

Parliamentary Privilege Consultation: Response of Dr Adam Tucker

Introduction

1. I am Lecturer in Law at the University of Manchester. I teach and research in the fields of Constitutional Law and Constitutional Theory. I am currently in the final stages of a research project on parliamentary privilege for publication in 2013. The answers in this response are derived from that work-in-progress.

Parliamentary Privilege and Constitutional Principle

2. Parliamentary privilege undermines the rule of law. Specifically it undermines the requirement, which is central to the rule of law, that the law be general. Even worse: it undermines that requirement in a particularly worrying way because it mainly (although not only) has the effect of excusing members of the political elite from conformity with the law.
3. The rule of law is not, however, an absolute principle. Its claims must be balanced against the competing claims of other principles. One of those competing principles is the separation of powers, specifically the requirement that no branch of government should interfere in the operation of another branch of government.
4. There are occasions when insisting upon the general application of the law would cause (or risk causing) the judiciary or the executive to interfere with the proper operation of Parliament. These are occasions when the demands of the rule of law come into conflict with the demands of the separation of powers. The constitutional doctrine of parliamentary privilege applies when such conflict occurs and the separation of powers must prevail.
5. So parliamentary privilege is warranted whenever the risk of another branch of government interfering with the operation of Parliament is sufficiently great to justify sacrificing the rule of law in the name of the separation of powers.

Competing Conceptions of Parliamentary Privilege

6. Translating these theoretical foundations into a stable and coherent doctrine of constitutional law has proved difficult. In the case law and constitutional literature, several competing conceptions of parliamentary privilege jostle for supremacy. The most significant illustration of this doctrinal instability can be seen in *R v. Chaytor and others*, the leading case on the issue.

Twelve judges in the Court of Appeal ([2010] EWCA Crim 1910) and the Supreme Court ([2010] UKSC 52) were unanimous in coming to the conclusion that the doctrine does not insulate MPs and peers from criminal prosecution for the submission of fraudulent expenses claims. But three different reasons for coming to this decision, or three different conceptions of parliamentary privilege, can be identified in the speeches given in that case.

7. Lord Judge, for the Court of Appeal, treated parliamentary privilege as essentially a creation of Article 9 of the Bill of Rights. For him the appeals in *Chaytor* were “concerned with its ambit, and whether it extends to criminal proceedings against members of Parliament for fraudulent claims for parliamentary expenses”. The appeals failed because the court declined to “read into article 9” the necessary protection (para [14]). I will call this the *Bill of Rights* conception of parliamentary privilege.
8. Lord Phillips, in the Supreme Court, adopted a more expansive approach to the issue. For him the appeals presented two separate questions. First, the question tackled by Lord Judge of whether fraudulent expenses claims could be brought under the protection of the Bill of Rights. Secondly, whether they could be brought under the (quite separate protection) of the “exclusive cognisance of Parliament” which “describes areas where the courts have ruled that any issues should be left to be resolved by Parliament rather than determined judicially”. For him, the appeals failed because the conduct in question was protected neither by the Bill of Rights nor by the exclusive cognisance of Parliament. I will call this the *dualist conception* of parliamentary privilege.
9. Although he clearly treated them independently of each other, Lord Phillips did express some doubts as to the underlying separateness of his two questions (para [13]). Lord Rodgers, also in the Supreme Court, embraced those doubts more forcefully. For him, “in truth there is really *only one basic question*: does the matter for which the appellants are being prosecuted in the Crown Court fall within the exclusive jurisdiction or cognisance of Parliament” (para [104], emphasis added). This question embraced both freestanding issues of Parliament’s jurisdiction, and issues covered by Article 9 of the Bill of Rights. For him, the appeals failed because they did not concern matters that fall under the exclusive cognisance of Parliament. I will call this the *unitary conception* of parliamentary privilege.
10. The choice of conception is important. Different abstract conceptions of parliamentary privilege lead to different concrete understandings of how the doctrine works, where its boundaries lie, and what questions need asking in order to properly locate them. Choosing correctly is fundamental to understanding, developing, reforming and justifying the doctrine of parliamentary privilege.

11. In the present consultation, the Government adopts the dualist conception of parliamentary privilege. It tackles the questions of freedom of speech and issues arising under Article 9 of the Bill of Rights in Part One before tackling the question of the scope of the exclusive cognisance of Parliament in Part Two.
12. However, the soundest conception of parliamentary privilege is the unitary conception. The foundation of parliamentary privilege is Parliament's right to self-regulate.
13. There is no freestanding principle of free speech in Parliament. In fact, speech in Parliament is reasonably heavily regulated. It is, for example, subject to prohibitions on accusations of dishonesty, restrictions on discussion of the activities of the Royal family and the *sub judice* rule. What is special and important about parliamentary speech is not that it is free; it is that it is regulated internally by Parliament rather than by the general law. But this is just one aspect of the broader doctrine of Parliament's right to self-regulate. Many non-speech activities connected to the constitutional functions of Parliament are privileged in the same way.
14. Furthermore, by tying all claims of parliamentary privilege to Parliament's right to self-regulate, the unitary conception is sensitive to the underlying principled conflict between the rule of law and the separation of powers. A sphere of regulatory independence is necessary and sufficient to protect Parliament in the exercise of its functions.
15. Finally by highlighting the single core question at the heart of parliamentary privilege, the unitary conception provides a foundation for coherent answers to concrete questions about the scope of the doctrine: any claim to parliamentary privilege should be adjudicated by asking whether the matter in question falls within the scope of that right.

Two Emergent Themes

16. Two themes relevant to the present consultation emerge from this discussion of the competing conceptions of parliamentary privilege and endorsement of the unitary conception.
17. The first theme is the issue of the status of Article 9 of the Bill of Rights. The Bill of Rights benefits from historical significance and rhetorical power. But it should not be given a special status in a way that distorts the underlying doctrine. Parliament has a sphere of independent self-regulatory jurisdiction whose boundaries are determined by the need to protect its proper functioning. For reasons of internal institutional organisation the vast majority of those regulatory powers are delegated to the two Houses, which regulate

themselves separately in many ways. Where appropriate it is open to Parliament as a whole, or to the Houses individually, to exercise that regulatory power by deferring to the general law; either systematically through internal rules that express such deference or on an *ad hoc* basis by, for example, reference by the Speaker to the police. Legislative intervention is only needed as a way of disturbing this arrangement. Such intervention can operate both to widen and to narrow the scope of parliamentary privilege. Article 9 is best understood as a legislative intervention that widens the scope of parliamentary privilege by narrowing Parliament's room to self-regulate. It takes away Parliament's power to defer to the general law (to "waive" privilege) in cases where that would lead to the questioning of parliamentary proceedings in another place. It is not the foundation of the doctrine of parliamentary privilege. It is a legislative exception to that doctrine. The bill of rights and dualist conceptions of parliamentary privilege err in treating Article 9 of the bill of rights as more important than it is. The unitary conception guards against this mistake.

18. The second theme is the regulatory jurisdiction of Parliament. The unitary conception makes clear that the core consequence of a successful assertion of parliamentary privilege is that the conduct concerned falls to be regulated by Parliament rather than by the courts. It is important, then, to avoid what I will call the *impunity fallacy*. Conduct which is protected by parliamentary privilege is not protected absolutely; it still stands to be regulated by the internal mechanisms of Parliament. We can see now, for example, that the question in *Chaytor* was not whether fraudulent expenses claims can be made with impunity. Rather, it was whether fraudulent expenses claims are best dealt with by the courts or by Parliament's internal regulatory mechanisms. It should also be stressed that this implies that Parliament has a *responsibility* to properly exercise its regulatory power. This must be borne in mind when facing concrete question about the boundaries of parliamentary privilege.

Answers to Questions

19. *Q1: Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?*
Yes. The reasons canvassed in the consultation are compelling.
20. *Q2: Do you think that "proceedings in Parliament" should be defined in legislation?* No. As part of Article 9, the role of the phrase "proceedings in Parliament" is to define that subset of privileged activity which is protected even against a waiver of privilege by Parliament. The consultation notes that advocates of this proposal are motivated by a desire for either reform

or clarification. But those advocates are not seeking reform of this subsidiary issue. They are seeking reform or clarification of the scope of privilege itself. Even if these motivations are sound, amendment of Article 9 is not the best way to proceed. This would presuppose (and encourage) the bill of rights conception of parliamentary privilege, and therefore show insufficient concern for the doctrine's foundation in the conflict between the rule of law and the separation of powers.

21. Furthermore, defining "proceedings in Parliament" is notoriously difficult. The best and most influential attempted definition is that in Erskine May as cited in the consultation [52]. But note that even this is remarkably clumsy as it links proceedings to decision making whereas the constitutional functions of Parliament include many activities which cannot be cast as decisions.

22. *Q4: Do you think that "place out of Parliament" should be defined in legislation?* No. As the consultation document observes Article 9 is, on its face, apparently absurd in that it appears to prohibit criticism of parliamentary proceedings on the street, in newspapers or even simply between friends over coffee. But the courts have handled this apparent absurdity well and its (sensible) meaning is now well established. No legislative intervention is necessary.

23. *Q5: Do you think that the situations when the courts can use proceedings in Parliament should be set out in legislation?* No. As the list (at [84]) illustrates well, the courts have successfully handled a series of unforeseeable such situations. The outstanding issue is the use of governmental statements in Parliament in the course of judicial review proceedings. This issue stems from the fact that Parliament is mixed, with the executive sitting in an otherwise legislative chamber. This has the effect that essentially executive actions and statements are drawn under the protection of parliamentary principle. This is a feature of our system, and Parliament's exercise of its supervisory power over government demands protection just as much as its legislative activities. Furthermore, the Joint Committee's proposal (at [85]) appears to adopt the bill of rights conception of parliamentary privilege. It would have a potentially confusing impact on a stable and coherent branch of the law. The status quo is satisfactory. "Questioning" and "impeaching" are regulatory functions. They are appropriately left to Parliament's exclusive cognisance and the courts police the borderline between those and other uses successfully.

24. *Q6: Do you believe that the protection of privilege should be disapplied in cases of alleged criminality, to enable the use of proceedings in Parliament as evidence?* The notion of disapplication in play here is ambiguous between giving the courts automatic jurisdiction and restoring Parliament's power to waive privilege and defer to the courts. The attractiveness of this proposal depends on Parliament's ability, capacity and willingness to regulate criminality. Parliament claims substantial but patchy jurisdiction of a broadly appropriate type (both under the label of contempt and in its disciplinary procedures for members). The question is whether this is suitable for dealing with the kind of criminality under discussion and (even if it is) whether Parliament is the appropriate institution to undertake such procedures. At this point an internal tension in the demands of the separation of powers comes into view. On the one hand, that principle requires that institutions refrain from interference in each others' functions. This mitigates in favour of respecting Parliament's own jurisdiction here. On the other hand, that principle requires that institutions do not perform each others' functions. On balance, the need to protect Parliament from interference by the judiciary does not extend to justifying the exercise by Parliament of an extended criminal jurisdiction.
25. *Q7: If so, do you believe that this disapplication should apply to all cases of alleged criminality unless specifically excepted, or should disapplication be restricted to certain specific offences such as bribery?* Disapplication should be very carefully restricted to certain offences. The risk of some under-regulated crime is one price we pay for parliamentary privilege, especially in light of the risk of the chilling effect that potential criminal prosecution would have on open debate. The restricted set of offences for which disapplication would be appropriate is well captured by the list at [123]. But this should not be achieved by a general disapplication alongside a list of exceptions. Rather, a carefully constructed list of offences should specify when the disapplication would apply. The list would need to be kept under review.
26. *Q10: Should the protection of privilege be disapplied where a person incites specific acts of violence or terrorism in proceedings in Parliament?* No. This is a clear case of an offence the risk of which should be managed by Parliament's internal regulatory mechanisms. The circumstances in which it could occur are too intimately linked with the circumstances of legitimate debate to permit any weakening at all of parliamentary privilege in this area. Indeed, the consultation document errs (at [130]) in arguing that they can be separated. It is possible to express general views in the course of debate which simultaneously give rise to the risk of prosecution for incitement. Note also that the temptation to reform here is connected to the

dangers of the impunity fallacy: even without reform, parliamentary speech takes place in a regulated environment which is suitable for managing the issues in question.

27. *Q12: Do you believe that, if the protection of privilege were disapplied in certain circumstances, a safeguard would be desirable before proceedings in Parliament could be used in evidence by the prosecution in specific cases?* Yes. But the consultation does not specify who or what stands in need of such safeguarding. It is important to stress that parliamentary privilege is the privilege *of Parliament* and as such the beneficiary of such a safeguard must be Parliament itself. This clarification helps to establish what kind of safeguard would be appropriate. Parliament should be given the power to safeguard itself.

28. *Q13: If so, do you support the approach in the draft clauses?* No. The draft clauses give the safeguarding power to independent authorities such as the Director of Public Prosecutions. This power should instead be given to Parliament as a whole (which, in practice, would entail its delegation and exercise by appropriate officers of each House).

29. *Q14: Do you believe the protection of privilege should in certain circumstances be disapplied for non-members as well as for Members?*

Q15: If so, do you believe this should be:

(a) in all the same situations as for Members; or

(b) only when a non-member is being tried on the same facts as a Member?

The protection of privilege should be disapplied in the same circumstances for non-members as for Members. Parliamentary privilege protects constitutional functions, not people. Its beneficiaries are predominantly Members only insofar as their position makes them more likely to be participating in the functions of Parliament. In principle, however, the operation of parliamentary privilege should apply in the same way to Members and non-members alike. This is not just a principled approach to the issue. It has the pragmatic advantage of addressing the concerns about the “unfortunate connotations” of the term privilege which the consultation document raises (at [16]).

30. *Q16: The Government does not think that any legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is desirable or necessary. Do you agree?* Yes. Again, the temptation for reform here is closely connected to the dangers of the impunity fallacy. Under the terms of Article 9, this kind of speech is currently subjected to internal regulation

by Parliament. Parliament is more than adequately equipped to deal with it appropriately. If reform is undertaken, there are two options. The first would consist in a selective repeal of Article 9 that restored the risk of a waiver of privilege. The second would be automatic liability for breaching injunctions in parliamentary proceedings. Only the first option is remotely consistent with constitutional principle. It would still create an unacceptable chilling effect. This is an area where Parliament must embrace its responsibility to self regulate.

31. *Q17: Do you think that section 13 of the Defamation Act 1996 should be repealed?*

Q18: If so, do you think that section 13 of the Defamation Act 1996 should be replaced with a power for each House to waive privilege, and do you have views on how that should operate?

Yes. Article 9 operates to remove Parliament's waiver power. Section 13 of the 1996 Act inappropriately restores that power but to individuals. It should be restored to Parliament as a whole (which, in practice, would entail its delegation and exercise by each House).

32. *Q30: Is there a continuing case for Members' exemption from attending court as a witness?* No. This rule extends beyond the appropriate operation of parliamentary privilege. It has the effect of granting a personal privilege to Members in excess of that justified by the demands of the separation of powers. Even without this general exemption, justified refusals to attend court as a witness would still be protected by the natural operation of the doctrine of parliamentary privilege.

An Afterword on Parliamentary Sovereignty

33. The consultation connects parliamentary privilege with parliamentary sovereignty on several occasions ([23], [26], [30], [205], [218]). This should be avoided. Parliamentary sovereignty is a doctrine about the extent of Parliament's legislative power. Parliamentary privilege is a doctrine about the way in which that power (alongside others) is insulated from the danger of interference by other state institutions. The two are mutually independent. The proper scope of parliamentary privilege would be the same whether or not there were limits on Parliament's legislative competence.

26 September 2012