth-century cant, would have cut even more ice if it had existed.

Let me turn for a moment to other privileges – freedom from arrest and favourable construction, which although seemingly antique, still resonate in the proceedings of certain modern states where the notion of a parliament outside the absolute control of the Executive is still fairly fragile. To get a proper understanding of these areas of privilege one needs to excursion back into history. The early struggles between Parliament – and in particular the House of Commons – and the Crown - lent a certain urgency to the notion of freedom from arrest. The King, like modern dictators, was fond of locking up people who opposed him including, of course, critical Members of Parliament. By the early Middle Ages the Commons had developed its protection from executive interference of this sort by making it the first duty of a Member to attend and participate in the proceedings of the House. Incidentally this call to duty has never protected a Member from the operation of the criminal law (in ancient times summed up as treason, felony and breach of the peace).

I am sure you will all be aware of the recent case where several Members of the Commons and a peer tried to claim the protection of parliamentary privilege in the face of serious criminal charges. Not only did the Courts dismiss
the plea but Parliament itself (and I was personally involved in these matters) made no attempt to play the privilege card. It would have been quite wrong to do so. Even in its earliest form, freedom from arrest was linked to a Member’s duty to attend (the functionality argument in another guise): in 1340 the King was obliged to release an imprisoned Member so that he could attend the House. But it was not all smooth sailing – there were setbacks. A century later, in 1452 when the Speaker of the House of Commons himself was imprisoned, the Commons gave way to the Crown and proceeded to appoint another Speaker in his place. In its modern, etiolated form, freedom from arrest enables a Member (via the Speaker) to ignore a *sub poena* to attend in Court if the House is sitting nor can he or she be arrested in the Chamber when the House is sitting. A dramatic example of the limitation of this immunity occurred in 1814 when Lord Cochrane (a Member of the House of Commons) was arrested while sitting on the Chamber benches when the House itself was not in session.

Another antique privilege gone into desuetude but which would resonant in the ears of opposition leaders in many modern, undemocratic states is that of “favourable construction”. Through that privilege the House sought the sovereign’s indulgence for any unfortunate interpretation of proceedings that might reach the royal ears. There is a deliciously regal and chilling response to Speaker Sir Thomas Gargrave’s petition to Elizabeth I to allow favourable construction in which the Queen, agreeing to its terms, adds a word of warning to the Speaker telling him it is allowed provided that

*your diligence and carefulness be such, Mr Speaker that the defaults in that part be as rare as may be.*

Since the Bill of Rights (1689) the struggle over parliamentary privilege moved to a new battlefield – that between Parliament and the Courts. It is important to remember that the Bill of Rights *is* a statute, however venerable and one which the Courts have never hesitated to interpret. Originally there was a considerable lack of clarity about what the status of privilege, the *lex parliamenti* really was; indeed the Courts claimed not to recognise it at all. But once there was a statutory expression of privilege, then the Courts started to regard it as their duty to interpret its meaning. By the middle of the nineteenth century Parliament, more particularly the House of Commons, had given up its
claim to determine whether a privilege existed: that task was ceded to the
Courts. But the ambit of privilege and the area within which the House
maintained exclusive cognisance had to be delineated and this came about
through 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.
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 from their
consideration when interpreting statutes, parliamentary material, including
debates, relevant to the legislative history of the statute. A number of cases
decided by the House of Lords in its (former) judicial capacity significantly
varied this rule. In 1992 as a result of decisions in the case of Pepper v. Hart,
the courts now feel free to refer to parliamentary material where legislation is
considered to be ambiguous or obscure, or leads to an absurdity. In such cases,
parliamentary material is used to elucidate the meaning of statute.

The rumblings of the dispute over jurisdiction between Parliament and the
Courts have not entirely abated although the then Attorney General, in an
important memorandum in 2009, tried to draw a line under it. Her statement -
that that the determination of whether material was admissible in a criminal
trial by virtue of Article IX was a question of law for the courts, not a
determination to be made by Parliament, or any of its organs, - is not hugely
controversial, indeed it matches what I have said about privilege not protecting
Members from the operation of the criminal law. What might be less palatable
to some parliamentarians is her conclusion that

*There is a risk that the principle of comity would be undermined by a purported
attempt by the House to determine such questions [of law relating to
parliamentary privilege] and thus usurp the determinative role of the courts.*

Let me now turn to a series of dilemmas facing us in the modern context of
privilege (including in the operation of select committees) and consider how
we might deal with them. Firstly I need to consider, from the parliamentary
side of the fence, breaches of privileges and contempts and what Parliament
can actually do about them. After that I will return to two themes I have
already introduced – how privilege can take account of human rights
requirements and finally whether there should be a modern, privileges statute.
When any of the rights and immunities of Parliament are attacked or disregarded, the offence committed is known as a breach of privilege which the Houses have 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 even more expedient since it is doubtful to what extent the Houses could exercise those powers.

One important aspect of the notion of contempt is that actions may be treated as contempts for which there have been no precedents. A recent example of this 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. In giving evidence to the Committee I suggested that in order for hacking to be regarded as a contempt, it would be necessary to establish exactly how it interfered with a Member performing his or her duty: did it for example make a Member less likely to pursue a matter in debate or decide not to table a parliamentary question? A difficult line has to be drawn in the matter of an MP’s constituency work since correspondence with constituents and matters pursued locally, unless related to proceedings in the House, are not covered by parliamentary privilege. I also raised the rather philosophical point about how the action of hacking could affect a Member’s performance if he or she did not know it was going on? Bishop Berkeley’s argument in favour of the existence of God was foremost in my mind. In its conclusions the Committee came to the view that hacking, by creating an atmosphere of insecurity generally in the House or in one of its committees or among a group of Members could amount to a contempt. It invited the House to consider a definition of contempt in a new Parliamentary Privileges Bill.xii

The notion that the penal powers of Parliament must be used sparingly (reiterated by the Joint Committee on Parliamentary Privilege in its landmark report of 1999 which I shall return toxiii) is a recognition that Parliament can no longer behave as a Court, even the highest court in the land. But the other side of this dilemma is the real weakness of Parliament in the face of deliberate obstruction. Let me turn to the most striking and topical example – how do
select committees deal with witnesses who refuse to attend or, turning up in a session, are reluctant to contribute fully to a Committee’s questioning? At the simplest level things are not too difficult: if for example someone interrupts proceedings (with or without bags of foam, which I know will have sprung to your minds) that person is simply removed from the room where the hearing is taking place. Under the existing Standing Orders of the House, the Serjeant-at-Arms has the power to take any offender into custody on instruction from the Chair of the Committee. As I have said the offender is kept in custody for the rest of the day unless a criminal offence has been committed in which case he or she is handed over to the police. Under another of the Standing Orders of the House, a Committee may decide to sit in private. Such a decision will lead to the clearing of the room by everyone except parliamentary staff supporting the Committee. So far so good: but what about dealing with a witness who is deliberately obstructive or evasive or, even more seriously, gives false evidence?

*Erskine May* lists all sorts of behaviour in this kind of situation which may be regarded as contempts. Examples range from refusal to produce documents, through insolence (on one occasion, in 1852, fuelled by intoxication) to giving false evidence. But what power of enforcement does the Committee have: the answer is, I fear, little. What the Committee has to do is to report the matter to the House; the House has then to decide whether a contempt has been committed and how to deal with it. In olden times (and I use the adjective deliberately) this could involve persons being summoned to the Bar of the House to be admonished or given some other punishment. This last happened in respect of an outsider in 1957 although in 1968 a Member of the House was reprimanded for leaking a select committee report by Speaker Horace Mawbray King, decked up in black tricorn hat and full bottomed wig. This kind of theatre is unlikely to happen again. Nor is it held possible for the House of Commons to impose a fine this last having been done in 1666 and is therefore regarded as lapsed. The House of Lords has the theoretical power to fine, but the power has not been used since the nineteenth century.

On the whole, of course, it is much better that these matters are settled without confrontation. When some acknowledgment of error has been made or a letter of apology received, then it is both gracious and politic for the
House to accept the gesture and move on. But what powers does the House have to take more drastic action if all else fails? The answer is precious little. Because I think that the Emperor has no clothes – any ad hoc punitive action would probably receive a hostile public reaction – I think it is time that the House did have something in the armoury. The Australian Parliamentary Privileges Act gives the House of Representatives the power to imprison offenders for up to six months (with provision for such a decision to be rescinded). It also enables the House to impose fines on anyone trying to intimidate or in any way influence witnesses. In a recent case in the House of Commons, when a witness was leaned on by her employer for the evidence she gave to a committee, the only redress was a letter of apology (from of all people the Minister of Justice) but had that not been forthcoming, what could the House have done? Probably it could do nothing more than to pass a disapproving resolution. When the matter was considered by the Joint Committee on Parliamentary Privilege in 1999 it noted that wilful obstruction of business had been made a criminal offence (punishable by a fine not exceeding level 5 of the standard scale) in the legislation establishing the devolved assemblies.15 The power to fine would seem reasonable to me, imprisonment possibly disproportionate.

I want to return to the complicated and controversial matter of a new statute but before doing so, let me in passing make two comments on recent occurrences in the House of Commons which raise the general question of the balance between the important principle of freedom of speech and the notion of human rights.

The first occurred last November when a Member of the House of Commons used parliamentary privilege to name a builder who allegedly botched a constituent’s loft conversion. The Member accused the builder of substandard work which rendered the property of his constituent virtually unsalable. The builder strenuously denied the claims, stating also that the MP had refused to see him to hear his side of the story. That individual named in the House and dependent on his good name for his livelihood, had no redress whatsoever. I do not believe that such a situation should be allowed to continue. Let me be clear – I am not suggesting in any way that a Member should be inhibited in what he says about an individual in the House (though I always advised
Members to be extremely careful in what they said when they did name someone) but I do not see why an individual so named should not have some avenue for making out his own case and making it out in public. That avenue of complaint should be kept within Parliament – it could be the newly set up Committee on Privileges. Having such a platform might not lead to any concrete result but it would give the appearance of justice being seen to be done and if restricted (say to cases of actual naming of individual) would not, it seems to me, lead to a spate of complaints as opponents of the idea in the House have suggested. Moreover a mechanism of this sort is exactly the sort of modern acknowledgment of rights which I said in my remarks on the case of A v the UK Government which would be welcome by the judges of the European Court of Human Rights.

The second incident I shall refer to also occurred in the autumn. In the middle of examining a witness the Public Accounts Committee without any private deliberation or any warning to a witness, suddenly forced the witness to take the oath and continued the questioning on that basis. My strong advice when I was a Clerk was always that rough handling of witnesses never produced good effects; far better to lull witnesses into a false sense of security in which they would talk more freely and probably spill the particular beans that the Committee was hoping would be spilt. I do not think that that action was reasonable. Again let me be clear: I understand what the Committee is trying to do – elucidate the sometimes murky details of government spending – but if it really wants to pick a fight, that should ultimately be done with the Minister not his civil servants, the only exception being in the case of Accounting Officers who are directly personally responsible for their actions. And if it is a fashion for Ministers to blame civil servants, Parliament should speak out against that and put the blame where it should be: on ministers.

Let me go back to the matter of a Privileges Statute upon which a Government Green Paper is awaited. I mentioned my experience in the case of A v the UK Government and Counsel’s decision to rely on the functionality argument rather than on a seventeenth-century document whose words have never been clearly defined. When the Joint Committee on Parliamentary Privilege considered the matter a few years before, it made the important point that there was a need for greater transparency in the area of parliamentary
privilege and that this would only be achieved in the form of a modern statute. Clearer, modern language would assuage modern public opinion, with its aversion to the arcane and obscure. An act would also make the law more accessible: it would provide a coherent framework in which Parliament would exercise its legitimate privilege openly. The Committee envisaged that the statute would define such key terms as “proceedings in Parliament”, “place out of parliament” etc. There would also be a definition of contempt (although it should be noticed that the Australian Act proceeds by saying what “essential” elements of an offence are and their limits rather than attempting a head-on definition). The powers to fine, which I have already dealt with, would be incorporated into the statute. Anachronisms, such as freedom from arrest, immunity from sub poenas and the privilege of peerage would be swept away.

There are several areas which have come more to the fore since the time of the Joint Committee’s report. The first of these is the increased reliance of the Courts on using select committee reports. I have alluded to the implications of Pepper v. Hart but in recent years there have been quite a number of occasions when the Speaker of the House of Commons had to intervene to seek the laying aside of privileged material. Sometimes the intention to intervene was enough to dissuade parties from proceeding to rely on such materials; at other times strongly worded intervention was needed. The principle lying behind Article IX is a separation of judicial and legislative functions in this case. If such material is used in evidence to question or impeach what happens in Parliament, there will be a chilling effect on debate. Obviously there must be an exception in the case where a Minister explains reasons to the House for certain decisions and these fall to be judicially reviewed but that exception does not negate the general principle of separation.

Next there is the area of “anonymised injunctions” (loosely referred to as “super injunctions”) and what the Master of the Rolls has recently indicated are unacceptable “floutings” of court orders by Members raising cases in the House. The problem here is that a single Member of the House can interfere directly with a judgment of the Court, arrived at with great care and detailed consideration of evidence. Parliamentary Committees have examined this question in the past. The Procedure Committee of 1996, having said that the
onus lies with Members, individually and collectively to maintain high standards went on to say that it would support limitation on freedom of speech if proceedings in the House represented a serious challenge to the due process of law. Exactly how such a restriction would operate is unstated.

Nor is an answer given to Enoch Powell’s inescapably logical statement that

_a privilege which cannot be abused is no privilege, for that which constitutes abuse is a matter of opinion and it is part of the privilege of this House to be able to say in this place not only what they could not say outside without risk of prosecution but to be able to say that to which grave objection is taken by every other hon. Member._

While each House retains control over the conduct of its Members, there has been a reluctance to take any action against a Member who does behave in a way that others may find undesirable. That is regarded as a disproportionate and damaging response, a view with which I have much sympathy. Nevertheless, the present situation is far from satisfactory. In evidence to the Joint Committee on Privacy and Injunctions, David Howarth (himself an ex-MP) made the interesting observation that the two important sets of values – freedom of speech on the one hand and the rule of law, on the other – may not be compatible. His conclusion, a very British one, is that it is necessary to make sure that “one does not beat the other permanently.”

He and other distinguished witnesses before the Joint Committee urged Parliament to instigate a self-denying rule, like the _sub-judice_ rule, to deal with breaches of injunctions by reference in debate in the Houses. While they struggled with how the mechanism of such a rule would work, I cannot but agree with the principle they are advocating. The Joint Committee on Privacy and Injunctions, in its recent report, has stood back from this proposal on the grounds that so far breaches have been too infrequent to justify such a rule being put in place in each House.

It would be wrong in any consideration of the need for a new statute to ignore the risks that might come with having one. In the first place my long training as a Clerk has taught me to wait for delivery of the words on the paper. Governments (of all hues) often express their intentions in hyperbolic language but when they come forward with proposals, these often turn out to be very
convenient for the executive. I don’t blame them for that but let us first have a very full and vigorous debate and let Parliament scrutinise and the public comment upon, any detailed provisions the Government comes up with.

Secondly there is the question of how and in what ways a statute might affect the constitutional balance between Parliament and the Courts. A new statute might encourage judicial inventiveness toward re-interpretation of the principles of privilege, setting aside all that has been determined by the courts since 1689. Some say that the existence of a Supreme Court would encourage this new judicial activism with the result that the flexibilities in our existing system would be lost. However carefully drafted the provisions of a statute would come under scrutiny and lead to disputes which would have to be resolved in the Courts. I do not regard the probability of this risk too highly though I accept that the impact of a direct clash could be significant. The reason for my optimism in this matter stems from recent judicial decisions and pronouncements which suggest that the judges understand the need to keep out of the internal affairs of Parliament. The most striking of these pronouncements was in the Supreme Court itself. In the case of *R v. Chaytor* while the judgment concerned the limits of parliamentary privilege in relation to criminal matters; recognition of Parliament’s exclusive cognisance of its own affairs is supported. That suggests to me that a clearer statement of parliamentary privilege would not lead to judicial intervention but would make the law, because as I said the Bill of Rights is a statute, more transparent and defensible in other contexts such as that of human rights. Australian experience also suggests that the existence of a Privileges statute has not led to undue interference in parliamentary affairs from “any court or place out of Parliament”, to revert to the language of the Bill of Rights.

Let me conclude by returning to answer the question I used as the title for this lecture: Parliamentary privilege must, in Walter Bagehot’s language, be both a dignified and an efficient part of the Constitution. To be the former, which means that it is trusted and accepted by the public, the language of privilege must be understood in modern, unambiguous terms; to be the latter, that is to be effective in a modern society recognising human rights, individuals should have some right of redress when they consider they have been unfairly maligned in parliamentary debate. At the same time, for the efficient working
of Parliament and its Committees, there needs to be a strengthening of penalties for contempt and Parliament itself must impose some discipline on Members who use privilege to flout the rule of law. Some of these measures imply legislation; others reform within Parliament itself.

These are difficult, complex matters but it is important to get them right for parliamentary democracy cannot function effectively without these freedoms and immunities. Let me be crystal clear about that: privilege is essential, what matters for the future is how it is best safeguarded and what steps need to be taken to ensure it remains in the very fabric of our modern parliamentary life. I very much hope that the forthcoming Government Green Paper will provide an opportunity for detailed, public debate as well as full parliamentary scrutiny of this vitally important subject.

_On all great subjects, much remains to be said and of none is this more true than of the English Constitution._xxi
\textsuperscript{xx} Joint Committee on Privacy and Injunctions, op. cit. paras 210-231.
\textsuperscript{xxii} Ibid.p.1.