The Competence of Parliament and the Limits of Criminal Law

by Edward McWhinney, MP

During the Spring of 1996 an unusual question of privilege was referred to the Standing Committee on Procedure and House Affairs. The question related to a communiqué sent to Members of the Canadian Armed Forces by a Member of Parliament on October 26, 1995, a few days before the Referendum on Quebec Independence. The letter stated that Quebec should create a department of defence and offer all Quebecers serving in the Canadian Forces the chance to integrate into the Quebec forces. The issue as to whether this letter constituted a breach of privilege was referred to the Committee on March 18, 1996. One witness asked to appear before the Committee was Dr. Edward McWhinney who was asked to advise on the contemporary limits to the House's power to punish or discipline its Members for actions or conduct occurring outside Parliament. This article is based on his testimony to the Committee.

The British Parliament, from whose historical practice and Conventions our own House of Commons' rules and practice have been so largely received, was in its origins a High Court of Parliament. The earliest ancestor of Parliament was the mediaeval *Curia Regis*, in which judicial, executive and legislative functions were fused, and this derived ultimately from the pre-Norman conquest, Anglo-Saxon, Witan. But the process of attrition of the judicial functions of Parliament was well under way by the 14th century and was completed with the outcome of the great English constitutional battles of the 17th century.

The United States Constitution, which was heavily influenced by 17th century English Puritan (Cromwell) constitutional theory, directly incorporated the English constitutional institution of Impeachment in its Article II, and this at a time when that institution had virtually disappeared in Great Britain itself. The last two British cases of Impeachment – of Governor-General Warren Hastings in 1787, and Admiralty Treasurer Lord Melville in 1805, – both ended in acquittal. In fact, the power of Impeachment had become politically redundant and unnecessary by that time, with the development of the principle of Ministerial responsibility before an elected House of Commons.

There is little doubt that, in its "classical" constitutional use in England, Impeachment, together with its constitutional analogue, Attainder, became high political acts of judgement against the King's Ministers, rather than legal trials in the strict sense in which issues of criminal conduct would have to be proved. Indeed, the popularity, with accusers, of Attainder rather than Impeachment, stemmed from the fact that an *Act of Attainder* was not necessarily preceded by a trial in which the accused could defend himself. But it was the development, by the early 18th century, of Cabinet Government, with Cabinet responsibility before Parliament, that explains the disappearance of Attainder, rather than any reaction to its frequently (in legal terms) arbitrary, capricious and politically vengeful character.

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In an Expert Opinion given, on invitation, to the American Senate Committee on Campaign Activities (Ervin Committee) two decades ago I directed attention to the schism, in English Constitutional history and practice, between Impeachment (Attainder) of a "criminal" character, – that is, for acts alleged to be in breach of the Criminal Law; and "political" Impeachment where what was complained of was the manner of exercise of the political discretion of the accused.[1]

American constitutional law has, of course, taken a different course than that of Great Britain or, by legal reception, Canada, because of the American Constitution's explicit separation-of-powers and system of inter-institutional checks-and-balances. But the Impeachment of Andrew Johnson after the American Civil War is, in historical retrospect, clearly a "political" Impeachment of the sort rendered obsolete and unnecessary in Great Britain by the triumph of the Parliamentary forces over Royalist Prerogative powers, in the English Civil War. The more recent American approach to Impeachment of President Nixon involved, for its part, a melding or confusion of "political" and "criminal" impeachments, with the issue, however, becoming academic with the President's own resignation under fire.

The well-evidenced inadequacies of Members of Parliament to handle highly technical "criminal", as distinct from "political", processes, was one of the factors hastening their demise in Great Britain itself. Added to this was the latter-day emergence of the constitutional principle of Equality before the Law, which would reject any special legal régime – substantive or procedural – for Members of Parliament because of their Parliamentary status, as such. In more contemporary legal parlance – amply recognized by Professor Dicey a century ago, MPs should be subject to the ordinary laws of the land, administered by the ordinary courts of the land. This principle is recognized in most British-derived legislatures, with the strict statutory limitation upon those legislatures' power to expel Members of the legislature, by the legal pre-condition of a prior conviction by the regular courts on one of only a few, historically-qualified, heinous offences.

I had, a decade ago, in an Expert Opinion rendered to the British Columbia Legislature, recommended *against* the expulsion of a Member even though the Member had been convicted of an offence before the ordinary courts.[2] The offence did not, for these purposes, come within the statutorily defined categories of felonies on which such expulsion might be legally grounded. With the acceptance, since the beginning of the 18th century, of a legal, maximum term-of-years for Parliament and

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similar British-derived legislatures, such matters can always be corrected, ultimately, by the voters, if need be.

> ***The central conclusion must be that the historical Criminal Law powers of Parliament, and specifically of the House of Commons, have become obsolete with the emergence of Responsible Government.***

To the constitutional trend, already adverted to, of submitting Members of Parliament to the ordinary courts and the ordinary laws of the land for purposes of adjudgment of alleged criminal misconduct, should be added another, equally powerful, constitutional principle that was reinforced by the unhappy experiences of the European countries in the between-the-two-World-Wars era: That is the obligation of political self-restraint of Parliamentary majorities in regard to minority parties represented in their chambers.

While the British Parliament, under occasional provocation, displayed an admirable political balance

and self-restraint in regard to its Irish Members in the late 19th and early 20th centuries, Constitutional European legislatures, under similar stresses, often did not. The "unholy alliance" of centre-right and extreme right parties in the Reichstag in early 1933, in the vote expelling the extreme left deputies, and thereby providing the constitutionally necessary two-thirds majority in the legislature for the then government to adopt the so-called *Enabling Act* abolishing the Weimar Republic for all practical purposes, is simply the pathological example of the problems of allowing political judgements to be made by Parliamentary majorities on what should, at base, be technical legal issues to be resolved by ordinary legal processes before professional legal tribunals.

My conclusion would be that Parliament should act, and only act, upon a decision by the ordinary civil tribunals of the land, rendered on an ordinary criminal process, in cases of alleged criminal misfeasance by its Members.

In the instant case, my understanding is that, in respect to facts occurring wholly outside the precincts of Parliament, intervention of the ordinary civil authorities was initiated and the ordinary civil processes exhausted, without, however, any verdict of criminality or criminal misconduct being returned. On the constitutional principles outlined, that would effectively dispose of the matter in legal terms. It is unnecessary, on this basis, to go on to consider the ancillary legal principle of double jeopardy, which is central to the Common Law legal systems and also explicit in various Common Law-derived constitutional systems, and which would otherwise come up for consideration if the House of Commons or its Committees were to purport to re-try the same essential fact-situation already examined and disposed of before the ordinary courts of the land.

Notes

1. See Edward McWhinney "Congress and the Presidency and the Impeachment Power," *Indiana Law Review*, Volume 7 (no. 5), 1974, pp. 833-851, "The English and the American Impeachment Powers and the Constitutional Separation of Powers", *Jahrbuch des öffentlichen Rechts der Gegenwart*, New Series, Volume 24, 1975, pp. 577-595. And see also "A Canadian's View of the Presidency", *Wall Street Journal*, January 28, 1974.
2. See Edward McWhinney, "Forfeiture of Office on Conviction of an Infamous Crime," *Canadian Parliamentary Review*, Volume 12, Spring 1989.