

CASE COMMENTARY

PARLIAMENTARY PRIVILEGE IN R V WHITE (LORD HANNINGFIELD) 2016

ALL EQUAL BEFORE THE LAW?

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I. INTRODUCTION

Enshrined within the Bill of Rights of 1689, parliamentary privilege continues to act as a guarantor of democracy and parliamentary supremacy, by providing a shield from unwarranted interference from the executive, the courts and others. Central to the constitutional arrangement of the United Kingdom, the functions and works of Parliament is of paramount importance. Parliamentarians, including Members of the House of Commons and the House of Lords, when conducting public duties must be safeguarded to ensure the discharge of such parliamentary business is conducted to the highest possible standard without fear or favour but with professional integrity.

Freedom of speech and *exclusive cognisance* are referred as the two broad categories of privilege¹ applicable to parliamentarians, both of which promote the freedom of Parliament. As per Sir Edwin Sandys' comments prior to the Glorious Revolution of 1688, "Parliament is no parliament if not free"², and article IX of the Bill of Rights 1689, "[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"³, reflects the limitations of the Crown and courts to intrude on proceedings. The 1999 Joint Committee on Parliamentary Privilege stated that *exclusive cognisance* "is to ensure that Parliament can discharge its functions as a

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¹ HM Government, *Parliamentary Privilege* (Cm 8318, 2012) para 17.

² Mary Frear Keeler, 'The Committee for Privileges of the House of Commons 1604-10 and 1614' (1994) 32 *Parliamentary History* 147, 156.

³ Bill of Rights 1689, s IX.

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legislative and deliberative assembly without let or hindrance”.⁴ Privilege promotes Parliamentary independence and provides practical measures to ensure the smooth continuity of the democratic process.

Limited case law⁵ reflects the successful attempts by both Houses to moderate, regulate, and to discipline Members, where malpractice is concerned, without the involvement of the courts. The uneasy tension concerning privilege rests within the applicability between Members and non-members. Where the class of non-members can be subjected to court proceedings, orders, and penalties for behaviours and acts, which if committed by a Member and claimed under the elusive banner of forming *parliamentary work* could result in an alternative direction of justice.

II. PROCEEDING SUMMARY OF *R v WHITE*⁶

On the 18th of July 2016, sitting in Southwark Crown Court his Honour Judge Alistair McCreath [Honorary Recorder of Westminster] directed that a not guilty verdict be entered against the indictment upon the Crown offering no evidence and inviting such a course. The verdict favoured Lord Hanningfield, dismissing allegations of financial misappropriations from the Parliamentary Expenses System for illegitimate purposes.

It was alleged that Lord Hanningfield made multiple claims for the daily allowance of £300, contrary to the qualifying threshold concerning as to what constituted parliamentary work, and the location in which the parliamentary works occurred. Members of the House of Lords are afforded financial support and the 2013 Guide to Financial Support For Members states under section 4.1.1 “[that a] member is entitled to claim a daily allowance of £300 for each qualifying day of attendance at Westminster”.⁷

⁴ Joint Committee on Parliamentary Privilege, *Parliamentary Privilege (First Report)* (1998-99, HL 43-1, HC 214-1) para 241.

⁵ C J Bulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st edn, Butterworths, 1989) 154 provides a comprehensive listing of contemporary cases concerning parliamentary privilege.

⁶ *R v White* (Southwark Crown Court 18th July 2016)

⁷ House of Lords ‘Guide to Financial Support for Members’ (Parliament, 2013) para 4. Available at <<https://www.parliament.uk/documents/lords-information-office/2013/Guide-to-Financial-Support-For-Members-2013.pdf>> accessed 3 November 2016. Section 4.1.1 was reaffirmed in the 2016 edition of ‘Guide to Financial Support For Members’ (Parliament, 2016) under section 4. Available at <<http://www.parliament.uk/documents/lords-finance-office/2016-17/Guide-2016-17.pdf>> accessed 3 November 2016.

Lord Hanningfield made occasional claims for the daily allowance whilst only spending 40 minutes within the Parliamentary Estate.⁸

It is worth noting that Lord Hanningfield was previously convicted under section 17 of the Theft Act 1968⁹ for false accounting and imprisoned for nine months in 2011.¹⁰ Aside from the criminal proceedings, for which the defence of *privilege* was not successfully used, the House Committee stipulated additional internal disciplinary measures. Notably a prohibition from engaging in divisions, or speaking within the Chamber until April 2012, when an outstanding sum of £30,000 had been repaid. In October 2013 Lord Hanningfield return to the House as an unaffiliated life peer, after some considerable distancing from the Conservative Party. However, in May 2014 Lord Hanningfield was suspended over expenses manipulation and was required to repay £3,300 whilst observing a House prohibition until May 2015.¹¹

The proceedings on the 18th of July, lasting less than five hours, was primarily directed by the Crown Prosecution Service, not by McCreath J. Resulting from a last minute change of interpretation by the House of Lords Authorities, fundamentally addressing the impact a contested jury would exert upon parliamentary privileges, the prosecution accepted that with no new evidence to challenge the House Authorities, the new interpretation

⁸ Martin Evans, 'Expense-Fiddling Peers to be Spared Criminal Trials' *The Daily Telegraph* (London, 19 July 2016) 2.

⁹ Theft Act 1968, s 17:

17 False accounting.

(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another,—

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or

(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular; he shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years.

(2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

¹⁰ 'Lord Hanningfield Jailed for Fiddling Expenses' (*BBC News*, 1 July 2009) <<http://www.bbc.co.uk/news/uk-politics-13989329>> accessed 3 November 2016.

¹¹ 'Lord Hanningfield Set To Be Suspended Over Expenses Breach' (*BBC News*, 12 May 2014) <<http://www.bbc.co.uk/news/uk-politics-27373115>> accessed 3 November 2016.

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would be respected. It is worth noting that as the case primarily concerned two central issues, “(a) whether the Defendant was, in fact, undertaking the actives¹² he claim[ed] to have been undertaking [...], and (b) whether the Defendant acted honestly [...]”¹³, McCreath J earlier ruled for the jurisdiction of the courts to apply in proceedings.¹⁴ However, and on the 18th of July, McCreath J did not present a ruling rather observed how the new position of the Crown precipitated a not guilty verdict being entered against the indictment.

III. EXCLUSIVE COGNISANCE

Often referred to as the doctrine of necessity¹⁵, Sir William Blackstone described exclusive cognisance as the sole jurisdiction of Parliament when “whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere”.¹⁶ The doctrine provides immunity from the standard application of the law to ensure Parliament conducts its work effectively and independently. The privilege of immunity distorts fundamental principles of the rule of law, most notably equality before the law, and creates an imbalance between the rights for access to justice, and the requirement for parliamentary safeguards. Such issues are summarised in the 2013-2014 Joint Committee report on Parliamentary Privilege:

A consequence of Parliament’s possession of exclusive cognisance over proceedings in Parliament is that participants, both Members and non-Members, are not legally liable for things said or done in the course of those proceedings; nor are those outside who are

¹² Malcolm Jack (ed), *Erskine May’s Treaties on the Law, Privileges, Proceedings and Usage of Parliament* (24th edn, Butterworths, 2011) 203. Notably “an exhaustive definition of proceedings in Parliament [can] not be achieved”.

¹³ Jeremy Johnson QC, ‘Regina and Lord Hanningfield: Observations on Behalf of the House of Lords Authorities’ (July 2016) para 4.

¹⁴ *Ibid* Johnson (n 13) para 15 “It is [the purpose of] the Courts (not Parliament) to determine whether a particular issues comes within the scope of Article 9 of the Bill of Rights”.

¹⁵ For the proposes of this case note, a discussion concerning the significant historical events facilitating the development of the doctrine has been deliberately omitted. For reference, the significant historical events begin with the period of parliamentary interference by King Charles I, proceeded by the English Civil War, and concludes with the restoration of the Crown in 1660.

¹⁶ William Blackstone, *Commentaries on the Laws of England* (1765) 58.

adversely affected by things said or done in Parliament able to seek redress through the courts.¹⁷

The substantive issue concerns the limited jurisdiction of courts to moderate the powers of both Parliament and government. *Bradlaugh v Gossett*¹⁸ demonstrates the refusal by the court to intervene within the internal processes of the House of Commons, when the House incorrectly interpreted and applied statute law. To the detriment of Mr Bradlaugh¹⁹, it was held that Parliament can exercise sole jurisdiction over matters pertaining “within the Walls”²⁰ and preclude the courts from interfering, irrespective of any rights granted by statute law. To this effect, a House may “practically change or practically supersede the law”²¹ through the actions of its Members. However, this paradigm is changing in light of the Supreme Court decision in *R v Chaytor*.²² It would appear that statute law and the jurisdiction of the court will be limited only when the “activities in question are *core* to Parliament’s function as a legislative and deliberative body”.²³ This assertion signposts the emergence of clarity regarding privilege applications and a departure from the uncertainty surrounding the extent to which statute law interferes with Parliament. After the decision in *R v Herbert*²⁴ two differing opinions emerged. The first stated that “where legislation is silent it is taken as not binding on Parliament”.²⁵ The second assumed that “law applies to Parliament, without any need to explicitly state that it applies”.²⁶ It would appear the first opinion has been disregarded, as per Lord Phillips in *Chaytor*; “there appears to have been a presumption in Parliament that statute do[es] not apply to activities within

¹⁷ Joint Committee on Parliamentary Privilege, *Parliamentary Privilege* (2013-14, HL 30, HC 100) para 17.

¹⁸ [1884] 12 QBD 271.

¹⁹ *Ibid* (n 18). Mr Charles Bradlaugh, elected Liberal Member for Northampton (1880-1891), was prevented from entering Parliament and from taking the Oath of Allegiance in accordance with the Parliamentary Oaths Act 1866. The actions of the Sergeant at Arms who prevented entry, reflected the religious animosity towards atheism.

²⁰ Charles Gordon (ed), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (20th, Butterworths, 1983) 82.

²¹ *Gossett* (n 18).

²² [2010] UKSC 52.

²³ HM Government (n 1) para 216 [additional emphasis]

²⁴ *The King v Graham-Campbell (ex p Herbert)* [1935] 1 KB 594.

²⁵ HM Government (n 1) para 207.

²⁶ *Ibid* HM Government (n 1) para 208.

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the Palace of Westminster [...]. That presumption is open to question”.²⁷ The second opinion is supported in the test applied by the 1999 Joint Committee where exclusive cognisance is available only when “[it] is necessary today, in its present form, for the effective functioning of Parliament”.²⁸ Additionally, the Supreme Court of Canada held in *Canada (House of Commons) v Vaid*²⁹ that to assert the right of cognisance “the assembly must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment [...] of their functions [...] that outside interference would undermine the level of autonomy required”.³⁰ Both cases³¹ demonstrate that despite the doctrine of parliamentary sovereignty and the rights of absolute privilege, the courts have formulated a constraint regarding the applicability of exclusive cognisance held by each House. Although the principle of judicial obedience³² to the will of Parliament is currently maintained, any further court implied limitations may seriously damage parliamentary privilege, both in practice and as a concept.

It is worth noting that Lord Denning MR in *British Railways Board v Pickin*³³ viewed the function of the courts as mutually beneficial to Parliament; “It is the function of the courts to see that the procedure of Parliament itself is not abused, and that undue advantage is not taken of it. In so doing the court is not trespassing on the jurisdiction of Parliament itself, it is acting in aid of Parliament and, might I add, in aid of justice”.³⁴ This view was rejected by the House of Lords³⁵, which stated the function of the court was only to consider and apply enactments of Parliament. If such a statement made by Lord Denning MR was upheld, it would have challenged the independence of Parliament, and eroded the fundamental articles contained within the Bill of Rights 1689.

Despite the limitations implied through the courts, other methods of curtailing privilege can be conducted with the consent of either House in

²⁷ *Chaytor* (n 22) para 78.

²⁸ Joint Committee on Parliamentary Privilege (n 4) para 4.

²⁹ [2005] 1 SCR 667

³⁰ *Ibid Vaid* (n 29) para 4.

³¹ Despite *Vaid* originating from the Canadian Supreme Court the British Parliament has endorsed the substantive test. See Joint Committee on Parliamentary Privilege (n 17) para 24.

³² Diana Woodhouse, ‘Politicians and the Judges: A Conflict of Interest’ (1996) 49 *Parliamentary Affairs* 423.

³³ [1973] 1 QB 219.

³⁴ *Ibid Pickin* (n 33).

³⁵ [1974] WLR 208 (on appeal to the House of Lords).

Parliament. As held in *Stockdale v Hansard*³⁶, each House is the principal judge of its privileges. Each House may, as its own discretion, formulate legislation to limit the applicable nature of Parliamentary Privilege. However, both Houses cannot create new privileges. The Recall of MPs Act 2015 provides for the automatic disqualification from the House of Commons if a Member is "...convicted in the United Kingdom for an offence and sentenced"³⁷, for a period greater than 12 months. For the purposes of the Act, Parliament cannot be viewed to provide sanctuary from the law "where the conduct of a MP does not relate to proceedings in Parliament"³⁸. Whilst the Act provides a limitation of privilege to Members of the House of Commons, the House of Lords Reform Act 2014³⁹ provides a similar mechanisms for exclusion and expulsion⁴⁰ for Peers. As with all articles of legislation, successor Parliaments may elect to repeal the aforementioned Acts and reduce the constraints limiting privilege interpretation and application. The doctrine of Parliamentary sovereignty would suggest that privilege is an inherent right of Westminster, originating from the conception of the British Parliamentary model.

IV. REFORM

The delicate balance between Parliamentary rights and the rule of law has long been an issue discussed within the Palace of Westminster, the courts, and the public realm. The substantive cause for debate centralises over the extent to which the various forms of privilege can be used; the

³⁶ [1839] 112 ER 1112.

³⁷ Recall of MPs Act 2015 s 1(3)(a).

³⁸ HM Government (n 1) para 27.

³⁹ Dan Byles, former Conservative Member of Parliament for North Warwickshire (2010-2015), proposed the various reforms in a Private Members Bill in May 2014. As of May 2016, only four Peers have been removed under the Act entirely for non-attendance (House of Lords Reform Act 2014, s 2) during proceedings. 'Four Absent Peers Cease to be House of Lords Members' (*BBC News*, 19 May 2016) <<http://www.bbc.co.uk/news/uk-politics-36330030>> accessed 3 November 2016.

⁴⁰ House of Lords Reform Act 2014, s 3:

- (1) A member of the House of Lords who is convicted of a serious offence ceases to be a member of the House of Lords.
- (2) A person "is convicted of a serious offence" if, and only if, the Lord Speaker certifies the person, while a member of the House of Lords, has been—
 - (a) convicted of a criminal offence, and
 - (b) sentenced or ordered to be imprisoned or detained indefinitely or for more than one year.

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limited jurisdiction of the courts; and the inherent inequality between those who enjoy privileges and those who do not.

The Joint Committee on Parliamentary Privileges has taken a proactive stance by conducting periodical reviews of privileges. The reports to both Houses identifies the relevance of freedom of speech and exclusive cognisance. The Committee strongly dispels any doubt that privileges are unwarranted, rather it reaffirms the necessity in relation to the effective discharge of duties required by both Houses. The 1999 Report suggested comprehensive codification⁴¹ with a view of providing greater clarity by codifying all aspects of parliamentary privileges. The proposed Parliamentary Privileges Act aimed to define, amongst other issues, proceedings in Parliament, Parliamentary competence, and to outline the extent to which privileges could be claimed. The major disadvantage of codification is a reduction in flexibility. Cited in the 2013-2014 Report, “[...] privilege is a living concept [...] and evolves as Parliament evolves, and as the law evolves”.⁴² By codifying privileges, Parliament would bind itself to what would quickly become an obsolete interpretation, reflecting outdated opinions and perspectives.

In a Green Paper published in 2012, the Government summarised a critical issue, “Parliamentary privilege is not a widely understood concept”.⁴³ The Paper indicates that special consideration must be afforded towards any motion for reform, and reform ought not be initiated without comprehensive political support. Stating that privilege “has developed over many centuries”⁴⁴, it was the opinion of the Government that no legislation should be introduced. Indeed, the coalition Government between the Conservative Party and the Liberal Democrats did not seek reform. It remains to be seen if the current Conservative Government will introduce legislation to clarify the applicable nature of exclusive cognisance. Given the heavy legislative programme, with particular regards towards the forthcoming European Union departure, reform appears unlikely.

In 2014 the Joint Committee concluded that an exhaustive list relating to matters subject to exclusive cognisance is “impracticable and undesirable”.⁴⁵ The fundamental element of Parliamentary privilege is to be detached from court interference. By codifying privileges the court would assert an active role regarding interpretation and application. This would be unacceptable as Parliamentary freedom would be restricted. The

⁴¹ Joint Committee on Parliamentary Privilege (n 4) para 378.

⁴² Joint Committee on Parliamentary Privilege (n 17) para 13.

⁴³ HM Government (n 1) para 343.

⁴⁴ Ibid HM Government (n 1) para 343-35.

⁴⁵ Joint Committee on Parliamentary Privilege (n 17) 71.

Committee has made a series of recommendations⁴⁶ that indicate temporal inappropriateness for serious and substantive reform. This is disappointing as the situation continues to be exacerbated by a general lack of consensus concerning the *correct* application of privileges. The actions of Members, reaching beyond the after effects of the 2011 Parliamentary Expenses Scandal, continue to cast doubt within the public realm regarding the appropriateness of implied immunities from the law.

During the proceedings against Lord Hanningfield, the expedited return of a not-guilty verdict precluded a formal examination of the alleged conduct by the Member in open court. A jury was not invited to consider the evidence presented by the Crown, nor did the court explore the evidence collected by the Metropolitan Police Service and other government agencies. From the application of parliamentary privilege, the trial of Lord Hanningfield is blatantly different from what would be expected in similar civil or criminal cases concerning financial malpractice. Submissions during proceedings exclusively concerned *if* exclusive cognisance was applicable; such debate would be unavailable for individuals not pertaining to the class of Parliamentarians. Aside from the trial-by-media that Lord Hanningfield experienced, no substantive penalty has been imposed and to date, no further public investigation has occurred. From *R v White*⁴⁷ it is debatable if an application of parliamentary privilege is appropriate regarding financial allegations and the need to encourage transparency of both Parliament and Parliamentarians. Therefore, in situations where public finances are concerned, it could be appropriate for the defences of privilege not to apply. The inherent value of privileges distorting the commonly held maxim of equality would appear as disproportionate in regards to repetitive malpractice and subsequent allegations.

Parliament, Government, and the courts are not directly seeking substantial and immediate reform. It is clear that differing attitudes continue to develop as parliamentary privileges continue to evolve. These attitudes acknowledge the tension between jurisdictional limitations, historical precedents and doctrines, and the distorting effect immunities bears on the rule of law. Whilst Parliament and Government wish to maintain their privileges, and the courts wishing for greater regulation, perhaps the *status quo* ought to remain. Perhaps the debate to have or not to have privilege is inherent within our system of governance. Perhaps an evolutionarily path of development, driven by Parliament, supported by Government, and questioned by the courts, is the future of parliamentary privileges.

⁴⁶ Ibid (n 17) for a definitive list of recommendations proposed by the Joint Committee.

⁴⁷ *White* (n 6).