Bargate Murray

Footballer Fallout – the radioactive debate about Superinjunctions, Twitter and Privacy.

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I'd like to think that the government hangs on my every word. However, while I suspect that is not the case, I was pleased to hear that the substance of my suggestion made during an interview with Clive Myrie on BBC news last Friday is to be given effect to, namely a new parliamentary committee to be established examine privacy and superinjunctions.[1]

I have said repeatedly that a new look at a limited privacy law is needed in the light of "Footballergate", the crazy circus that has surrounded the injunction preventing the disclosure of a certain footballer's name despite its free circulation on social media sites.[2]

We now have a confluence of several linked issues, some more serious than others, all of which deserve our considered attention, and which go beyond the usual privacy versus freedom of the press debate, important though that is.

The Constitutional Issue – Judges v Parliament

The most recent and potentially most serious issue is the apparent clash between parliament and the judiciary.

On 20 May, the Lord Chief Justice, Lord Judge, warned MP's not to break injunctions by using parliamentary privilege. He questioned whether it is a good idea for our parliamentarians to be flouting court orders just because they disagree with them.

Yesterday, Eady J refused to discharge the injunction against naming the footballer only a few minutes before a Liberal Democrat MP, John Hemming, stood

[1] A misnomer: there is no court order called a "superinjunction" but I will use the term to include injunctions that prevent the disclosure of their existence.

[2] Why do I not name him here? Because the injunction is still in effect and I do not wish to further weaken its effect – after all, I am an officer of the court, regardless of whether I agree with the injunction or not.

up in parliament and promptly named the footballer. Given the fact that the court had flatly refused to discharge the injunction just a short time before, a clearer flouting of the terms of that injunction are hard to imagine, as the Speaker, John Bercow, seemed to understand when reprimanding Mr Hemming,

We also heard the prime minister describing the situation as "unsustainable", and today, we learn of a plea from the former deputy prime minister, Lord Prescott, to stand up for the judges.

The matter is more serious than the privacy and reputation of even a well paid footballer. It goes to the very basis of the separation of powers between the legislature and the judiciary.

For example, what if an MP uses privilege to repeat a libel about someone, or reveals the identity of someone suspected of an offence who is later shown to be entirely innocent? That person would have no recourse. Indeed, in another case, a respected law firm had to apologise to parliament for threatening legal action against the very same John Hemming in connection with a demand not to repeat allegedly defamatory comments about one of their clients in connection with planning dispute.

The origins of parliamentary privilege can be found in Article 9 of the Bill of Rights of 1689 which provides 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".*

The exact scope of parliamentary privilege is a matter of some debate. I would question whether the calculated and deliberate flouting of an injunction by an MP is or is not within the scope of parliamentary privilege. Certainly some senior judges have expressed reservations.

However, it is unlikely that Mr Hemming or any other MP will be led from Parliament in chains any time soon. It is simply very dangerous for MP's to use parliamentary privilege to breach court orders.

Parliament expects that the laws it enacts will be obeyed; what kind of message does an MP who deliberately flouts a court order he happens to disagree with think he is sending to the general public?

And of course the key point surely its that Parliament introduced the Human Rights Act in to English Law, to give effect to the European Convention on Human Rights, on the clear understanding that the courts would have to interpret that act when giving effect to it. It is a bit rich now for politicians to complain that the courts are doing exactly what they are supposed to do.

It is open to Parliament to legislate to update or change the law relating to privacy, but it has continually refused to do so, although maybe that is all about to change with the announcement of the new parliamentary committee.

In the meantime, the answer must be in far tighter self-regulation by the Standards and Privileges Committee of the House of Commons ("Privileges Committee").

In my view an MP who deliberately uses parliamentary privilege to flout a court order ought to be required to answer to the Privileges Committee, with a rebuttable presumption that such conduct will at the very least merit suspension from Parliament. This proposal is in line with the recommendations of the 1999 report of the Privileges Committee which said

> *… a member breaching an injunction should be required to justify his action before the privileges (or another) committee after the event, or risk punishment for misconduct…"*

The current system in which any MP can ride roughshod over decisions of the courts in cases like the present "Footballergate" case is not sustainable and is damaging democracy and the rule of law. As a 1996 Commons Procedure Committee report said

> *"If there were strong evidence to suggest that breaches of court orders as a result of proceedings of [Parliament] represented a serious challenge to the due process of law, we would not hesitate to recommend a further limitation on the rights of free speech enjoyed by members"*[3]

It would appear that moment has now arrived.

The Privacy Issue – Social Media v the Rule of Law

Of course Mr Hemming was not the first to identify the alleged name of the footballer who had obtained a superinjunction to protect his identity and his privacy. His name was already everywhere to be seen on social media sites like Twitter long before Mr Hemming spoke in Parliament.

Twitter is based in California. When the story first broke that the footballer's lawyers had obtained an order requiring Twitter to disclose the identity of certain individuals who had breached the injunction in tweets, I was in the back of a cab on the way to the BBC interview. My initial reaction, which I mentioned in the interview and repeat now, is that Twitter is not apparently subject to the jurisdiction

[3] With grateful credit to the Human Rights Blog published by Henry Fox of 1 Crow Office Row of 24 March 2011 for identifying this and the preceding quote taken from the findings of these committees.

of the English courts. That is oversimplifying the point, but in general terms, Twitter is unlikely to comply with any request to disclose its users' data and I doubt the California courts would order it to do so.

But what about Twitter users themselves? Again, it's a question of information – how to find out who has posted the offending messages.

It is entirely possible to start a Twitter account with a false email address from an internet café, in which case it may be almost impossible to track the culprit down.

Twitter's terms and conditions allow it to disclose your personal information, but why would they, and risk prejudicing their image, without a court order binding on them in California?

There is a type of court order called a *Norwich Pharmacal* order that requires a respondent to disclose certain documents or information to the applicant. The respondent must either be involved or mixed up in a wrongdoing, whether innocently or not, and is unlikely to be a party to the potential proceedings. Such an order could be sought, but against whom? Again, Twitter is outside the jurisdiction. To be fully effective, the order would have to be obtained against an ISP (Internet Service Provider) in England or Wales that held the relevant data.

Then again, beware of unintended consequences. Do we really want to muzzle one of the heroes of the Arab Spring, where Twitter enabled information to be spread amongst supporters of democratic reform without government censorship? Will the private life of a footballer really mark the beginning of a new attempt to seize control of the internet? Will cases against Twitter in England signal a free for all that might end up crippling free speech for the sake of the reputations of the rich and famous? I hope the answer to these questions is "no" but we cannot be sure.

The money issue – my wallet is bigger than yours

This is the third of the three issues I wish to raise. A major problem with privacy law at the moment is not that it all turns on judicial interpretation of the Human Rights Act, but that access to justice in this area is limited by access to money – and lots of it!

It is thus no accident that superinjunctions and their plainer stablemates are almost always the preserve of the rich and famous. Lord Judge is reported to have said that damages would usually be the appropriate remedy for breach of privacy. However, first you must establish a breach, facing the firepower of a presumably wealthy media baron.

So what is the answer? I do not think that the solution to most of these issues is that hard to find. I suggest the following:

1. First. a key reason I believe that a new privacy law of limited scope (without compromising freedom of the press to report genuinely serious issues) is needed is to try to level the playing field, and remove some of the uncertainly behind the scope of Art 8 of the European Convention on Human Rights which is now part of English law and which enshrines the right to respect for a person's private and family life.

2. Second, the Press Complaints Commission ("PCC"), a voluntary body, has a far greater role to play here in controlling breaches of privacy where there is no genuine public interest in publication. In my view, the PCC should be placed on a statutory basis and be given express powers to levy substantial fines for breaches of its code of conduct. It should operate in a similar manner to the Banking Ombudsman in dealing with individual complaints from members of the public and in awarding them compensation.

3. Third, as I have already proposed, self-regulation in Parliament including a presumption that using Parliamentary privilege to flout a court order merits a suspension from Parliament.

4. Fourth, on the "Twitter" issue, most people do not regard Twitter as an unimpeachable source of information. We must get used to Tweets that are less than music to our ears whilst at the same time trying to reach international agreement on some measure of greater control or recourse.

These are not "easy" answers, and you are free to advance your own better solutions if you can think of them. Pending any resolution in this area, hands off the Judges who are only doing their job and I would suggest that MP's should exercise a tad more self-restraint. We really do not want or need "Footballergate" to lead to an avoidable constitutional crisis.

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