

Parliamentary privilege, Article 9 of the Bill of Rights and admissibility: What use can be made of Parliamentary materials in litigation?

I. INTRODUCTION

1. As the Court of Appeal observed recently, “...it has become relatively commonplace in public law proceedings for every last word spoken or written in Parliament to be placed before the court. In particular, debates are relied upon extensively when they should not be and, furthermore, the conclusions of select committees are prayed in aid with the court being asked to “approve” them. For the reasons summarised by Stanley Burnton J in his judgment in *Office of Government Commerce v Information Comr (Attorney General intervening)* [2010] QB 98, paras 46–48, that should not happen”: ***R (Reilly) v Secretary of State for Work and Pensions*** [2017] QB 657 at ¶109.
2. The reason that Parliamentary materials should not be used in this way is, of course, Parliamentary privilege. There are two distinct aspects to this: Article 9 of the Bill of Rights 1689; and a wider principle known as the “exclusive cognisance” privilege. The former is statutory, whereas the latter is a feature of the common law. Article 9 cannot be waived even by Parliamentary resolution, but the exclusive cognisance principle can be: ***R v Chaytor*** [2011] 1 AC 684 at ¶¶61, 63, 68 per Lord Phillips and ¶130-131 per Lord Clarke.
3. This paper summarises the law in relation to both aspects of Parliamentary privilege (Sections II and III), and then discusses the resulting practical constraints in relying upon Parliamentary material in judicial review and other public law proceedings (Section IV).

II. ARTICLE 9 OF THE BILL OF RIGHTS

(a) Historical background

4. The Bill of Rights 1689 is one of the UK’s “constitutional instruments”.¹ Its genesis is to be found in the long struggle for supremacy between Parliament and the Crown during the 17th century.
5. During those turbulent years, the question whether a Parliamentarian could be made liable for words spoken in Parliament was of far more than merely academic or even financial interest. In ***Sir John Eliot's Case*** (1629) 3 St. Tr. 294, 3 Digest 326, 134, three MPs were prosecuted for making seditious speeches in Parliament. They refused, on principle, to accept the court’s jurisdiction to consider such a charge, which they asserted lay within the exclusive jurisdiction of Parliament. They were imprisoned in the Tower of London. Sir John Eliot died there in 1632; his two fellow MPs were imprisoned for 11 years. It was only after the Civil War, in 1666, that the House of Lords recognised that the court should never have assumed jurisdiction over the charge of seditious speeches, which was “fully answered by the plea of privilege” ((1668) 3 St.

¹ ***R (Buckinghamshire County Council) v Secretary of State for Transport*** [2014] 1 WLR 324 at ¶207 per Lord Neuberger of Abbotsbury PSC and Lord Mance JSC.

Tr. 331-333). As Stephen J later observed of the *Eliot* case in *Bradlaugh v Gossett* (1884) 12 QBD 271 at 283:

*“This case is the great leading authority, memorable on many grounds, for the proposition that **nothing said in parliament by a member as such, can be treated as an offence by the ordinary Courts.**”*

6. The turf war between Parliament and the Crown was far from finished, however. When King James II, a Catholic, assumed the throne in 1685, he rapidly upset Protestant Parliamentarians by seeking the repeal of anti-Catholic laws. This, along with disputes regarding financial issues, led James II to prorogue Parliament in November 1685. Over the coming years, James implemented a succession of measures, promulgated under the royal prerogative and without Parliamentary approval, which sought to improve the position of Catholics. There was increasing unease at this course of action.
7. In 1688, James produced a Catholic heir. The threat of a Catholic dynasty crystallised opposition. Shortly afterwards, a group of Protestant nobles and Parliamentarians invited James’ Protestant daughter Mary, together with her husband William of Orange, to assume the throne in place of James II. In November 1688, William and Mary came to England in order to do so, bringing with them a substantial army. James II fled for France on 23 December 1688. On 28 December 1688, in the culmination of the so-called “Glorious Revolution”, William took over provisional government by appointment of the peers of the realm. William then summoned what became known as the “Convention Parliament”, which met in January.
8. On 12 February 1688², a declaration was drawn up by the Convention Parliament and approved by William and Mary. It was enacted, with some additions, on 13 February, under the title of the “Bill of Rights”. The Act is now commonly known as the Bill of Rights 1689.

(b) The key provision: Section 1, Article 9

9. The Bill of Rights begins by reciting that it is “*An Act declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne*”. The material part of the Bill of Rights for present purposes is the first part of Section 1.
10. Section 1 begins by reciting thirteen specific respects in which James II “...*did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome*”. Many of these thirteen criticisms relate to usurpation of the powers and privileges of Parliament. The relevant criticism for present purposes is entitled “*Illegal Prosecutions*”, and criticises James II for having brought:

“...Prosecutions in the Court of Kings Bench for Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegall Courses.”

11. This was, as Lord Judge CJ has observed, a “*clear reference to Eliot’s case*”: ***R v Chaytor*** [2010] 2 Cr. App. R. 34 at ¶12. Section 1 then proceeds, under most of the same headings as entitle the thirteen criticisms of James II, to make a series of

² Until the Calendar (New Style) Act 1750, the legal commencement of the year was 25 March, and hence the year 1689 had not yet commenced when the Act was passed on 13 February.

declarations. In response to the criticism under the heading “*Illegal Prosecutions*”, it is declared as follows:

“Freedom of Speech.

That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”

12. This provision has become known as Article 9 of the Bill of Rights. As Lord Browne-Wilkinson observed in *Pepper v Hart* [1993] AC 593 at 638D: “***Article 9 is a provision of the highest constitutional importance and should not be narrowly construed.***” To like effect, Lord Judge CJ stated in *R v Chaytor* (cited above) at ¶14 that “[t]his provision has remained in force for over 300 years. ***Its importance cannot be overstated. It has never been questioned.***”
13. Notwithstanding the constitutional significance of Article 9, the courts have recognised that both its antiquity and its generality mean that it cannot always be literally construed. In *Toussaint v Attorney General of Saint Vincent and the Grenadines* [2007] 1 WLR 2825, Lord Mance observed that (¶10):

“...the general and somewhat obscure wording of article 9 cannot on any view be read absolutely literally. The prohibition on questioning “out of Parliament” would otherwise have “absurd consequences”, e g in preventing the public and media from discussing and criticising proceedings in Parliament, as pointed out by the Joint Committee on Parliamentary Privilege, para 91 (United Kingdom, Session 1998–1999, HL Paper 43-I, HC 214-I).”

(c) The purpose of Article 9: freedom of debate and speech

14. The purpose of Article 9, “...viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed”: *Pepper v Hart* per Lord Browne-Wilkinson. Parliamentary privilege is not the privilege of a particular MP, but rather that of Parliament as a whole: *Church of Scientology v Johnson-Smith* [1972] 1 QB 522 at 528 per Browne J; *Hamilton v Al Fayed* [2001] 1 AC 395 at 408C per Lord Browne-Wilkinson. Indeed, in the *Chaytor* case Lord Judge held (at ¶5) that:

“Properly understood, the privileges of Parliament are the privileges of the nation, and the bedrock of our constitutional democracy.”

(d) What is a “proceeding in Parliament”?

15. The following definition of a “*proceeding in Parliament*”, taken from *Erskine May*, was quoted with approval in *Chaytor* at p701:

“...some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such

as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.”

16. The courts nowadays generally take a narrow approach to identifying “*proceedings in Parliament*”. In the Chaytor case, the High Court, Court of Appeal and Supreme Court all rejected an argument that the submission of expenses claims amounted to “*proceedings in Parliament*”. As Lord Phillips observed (¶¶47-48):

*“... the principal matter to which article 9 is directed is **freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.***

*If this approach is adopted, **the submission of claim forms for allowances and expenses does not qualify for the protection of privilege. Scrutiny of claims by the courts will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech. Indeed it will not inhibit any of the varied activities in which Members of Parliament indulge that bear in one way or another on their parliamentary duties. The only thing that it will inhibit is the making of dishonest claims.***”

17. So, beyond obvious candidates like speeches and written submissions to either House or their Committees, the issues will be (i) whether a particular act is sufficiently connected to the core business of Parliament and (ii) whether immunity from suit is required so as to protect the core or essential business of Parliament. The courts are careful not to expand Parliamentary privilege in a manner that would bring it into disrepute. In Wellesley v The Duke of Beaufort (1831) 2 Russell & Mylne 639 at 659, Lord Brougham LC referred to (at 659):

“...how incumbent it is upon the Courts of law to defend their high and sacred duty of guarding the lives, the liberties, and the properties of the subject, and protecting the respectability and the very existence of the Houses of Parliament themselves, against wild and extravagant, and groundless, and inconsistent notions of privilege.”

18. An area of particular difficulty in this regard has been the extra-Parliamentary repetition or affirmation of statements originally made in Parliament. In principle, a person who has made a statement in Parliament which is protected by absolute privilege may lose that privilege simply by stating outside Parliament that he “*did not resile*” from that earlier statement: see Buchanan v Jennings [2005] 1 AC 115. That is so even though a defamation claim in such circumstances “*...may well involve a challenge to the good faith of the defendant in affirming the statement, which will inferentially challenge his good faith in making the original statement*” (Chaytor at ¶45). The rationale is that a person who has chosen “*for his own purposes*” to repeat a Parliamentary statement “*has no claim to the protection of article 9*”: Makudi v Triesman [2014] QB 839 at ¶21 per Laws LJ. However, there may be instances where

the protection of Article 9 extends to extra-Parliamentary speech: they will “generally” possess two characteristics, namely (Makudi at ¶25):

“(1) a public interest in repetition of the parliamentary utterance which the speaker ought reasonably to serve, and (2) so close a nexus between the occasions of his speaking, in and then out of Parliament, that the prospect of his obligation to speak on the second occasion (or the expectation or promise that he would do so) is reasonably foreseeable at the time of the first and his purpose in speaking on both occasions is the same or very closely related.”

19. An example of such a case was found in Makudi itself. In that case Lord Triesman, having given evidence to a Parliamentary Select Committee about apparent corruption in the 2018 FIFA World Cup bid process, was asked to confirm that evidence, and did so, in a subsequent FA inquiry conducted by James Dingemans QC. The Court of Appeal held that Article 9 protected Lord Triesman against a defamation claim even as regards his statements to the FA inquiry. There was both a public interest in Lord Triesman doing so, and a very close connection with the Parliamentary statements (¶30 per Laws LJ).

(e) What is “impeaching” or “questioning”?

20. In the bulk of cases, however, it is reasonably clear that what a litigant seeks to use is a statement made during “*proceedings in Parliament*”. The usual case, certainly in the public law context, is the case identified by Underhill LJ in Reilly (see paragraph 1 above), where a litigant seeks to make use of some statement made during debates or in Committee with a view to assisting their argument on a question in issue in the proceedings (such as, for example, a question of statutory interpretation, or ECHR compatibility).
21. The key issue in such cases is usually whether the use which the litigant seeks to make of the statement is such that the statement is “*impeached or questioned*”. We return to this topic in the specific context of admissibility of Parliamentary materials in Section IV below. But a good sense of the fine distinctions which emerge can be gleaned by considering some of the criminal and defamation cases:
 - (i) Conspiracy to make a false statement versus a bribe: In Ex Parte Wason (1869) L.R. 4 Q.B. 573, an alleged conspiracy amongst three members of the House of Lords to make false statements to the House was held, by Cockburn CJ, Blackburn J and Lush J, to be incapable of being made the foundation of criminal proceedings, because “...*the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House*” (576-577 per Lush J). By contrast, in R v Greenway and ors [1998] Public Law 356, Buckley J ruled that Article 9 did not protect an MP against criminal proceedings for bribery, even where the bribe was intended to induce that MP to use his influence in Parliament, because the crime was complete as soon as the bribe was taken and therefore “...*owes nothing to any speech, debate or proceedings in Parliament.*”
 - (ii) Core elements of Parliamentary machinery versus peripheral ones: In Bradlaugh v Gossett (cited above), a resolution of the House which prevented an MP from taking the oath, and hence contributing to debate, was held to be beyond the

jurisdiction of the Courts, even if it contravened the Parliamentary Oaths Act 1866. Similarly, in *Rost v Edwards* [1990] 2 QB 460 an MP bringing libel proceedings in respect of a newspaper article was not entitled to lead evidence as to his allegedly resultant de-selection as Chairman of a Select Committee, because the appointment and selection of Committee members was a proceeding in Parliament. He was, however, entitled to lead evidence relating to the lack of any impropriety in his registration of interests, because “...*claims for privilege in respect of the Register of Members’ Interests do not fall within the definition of ‘proceedings in Parliament’*” (per Popplewell J at 478E-F).

22. The core of the concepts of “impeaching” and “questioning” is any element of criticism of the honesty, accuracy or sufficiency of a Parliamentary statement. As was observed in *Hamilton v Al Fayed* [2001] 1 AC 395 at 403, the “...*courts are precluded from entertaining in any proceedings (whatever the issue which may be at stake in those proceedings) evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament.*” Likewise, in *Dingle v Associated Newspapers* [1960] 2 QB 405³, it was held that the Court could not inquire into the validity of a report of a Select Committee upon which an allegedly defamatory article was partly based, because “...*to impugn the validity of the report of a select committee of the House of Commons, especially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 of the Bill of Rights. No such attempts can properly be made outside Parliament*” (per Pearson J at 410).
23. Before turning to the practical implications for the admissibility of Parliamentary material in public law litigation, we briefly address the second element of Parliamentary privilege discussed above.

III. EXCLUSIVE COGNISANCE AND THE SEPARATION OF POWERS

24. There is a formidable weight of authority which establishes that Article 9 is part of a second, wider principle of separation of powers.
25. There are a variety of expansive statements in some of the older case law: in *Bradlaugh v Gossett* (cited above), Lord Coleridge CJ said that (p275): “*What is said or done within the walls of Parliament cannot be inquired into in a court of law.*” The consolidation of these expansive statements into the “wider principle” came in the speech of Lord Browne-Wilkinson in the Privy Council decision in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, in which he stated as follows (332C-D, emphasis added):

“In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established

³ Pearson J’s decision on damages was reversed by the Court of Appeal [1961] 2 QB 162, a reversal which was then upheld by the House of Lords [1964] AC 371. However, no doubt was cast on his judgment on the ambit of Parliamentary privilege.

privileges: Burdett v. Abbot (1811) 14 East 1; Stockdale v. Hansard (1839) 9 Ad. & El. 1; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271; Pickin v. British Railways Board [1974] A.C. 765; Pepper v. Hart [1993] A.C. 593.”

26. The ambit of the wider principle can be seen from the way in which Lord Browne-Wilkinson went on to describe its effect (332F):

*“According to conventional wisdom, the combined operation of article 9 and that wider principle would undoubtedly **prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead. It would also prohibit any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of the alleged conspiracy.**”*

27. In *R v Parliamentary Commissioner for Standards, ex parte Al Fayed* [1998] 1 WLR 669, Lord Woolf MR referred to (p671):

“...the broader principles which underline the relationship between Parliament and the courts. That relationship was elegantly described by Sedley J. as “a mutuality of respect between two constitutional sovereignties”.”

28. In *Hamilton v Al Fayed* (cited above), Lord Browne Wilkinson cited his comments in *Prebble* as support for a holding that *“It is well established that article 9 does not of itself provide a comprehensive definition of parliamentary privilege”* (402E-F). He went on to say that *“The wide scope of parliamentary privilege was fully discussed in the Prebble case which was not criticised before your Lordships”* (403A). The *Prebble* dicta were again cited with approval in *Wilson v First County Trust* [2004] 1 AC 816 at ¶55 per Lord Nicholls; and were discussed in *Toussaint* (cited above) by Lord Mance at ¶¶10-15.

29. The “exclusive cognisance” or “exclusive jurisdiction” principle has been applied by the courts most frequently where a claim challenges some aspect of Parliamentary administration or procedure where there is at least some doubt as to whether such aspect qualifies as a proceeding in Parliament for Article 9 purposes. By way of example, in *Re McGuinness’s Application* [1997] NI 259 (High Court, Kerr J), Martin McGuinness sought judicial review of a decision of the Speaker of the House of Commons to restrict his access to various benefits and facilities on the ground that he refused to swear or affirm allegiance. Kerr J emphasised three times in his judgment that the Speaker had been acting *“...on behalf of the House”* (see 365, 366). On that basis, Kerr J held that *“...whether it qualifies as a proceeding in Parliament or not, the Speaker’s action lies squarely within the realm of internal arrangements of the House of Commons and is not amenable to review”* (366).

IV. USING PARLIAMENTARY MATERIALS IN PRACTICE

30. The true scope of the exclusionary rule, given the two aspects of Parliamentary privilege discussed above, might be thought to be reasonably clear: (1) no litigant can make any use of Parliamentary materials which impeaches or questions the statements

in question, and (2) no litigant can bring any action or make any submission which trespasses upon the sovereignty of Parliament to arrange its own affairs.

(a) The prohibition on reliance or “passing judgment”

31. The courts have, however, been required on occasion to consider the unfairness which would arise if the rules only went that far. A litigant whose case is assisted by Parliamentary materials would adduce those materials, and find his opponent unable to criticise them in any way lest Parliamentary privilege be infringed.
32. Given such unfairness, the courts have formulated the exclusionary rule as being far wider than a prohibition upon “impeaching” or “questioning”, and instead a being a rule against “relying on” or “passing judgment” upon Parliamentary proceedings at all. In **Office of Government Commerce v Information Commissioner** [2010] QB 98, Stanley Burnton J dealt with this issue as follows (¶¶58-59, emphasis added):

*“...If a party to proceedings before a court (or the Information Tribunal) seeks to rely on an opinion expressed by a select committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the committee was wrong (and give reasons why), thereby at the very least risking a breach of parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. It indicates that a party to litigation should not seek to rely on the opinion of a parliamentary committee, since it puts the other party at an unfair disadvantage and, if the other party does dispute the correctness of the opinion of the committee, would put the tribunal in the position of committing a breach of parliamentary privilege if it were to accept that the parliamentary committee's opinion was wrong. As Lord Woolf MR said in *Hamilton v Al Fayed* [1999] 1 WLR 1569, 1586g, the courts cannot and must not pass judgment on any parliamentary proceedings.*

If it is wrong for a party to rely on the opinion of a parliamentary committee, it must be equally wrong for the tribunal itself to seek to rely on it, since it places the party seeking to persuade the tribunal to adopt an opinion different from that of the select committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the tribunal either rejects or approves the opinion of the select committee it thereby passes judgment on it. To put the same point differently, in raising the possibility of its reliance on the opinion of the select committee, the tribunal potentially made it the subject of submission as to its correctness and of inference, which would be a breach of parliamentary privilege.”

33. These wide dicta have been cited with approval, recently, by a Divisional Court presided over by Burnett LJ in **GS v Central District of Pest** [2016] 4 WLR 33 at ¶34. In that case, the Divisional Court held that “...[b]oth endorsement of and disagreement with the conclusions of [a] Select Committee report would be inappropriate” (¶34 per Burnett LJ).
34. So, is the rule simply, as **OGC** would appear to suggest, that no reference may be made to Parliamentary materials at all? No. It is critical always to identify the *purpose* for

which evidence of proceedings in Parliament is adduced: *R (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin) per Burnton J at ¶120. The position differs as between ECHR/EU case and ordinary domestic law cases. The latter can be taken most easily first.

(b) Domestic law cases

35. In domestic law cases, the courts have endorsed the use of Parliamentary materials in a variety of situations including:

- (i) To establish the reasons for a challenged decision where those reasons were announced in Parliament (*R v Secretary of State for the Home Department, ex p. Brind* [1991] AC 696, per Lord Ackner at 758-9), or where statements in Parliament show what was the motivation of the executive's action *outside* Parliament (*Toussaint*, cited above).
- (ii) To identify the “*mischief*” which an Act was intended to remedy, when considering a question of interpretation of that Act: *Black-Clawson v Papierwerke* [1975] AC 591 at 614 per Lord Reid; *McDonnell v Congregation of Christian Brothers Trustees* [2004] 1 AC 1101 at ¶29 per Lord Steyn, subject to the conditions in *Pepper v Hart* [1993] AC 593, 634, i.e. (1) a legislative provision is ambiguous or obscure or the literal meaning of which leads to an absurdity; (2) the parliamentary material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words; (3) the words are given by the Minister or other promoter of the Bill.
- (iii) To determine whether the conditions of the Parliament Acts 1911 and 1949 have been complied with: *Jackson v AG* [2006] 1 AC 262.
- (iv) When considering the very question of the scope and ambit of Privilege: *OGC* (cited above) at ¶61 (explaining why many of the leading cases on the scope of Parliamentary privilege themselves rely on the conclusions of select committees of Parliament).
- (v) When evidence given to Parliamentary Committee or statements made in Parliament is uncontentious, i.e. where such evidence is not being relied upon in support of one or other side's submissions on a contested issue in the proceedings: *OGC* (cited above) at ¶64.

(c) ECHR/EU law cases

36. In ECHR and EU compatibility cases, much more difficult issues arise. The proportionality analysis in such cases inevitably requires careful scrutiny not merely of the decision-making process giving rise to a decision but also its substantive merits. For a flavour of the sort of exercise which is sometimes undertaken in EU law cases, see for instance the following conclusion of Green J in the *British American Tobacco* case, cited by the Court of Appeal ([2017] 3 WLR 225 at ¶195):

“In my judgment, objectively, Parliament acted reasonably in concluding that there was no equally effective less restrictive measure which met the aims and

objectives of standardised packaging and that conclusion still holds true in these proceedings.”

37. The Court of Appeal ([2017] 3 WLR 225 at ¶¶169-254) endorsed Green J’s approach to proportionality as a proper application of the latest guidance from the CJEU in the Scotch Whisky case ([2016] 1 WLR 2283). No-one raised a point on Parliamentary privilege, most probably because the legislation in issue was delegated legislation, in which context the courts have rejected any suggestion that Article 9 precludes judicial review including on irrationality grounds: see e.g. R (Javed) v Secretary of State for the Home Department [2002] QB 129; Toussaint (cited above) at ¶49. The correct EU law approach would have been precisely the same, however, had the legislation happened to be primary legislation. This would pose a real problem. In Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] AC 1016, Lord Mance JSC said this (¶56, emphasis added):

*“If ... when the court is considering whether a measure strikes a fair balance, weight attaches to the legislative choice, then the extent to which the legislature has as the primary decision maker been in or put in a position to evaluate the various interests may affect the weight attaching to its assessment: see Belfast City Council v Miss Behavin’ Ltd [2007] 1 WLR 1420 , paras 27, 37, 46-47, per Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Mance. **That was a case involving subordinate legislation, to which article 9 of the Bill of Rights does not apply. Perhaps in the light of article 9 there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions. It is, I think, unnecessary to go further into this difficult area on this reference. On any view, if the admissible background material shows that the Bill was put before and passed by the Welsh Assembly on the basis of a supposed analogy or precedent, it must be possible to consider whether that analogy or precedent actually applies, and, if it does not, the same assistance cannot be obtained from the legislative choice as might otherwise be the case.”***

38. This is an issue which exercised the Supreme Court in R (Buckinghamshire) v SS Transport (HS2) [2014] 1 WLR 324. In that case, two Advocates General had given opinions on the Directive in issue suggesting that compliance with EU law needed to be tested by “...close scrutiny by national judges of the legislative process to see whether “the people’s elected representatives” had been able “properly” to examine and debate the proposal or had “perform[ed] their democratic function correctly and effectively”” (¶201 per Lords Neuberger and Mance). The claimants’ invitation was for the Supreme Court to “...consider the adequacy of the information placed before members of both Houses of Parliament, but also to take the step of scrutinising the likely adequacy or otherwise of their procedures and debates, including the extent to which individual members are likely to direct attention to and understand, and apply an independent mind to, any issue falling for decision by the legislature within article 1(4) of the EIA Directive” (¶200 per Lords Neuberger and Mance). The Court observed that such an approach would infringe Article 9 of the Bill of Rights and left open the question of whether the European Communities Act 1972 had impliedly repealed Article 9 where EU law was involved (¶79 per Lord Reed; ¶208 per Lords Neuberger and Mance). As Lords Neuberger and Mance observed:

“The claimants’ case, that the parliamentary process will be tainted by considerations such as whipping or collective ministerial responsibility or simply by party policy, amounts to challenging the whole legitimacy of parliamentary democracy as it presently operates.”

39. A very similar issue arises in the context of ECHR proportionality analyses, as can be seen from *Hirst v UK* (2006) 42 EHRR 41, the original Grand Chamber decision on prisoner voting. The Grand Chamber accepted that it is legitimate in principle to deprive persons of the right to vote as a measure of punishment for a crime (¶75). It nevertheless found that the UK’s ban on convicted prisoners voting, which had been renewed in successive pieces of primary legislation, was unlawful because it was disproportionate, stating (at ¶79):

“...there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. ... It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards ...”

40. This kind of reasoning gives rise to fundamental difficulties. Applying the orthodox understanding of Parliamentary privilege discussed above, a domestic court could never realistically find, as the Grand Chamber did, that Parliament’s debate of a given issue had been inadequate, had failed to take into account current human rights standards, and that a measure was therefore disproportionate.
41. These difficulties were the topic of debate in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816. In that case, Lord Nichols stated that *“it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. In discharging their duties under the Human Rights Act 1998 (HRA) the Court is to assess the proportionality of legislation on that basis”* (¶67). However, sometimes it is necessary for the court to consider *“additional background information”* in order to discharge its constitutional functions under the HRA. That additional background information may include the reports of Parliamentary committees and debates in either House of Parliament: *Wilson*, cited above, ¶¶61-64. The permissible uses of such material are to enable the Court to inform itself as to the statutory history of a provision; the relevant considerations that led to the formation of policy; the aim of the policy in promoting the legislation (that is to say, the ‘mischief’ that the legislation was intended to address); and the existence of factors that might be relevant to the assessment of whether any interference with Convention rights is necessary and proportionate, including *“the likely practical impact of a statutory measure and why the course adopted by the legislature is not appropriate”* (*Wilson* ¶¶61-65; *Age UK* [2010] 1 CMLR 21 at ¶50).
42. Indeed, where there has been active consideration given by Parliament to the human rights implications of legislation the courts have accorded greater weight, or respect, to that judgment and are less likely to find that a human rights interference is disproportionate: *R (Tigere) v SS Business* [2015] 1 WLR 3820 at ¶32; *Animal*

Defenders [2008] 1 AC 1312 (HL) at ¶31 and *Animal Defenders* (2013) 57 EHRR 21, concurring Opinion of Sir Nicolas Bratza at OI-16. The Courts can only do that by considering the Parliamentary material.

43. The Court will nevertheless be “*astute to ensure it does not directly or indirectly impugn or question any proceedings in Parliament*” (*Age UK* ¶51). Accordingly:
- (i) The Court should avoid making “*a judicial determination as to whether a statement in Parliament is right or wrong*” (*Age UK* ¶51).
 - (ii) The court should “*reach its own conclusions on questions of law and the legality of administrative action, and whether primary legislation is compatible with*” the Convention; it cannot do so merely by “*agreeing or disagreeing*” with expressions of opinion that may have occurred inside Parliament (*Age UK* ¶51; *Wilson* ¶¶65-67).
 - (iii) The proportionality of the measure is not to be judged by the quality of the reasons advanced in support of it in the course of Parliamentary debate. The lack of cogent justification does not “*count against*” the legislation on issues of proportionality (*Wilson* ¶67). However, there are cases in which the courts have drawn inferences from a lack of Parliamentary consideration of a statutory instrument when applying the HRA: *Mathieson v SSWP* [2015] 1 WLR 3250.
 - (iv) However, by reaching a conclusion that legislation is compatible or incompatible with the ECHR or EU law the Court does not “question” proceedings in Parliament if it thereby agrees or disagrees with the statement of a Minister made under s 19 HRA (*OGC* ¶49) or when referring to the conclusions of the JCHR, (*OGC* ¶¶42, 60)).

(d) Recent examples

44. The policing of the boundary between permissible and impermissible uses of Parliament materials remains an active area, as recent cases indicate:
- (i) In *R (Scott H-S) v Secretary of State for Justice* [2017] EWHC 1948 (Admin) (28 July 2017), the High Court declined to consider Parliamentary materials upon an invitation to “*...construe from the words of individual members, and their proposed amendments, the intention and purpose of Parliament when enacting LASPO 2012, in particular, section 128*” (¶72, see further ¶¶33-75).
 - (ii) In *R (Butt) v Secretary of State for the Home Department* [2017] 4 WLR 154 (26 July 2017), the High Court looked “*tentatively*” at Parliamentary materials and found that “[t]aken at face value, and without any agreement or disagreement, I appraise the material as being to a degree more supportive generally of” a particular proposition (¶¶164-165), but declined to go any further, noting that to do so “*...would invite impermissible approbation, qualification, disagreement or comment on others whose contributions had been lauded by successive speakers*” (¶171).
 - (iii) In *R (Conway) v Secretary of State for Justice* [2017] EWHC 640 (Admin) (30 March 2017) at ¶¶19-20, the majority of the Divisional Court declined to

entertain an argument that Parliament’s debate had omitted a critical consideration, observing that Article 9 of the Bill of Rights “...prevents a court from relying upon or analysing the content of debates in Parliament with a view to judging their quality or agreeing or disagreeing with them”. On an application for permission to appeal, the Court of Appeal endorsed the correctness of this approach notwithstanding comments by a 9-Justice Supreme Court in *Nicklinson* that appeared, on one reading, to be requiring “a qualitative assessment of the nature of the debates” ([2017] EWCA Civ 275 at ¶32 per Beatson LJ).

- (iv) In *R (Justice for Health Ltd) v Secretary of State for Health* [2016] Med LR 599 (28 September 2016), Green J rejected the proposition that an executive decision could be insulated from challenge merely because a Minister announced it in Parliament: there was no “*Harry Potter ‘invisibility cloak’*” (¶¶151-165).

(e) The future

- 45. A key topic for the future, as the quotations from the Supreme Court’s decisions in the *Asbestos* and *HS2* cases above indicate, will remain how to operate Parliamentary privilege in the context of ECHR and EU law compatibility analyses. In particular:
 - (i) The Supreme Court has expressed itself in *HS2* and *Asbestos* to be troubled by the extent to which such analyses appear to require the courts to engage in impermissible scrutiny of the adequacy or otherwise of Parliamentary reasoning and debate.
 - (ii) The *Wilson* decision, which remains the most authoritative case on this issue, was decided more than fourteen years ago, during which time the trend in both ECHR and EU case law has been towards ever more intrusive scrutiny on proportionality grounds. This area is ripe for reconsideration at the highest level.
 - (iii) Moreover, such reconsideration may well, by the time of any Supreme Court decision in this area, need to grapple with the impact of the European Union (Withdrawal) Bill, which will add another dimension to the Supreme Court’s discussion in *HS2* of the relationship between EU law and Parliamentary privilege.

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