Reflections on the Autonomy of Parliament

by Rt. Hon. Beverley McLachlin, PC

While speakers and judges are alike in many ways, the institutions they serve are very different. Parliament is the representative body of the people, charged with making laws for the good of the country. The courts play the more modest yet constitutionally vital role of ruling on disputes and maintaining the integrity of the Constitution from decade to decade, generation to generation. This article offers some reflections on the relationship between these two institutions – the legislatures and the courts.

The role of a speaker is similar in certain respects to a role that I am quite familiar with – the judicial role. Speakers, like judges, spend most of their time doing something most people avoid at all costs – making decisions. Like judges, they rule on points of order and make a myriad of decisions on questions of process. Like judges, they are required to render objective and impartial decisions on issues that can prove controversial and complex. Like judges, they must be above the fray and free from bias. Like judges, they are required to abandon partisan politics and must be independent and free from political influence. Like judges – speakers are human beings. But like judges, they must strive to set aside personal preferences and opinions and rule as objectively as humanly possible. And like judges, speakers doubtless sometimes feel a little lonely. Both roles entail sacrifice and dedication to the office. Yet both offer great rewards, the most important being the privilege of serving one's nation and community by promoting justice, the rule of law and democracy.

Let me start with an historical fact. The relationship between the judicial and legislative branches has not always been either clear or harmonious. There was a time when judges and parliamentarians in the British democratic tradition feared displeasing the Sovereign and each other – and with good reason. Indeed, such fears are even today a fact of life in nations not yet fully committed to democracy and the rule of law. We are all familiar with the struggle between Chief Justice Coke and King James I, a struggle which ultimately led to Chief Justice Coke's removal from office in 1616. And there were other episodes. In 1689 two judges of the English Court of King's Bench were brought before the House of Commons, questioned and imprisoned for a decision they rendered against the Sergeant-at-Arms.[1] Such an event today, we hope, would be unthinkable. On the other side of the coin, Parliamentarians were not always free from judicial interference and threat. For example, in 1629, Sir John Eliot and two other Members of the House of Commons were arrested and found guilty in the Court of King's Bench for words spoken in the House deemed to be seditious.[2]

The struggle over parliamentary independence eventually led to the adoption in 1689 of Article 9 of the English *Bill of Rights* which provides that "the freedom of

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speech and debates or proceedings in Parliament ought not to be questioned in any court or place out of Parliament". At the same time, judicial independence eventually found statutory protection in 1700 under the *Act of Settlement*. All this was fine on paper. But the question remained: how could parliamentary independence be reconciled with judicial independence in fact?

The answer came from the courts of common law, which used two principles to construct a workable and practical balance between the potentially conflicting powers of Parliament and the courts: parliamentary autonomy and the rule of law.

Let's look for a moment at the first of these principles – parliamentary autonomy. Today, it is accepted without question that the courts cannot interfere in proceedings before Parliament. The process of parliamentary decision-making must proceed free from judicial oversight. Where constitutionally permissible, courts may review the product of parliamentary decision-making – for example, how a particular law is to be interpreted or whether a particular law is constitutional. However, judicial interference in the process by which elected representatives come to their collective decision is tantamount to interference in the democratic process itself, and under our constitutional tradition is unacceptable. To operate effectively, the decision-making process of legislative assemblies must be free from interference – whether judicial or executive – and must remain firmly in the hands of speakers and Parliament itself. In a democracy it cannot be otherwise. Parliament, as the representative of the ultimate sovereign – the people – must be free to set its own agenda and govern its own proceedings.

The second principle that characterizes the relationship between Parliament and the courts is commitment to the rule of law. The rule of law signifies that all actors in our society – public and private, individual or institutional – are subject to and governed by law. The rule of law excludes the exercise of arbitrary power in all its forms. Without the rule of law and an independent judiciary to enforce it there is no democracy, only tyranny or mob rule. The rule of law thus implies that even Parliament itself is not above the law; and with that comes the possibility that courts may be called upon to ensure that Parliament acts in accordance with the rule of law.

It thus becomes apparent that simply stating these two principles – parliamentary autonomy and the rule of law – does not however resolve the problem, since the principles themselves can conflict. Autonomy implies that Parliament must be entitled to govern itself and thus cannot be subject to judicial review of the legality of its proceedings. But the rule of law, pushed to its extreme, entails judicial oversight and legislative submission to the same general law that applies to everyone else. This potential conflict has been resolved by seeking a balance under the principle of *lex et consuetudo Parliamenti* – the law and custom of Parliament – and the doctrine of parliamentary privilege.

In the 22nd Edition of Erskine May's seminal treatise on *Parliamentary Practice*, parliamentary privilege is defined as "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of Each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals".[3] Parliamentary privilege gives to members discharging their duties special legal exemptions that other individuals and bodies do not enjoy. Otherwise, it makes "no go" zones for the law, reserved only to Parliamentarians. "Privilege" connotes "the legal exemption from some duty, burden, attendance or liability to which others are subject".[4] It is the "necessary immunity that the law provides for Members of Parliament … in order for these legislators to do their legislative work.".[5] Among other privileges, parliamentarians enjoy freedom of speech including immunity from civil proceedings with respect to matters arising from the duties of a member of the House, exclusive control over the House's proceedings, the right to eject strangers from the House and its precincts and the right to control the publication of debates and proceedings of the House.[6]

How, precisely, is the balancing act between parliamentary autonomy and the rule of law executed through the medium of parliamentary privilege? What role does Parliament play? What role is left for the courts? After some dispute, it is now settled that parliamentary autonomy requires that the main role in judging matters of privilege must fall to Parliament itself. Thus the exercise of an existing parliamentary privilege is not amenable to review by the courts. However, in order to ensure preservation of the rule of law, the courts are entitled to inquire into whether a claimed privilege exists.

This allocation of powers in Canada rests on two court decisions, one English and one Canadian. The first is an 1839 decision of the English Court of Queen's Bench in the case of *Stockdale v. Hansard*.[7] Mr. Stockdale brought a law suit against Hansard alleging that the publication of a report tabled in the House of Commons defamed him. In defence it was argued that the report was published under an order of the House of Commons and, as such, was protected by parliamentary privilege. In his reasons for judgment, Chief Justice Denman recognized that the independence of Parliament was the "cornerstone" of a free Constitution.[8] Nevertheless, he rejected the argument that once privilege was claimed by the House of

Commons, the courts had no jurisdiction but to accept the claim so made. The House of Commons, acting alone, could not bring a matter within its jurisdiction by simply declaring it so. It followed, Chief Justice Denman reasoned, that the courts must be entitled to inquire into such a claim to determine whether it is indeed a matter of privilege – that is, whether the privilege claimed existed. But at the same time, once a matter was found to properly fall within the jurisdiction of the House, the courts could not review the exercise of privilege. In *Stockdale*, the Court of Queen's Bench found that the existence of the claimed privilege had not been proven.

Stockdale v. Hansard laid down the compromise that prevails at common law. Over 150 years later, the Supreme Court of Canada reviewed parliamentary privilege in light of the *Canadian Charter of Rights and Freedoms* – our constitutionally entrenched *Bill of Rights*. The question arose in Canada – did the 1982 *Charter* change this; could courts now pronounce not only on the existence of privilege but also on its exercise? In 1993, we heard the case of *New Brunswick Broadcasting v. The Speaker of the Nova Scotia House of Assembly*. The case involved a claim by a television broadcaster who sought an order allowing it to film proceedings in the Nova Scotia provincial House of Assembly from the public gallery and using hand-held television cameras. The Nova Scotia House of Assembly, in the purported exercise of its privileges, had prohibited the use of television cameras in the House except on special occasions. The broadcaster claimed that this infringed its right to freedom of expression protected by the *Charter*. The issue for the Court was whether the *Charter* applied to the exercise of Parliamentary privilege.

The question was novel and, not surprisingly, admitted of several possible answers. On one view, that of Chief Justice Lamer, the *Charter* applied to the provincial legislatures, but not to Houses of Assembly, which are mere components of the legislature. On another view, that expressed by Justices Cory and Sopinka, the *Charter* applied to all aspects of parliamentary privilege. Parliamentary rulings on privilege must comply with the *Charter*, and the courts are entitled to review the exercise of such privileges in light of the various *Charter* guarantees.

The majority, for whom I wrote, affirmed that the common law position enunciated in Stockdale continued to apply. This view grounds itself in the Preamble to the *Constitution Act, 1867*, which provides that Canada is to have a "Constitution similar in Principle to that of the United Kingdom". This Constitution includes the parliamentary privileges that "have historically been recognized as necessary to the proper functioning of our legislative bodies".[9] Since one part of the Constitution – the *Charter* – cannot be used to invalidate another, *Charter* review of parliamentary privilege was precluded.

The majority affirmed that the courts' only role is to ensure that the privilege claimed in fact exists and that the test for existence of a privilege is a test of necessity. Thus Canadian legislative assemblies possess the inherent privileges that are necessary to their proper functioning.[10] Courts can determine whether a claimed privilege is indeed necessary to the proper functioning of the House, but may not review the rightness or wrongness of any decision taken pursuant to a necessary privilege.[11] We concluded that the right to exclude strangers from the House and thus prohibit the use of television cameras was necessary to the functioning of the Legislative Assembly and hence a privilege, and that the courts consequently could not interfere.

And the story is not over. The question of what is and what is not a privilege necessary to the proper functioning of a legislative assembly is a difficult one and it will arise again later this year, when my Court examines a case concerning whether the *Canadian Human Rights Act* applies to parliamentary employees.[12]

I have stated that parliamentary autonomy is a fundamental principle, and that while the courts can rule on the existence of privilege, they cannot rule on its exercise. Allow me to add this: the corollary to parliamentary freedom from judicial interference in its internal proceedings is judicial independence from parliamentary interference. Like parliamentary privilege, judicial independence is a principle of constitutional importance.[13] It implies that Parliament and parliamentarians cannot interfere with the process of judicial decision-making. Once the courts have rendered their decision, it may be perfectly legitimate for Parliament to discuss and criticize the decision and if, seen fit, to change the law. However, when a matter is before the courts – *sub judice* – Parliament and parliamentarians must refrain from seeking to influence in any way the courts' decision. Indeed in Canada, ministers of the Crown who have contacted judges in relation to cases before them have been required to offer their resignations.

Despite this fundamental precept of democratic governance, many parts of the world are still witness to gross interference with judicial independence. Judges have been "called down" to explain or justify their decisions to members of the executive. Judges have been attacked publicly, removed from office, punished and even physically assaulted for rendering unpopular decisions. Interference with judicial independence threatens judicial impartiality and public confidence in the administration of justice. It threatens the constitutional order, just as surely as courts interfering with the processes of Parlia-

ment would threaten it. Both are assaults upon the rule of law which stands as a cornerstone to all civil societies.

Just as the courts must respect parliamentary privilege and freedom from interference in the parliamentary decision-making process, Parliament, parliamentarians and members of the executive must respect the judicial process and judicial independence. The result is a regime of mutual respect, which serves to further the ideals of justice, democracy and the rule of law to which we all, legislators and judges alike, are committed.

Notes

1. See J.P. Joseph Maingot, *Parliamentary Privilege in Canada*, 2nd Ed. (Ottawa, 1997), pp. 276-277.
2. See D. Limon and W.R. McKay ed., *Erskine May's Treatise on the Law Privileges, Proceedings and Usage of Parliament*, 22nd Ed. (London, 1997), pp. 70-71.
3. *Ibid.*, p. 65.
4. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378.
5. J. Maingot, *op. cit.* p. 12.
6. *Supra*, note 4, 385.
7. (1839) 112 E.R. 1112.
8. *Ibid.*, p. 1154.
9. *Supra*, note 4, p. 377.
10. *Ibid.*, p. 384.
11. *Ibid.*, pp. 384-385.
12. *House of Commons et al. v. Satnam Vaid* (29564).
13. See *Ell v. Alberta*, 2003 SCC 35, paras. 18 ff.