

*A version of this article first appeared in **The Times**, on 6th June 2011.*

MPs who named names could end up less privileged than they think

The outing of Sir Fred and Ryan Giggs using parliamentary privilege may conflict with the Human Rights Act

In outing Sir Fred and Ryan Giggs, Lord Oakeshott and John Hemming breached the injunctions that these litigants had obtained. Ordinarily, a serious breach of an injunction such as this will give rise to proceedings for contempt of court against the wrongdoer, who can be punished by the imposition of a fine and/or imprisonment. No doubt, however, both parliamentarians thought they could breach a super-injunction with impunity by “outing” their target by words spoken in the House of Lords (in the case of Lord Oakeshott) and the House of Commons (in the case of John Hemming). They would have had in mind article 9 of the Bill of Rights 1689 which, on the face of it, confers absolute legal immunity to members of either House for what they say or do in proceedings in Parliament.

However, the trust that both the parliamentarians put in article 9 of the Bill of Rights may be misplaced. Under section 4 of the Human Rights Act 1988, our domestic courts have the right to make a “declaration of incompatibility” where any primary legislation is incompatible with a Convention right. (The making of a declaration of incompatibility by our domestic courts invariably leads to Parliament amending the offending legislation.) Accordingly, article 9 of the Bill of Rights, like any other primary legislation, is susceptible to attack under the HRA if it can be shown to be incompatible with a Convention right. The Convention rights are set out in schedule 1 to the Act, which include the right to privacy under article 8 and the prohibition under article 17 of wrongful abuse of Convention rights. Article 17 states: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights

and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

There must be an arguable case that: Lord Oakeshott and John Hemming, by outing Sir Fred and Ryan Giggs respectively in breach of an order of the court, are “persons” who have engaged in activity calculated to destroy these litigants’ Convention right to privacy; and (ii) to the extent to which article 9 of the Bill of Rights (purports) to confer absolute legal immunity on Lord Oakeshott and John Hemming, it is incompatible with Convention rights and thus susceptible to our domestic courts making a declaration of incompatibility. (Ultimately the question may have to be decided by the European Court of Human Rights.)

There is a strong public interest in parliamentarians having freedom of speech. However, I query whether that freedom of speech needs to be absolute in a democratic society. A cogent argument can be advanced that the freedom of speech conferred on parliamentarians should be qualified. In a democratic society, Convention rights such as the right of privacy should only be cut down (in the words of paragraph 2 of article 9) in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. It is not necessary for the freedom of speech conferred on parliamentarians to be absolute so as to enable them, with impunity, to destroy the rights of individuals for a purpose unconnected with national security, public safety etc etc. What (legitimate) purpose was outing Sir Fred and Ryan Giggs intended to serve?

The European Court of Human Rights has stated that Parliament must (against its wishes) amend the law so that certain prisoners can vote in elections. A further attack on parliamentary sovereignty could come from our domestic courts or the ECHR ruling that Parliament must amend the Bill of Rights by cutting down the immunity given to parliamentarians for anything said in either House.

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