October 21, 2019

Judges, Parliament, Brexit and Constitutional Change: Echoes of *Stockdale v Hansard* (1839)

By: Lyndsay Campbell

Matter Commented On: *R (on the application of Miller) v The Prime Minister*; *Cherry et al v Advocate General for Scotland*, [2019] UKSC 41, available here: https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf.

In making its recent decision to nullify Prime Minister Boris Johnson's advice to the Queen to prorogue Parliament, the Supreme Court of the United Kingdom waded into deep constitutional water, raising the question of constitutional precedent and arguments about the propriety of judicial intervention in "political" matters. This comment describes the Miller decision and considers it against the backdrop of another huge constitutional controversy that began to unfold in London in 1838.

On September 24, after a three-day hearing, the Supreme Court of the United Kingdom unanimously ruled that Prime Minister Boris Johnson's advice to the Queen, given in late August, that Parliament should be prorogued from mid-September until October 14 was unconstitutional and that the prorogation was therefore invalid. Lady Hale and Lord Reed, for the Court, noted that all parties agreed that the court had jurisdiction to decide on the existence and limits of a prerogative power, a jurisdiction which courts had exercised in the past (they cited highly contentious cases from 1611 and 1765). The question was about the limits, if any, on the Prime Minister's specific power to advise Her Majesty to prorogue Parliament. The Court observed that courts for centuries had overseen the actions of politicians; it was legitimate for courts to hold the Prime Minister accountable to Parliament. Without a legal limit on the power to prorogue, the Crown's ability to prevent Parliament from acting would be limited only by unreassuringly practical constraints, such as the need for revenue and for the renewal of legislation to maintain a standing army. Prime Minister Boris Johnson's decision to advise Her Majesty to prorogue Parliament was unlawful because it had "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its functions as a legislature and as the body responsible for the supervision of the executive." The prorogation was considerably longer than normal. Johnson's purpose in prorogation was argued to be to keep alive the threat of a no-deal Brexit, which he believed strengthened the government's hand in negotiations with the European Union. The majority in Parliament opposed such an approach and seemed set to legislate against it. This prorogation would of course prevent Parliament from carrying out its business and from thwarting the government's strategy. The government failed to give a reasonable justification for this prorogation – preparations for the next parliamentary session would take days, not weeks. There was no evidence the government had considered how Parliament would be able to respond to a new withdrawal agreement or prepare for withdrawal

with or without an agreement. As the government is responsible to Parliament, thwarting it without a reasonable justification was unconstitutional.

The Court held that the effect of this finding was to nullify the prorogation. The steps through which the purported prorogation had been carried out – which included the reading of an Order in Council to the assembled Members in the House of Lords – were not protected by the provisions of the 1688 English Bill of Rights or the 1689 Scottish Claim of Right aimed at protecting parliamentary debate. The steps were not "proceedings in parliament." Indeed, those statutory provisions are aimed at protecting parliamentary deliberations and members' actions. They protect legislative bodies against attack by individuals and the Crown (originally the overweening Stuarts), rather than protecting the Crown against Parliament. In interpreting these provisions, the Court turned to the 25th edition of Thomas Erskine May's *Parliamentary Practice* (2019). Although prorogation would be carried out in Parliament, it happened *to* Parliament, the effect of a body on the outside. Because the advice to Her Majesty was unlawful, the Order in Council to which it led and which was read in Parliament was void, and so was the prorogation itself. As far as the Court knew, the next steps would be taken by the Speaker of the House of Commons and the Lord Speaker, to cause the two Houses to resume meeting.

Voices have been raised against the Supreme Court for interfering. On Monday, September 30, Professor Sue Prince of the University of Exeter, in a talk at the Faculty of Law at the University of Calgary, displayed an English newspaper headline that suggested that the judges might be "'Enemies of the People.'" Prince's focus was on the changing role of the UK Supreme Court – its likely shift into an arbiter of constitutional matters – now that the court itself is institutionally separate from the House of Lords. Questions familiar to Canadians have been raised, about the legitimacy of the judges in determining previously non-legal questions, such as when the Prime Minister may ask the Queen to prorogue Parliament. With the prospect of a no-deal Brexit looming, the country is also, it seems, in a moment of constitutional transition.

This blog explores another moment of transition in British constitutional history. Lady Hale and Lord Reed remarked in *Miller* that the current circumstances are a "one-off" and unlikely to arise again. This assurance recalls the saying that history doesn't repeat itself, but it does sometimes rhyme. The law, they said, "is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution." The words "used to" may overstate the case somewhat, but similar tools were brought out during an earlier constitutional crisis in British history, a crisis that produced constitutional renovations that have now comfortably blended so well into the earlier structure such that the seams are mostly invisible, or are at least indistinguishable from the many other seams and small cracks in a structure built over hundreds of years. Today's crisis is about prerogative, the powers retained by "the Crown" (a complicated idea) in the constitutional settlement of 1689, when William and Mary became king and queen "in Parliament," and the age of the absolutist-inclined Stuarts came to an end. Close to 200 years ago, the powers and privileges of the House of Commons were at stake in another constitutional crisis, which raised the question of the relationship between the House of Commons and the Court of Queen's Bench. Lady Hale and Lord Reed informed us that "[t]ime and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty." However, in the

name of parliamentary sovereignty courts have also curtailed the claims of the individual Houses of Parliament, especially the Commons, the Lords having been the final court of appeal until recently. English constitutional history features a three-way struggle among courts, Parliament and the Crown. The mid-19th century controversy discussed here did not end conclusively but went on for years, morphing into other legal proceedings, but its overall thrust was finally to limit the power of the House of Commons, to temper its claims to be the ultimate protector of the "rights of Englishmen," and to configure courts as the protectors of individual rights. Ultimately the legal profession's victory was so complete that the controversy is largely forgotten, its enduring ripples producing difficult but fairly limited puzzles in constitutional theory.

The key case, *Stockdale v Hansard* (1839), 9 Adolphus & Ellis 1, 112 ER 1112 (KB), started with a not-very-salacious, more-or-less medical book on diseases of the venereal system that turned out to be surprisingly popular reading in Newgate prison. Two reform-oriented prison inspectors, commissioned by the House of Commons to take stock of the physical and moral condition of the prison, discovered the book and, reporting back to the Commons, described it as obscene and disgusting. In this report, the inspectors (suggestively) replaced the title and the name of the author with blanks but identified it as published by John Joseph Stockdale in 1827. Stockdale did not welcome the implication that he published disreputable texts. The Commons had taken to publishing its reports for the edification of the multitude and as a reflection of its sense of responsibility to society, and perhaps also for the revenue. In November 1836, Stockdale launched a libel suit against the publishers, several members of the Hansard publishing family.

When the case came before Chief Justice Denman and a special jury in King's Bench in February 1837, two main arguments were made ((1837) 3 State Trials (New Series) 723). The first was truth: that the book was indeed indecent and obscene, and that as Stockdale admitted publishing it, obviously any reputational harm that flowed from the publication was his problem. This argument persuaded the jury and Stockdale lost, despite his protestations (he represented himself) that the book was medical and he was the victim of a conspiracy. However, the more interesting argument was that the inspectors' report could not be the subject of a libel case because it had been published at the behest of the House of Commons – that it was protected by parliamentary privilege: the subject, Stockdale, would simply have to endure the reputational harm done through a parliamentary report.

The root of this claim was an old constitutional idea that the law and custom of Parliament was the highest law in the land, knowable and determinable only by the two Houses of Parliament themselves by reference to their own records. As William Blackstone put it in 1765, "the principal privilege of parliament consisted in this, that it's [*sic*] privileges were not certainly known to any but the parliament itself" (*Commentaries*, *I:159). His contemporary John Rayner observed that it was unclear whether parliamentary privilege could entitle anyone to commit wrongs outside of Parliament, but if the Commons claimed such privileges, "they must be allowed to them; for they are to be presumed to have Wisdom to discern their own Rights, and Power sufficient to secure them" (*Digest of the Law Concerning Libels*, 120, by "A Gentleman of the Inner Temple"). The Commons, however, had not always used their privileges wisely and judiciously. Prickly legislators had thrown their critics in jail and published their own defamatory speeches to get back at their enemies. In the linked early eighteenth-century cases of *Ashby v*

White and *R v Paty et al* Chief Justice Holt had opposed the Commons and the rest of the judges, asserting that the Commons could not deprive electors of their right to vote, that courts had to be able to provide a remedy for the Commons's misdeeds (see Howell's State Trials, 696-888). In 1810, the Commons sent a radical member, Sir Francis Burdett, to the Tower of London over a pamphlet that questioned the power of the Lords to imprison for contempt (see *Burdett v Abbott* (1811), 14 East 1, 104 ER 501 (KB)). In a series of cases in the late eighteenth century, famed barrister Thomas Erskine turned to the courtroom – especially King's Bench – to defend the liberties and reputations of individual critics not only against the Crown but also against the Commons. Gradually, over more than a century of politics and social and institutional change, and with Parliament in considerable turmoil (the prime minister had changed five times since 1830), the stage was set for a contest over which institution could determine the nature and extent of parliamentary privilege when the ends of the Commons collided with individual rights.

Chief Justice Denman was troubled by the argument, advanced by the attorney general on behalf of the Hansards, that parliamentary privilege protected the inspectors' report and barred Stockdale from suing the Hansards for reputational harm. Denman observed that parliamentary privilege would have protected the report if it had been published only for the use of the members of the House of Commons, but he did not think privilege could protect a printer from liability for libel flowing from a publication circulated to the public generally. Charging the jury, he observed that he wanted to make this point:

> most emphatically and distinctly, because I think that, if on the first opportunity that arises in a court of justice, on a point of this kind being stated, the point were left unsatisfactorily explained, the judge who sat in that court might become an accomplice to the destruction of the liberties of the country, and expose every individual in it to a tyranny to which no man ought to be called upon to submit (State Trials, n.s., III: 733).

Denman later referred to the "zealots of privilege in the House of Commons" and suggested that "none of its members [were] more averse than other people to the possession of absolute power" (State Trials, n.s., III: 732n).

Stockdale was unhappy with the verdict and made an unsuccessful effort to have it set aside. More importantly for our purposes, members of the House of Commons were outraged by Denman's views and mobilized to defend their privilege. Eight days after the jury's verdict, the House appointed a select committee to ascertain the law and practice around the circulation of their reports – to go through their own precedents to determine the parliamentary law in the area, as was the normal practice when questions of privilege arose. On May 30, Stockdale began another libel action, this time about a response the inspectors had made, and which the House of Commons had also ordered published, when London's Court of Aldermen publicly disagreed with the inspectors' view of the book. The inspectors had again portrayed Stockdale as a more or less a purveyor of pornography. In this second action, Stockdale claimed the immense sum of 5000*l* in damages against the Hansards.

The next day, May 31, 1837, the House of Commons threw down the gauntlet to the Court and the legal profession, narrowly passing three resolutions. First, the Commons resolved that the power to publish "such of its reports, votes, and proceedings as it shall deem necessary or

conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it." Second, the Commons resolved that it had "the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges" and that taking any legal action to bring its powers into discussion anywhere other than in Parliament was "a high breach of such privilege, and render[ed] all parties concerned therein amenable to its just displeasure and to the punishment consequent thereon." Third, "for any court or tribunal to assume to decide upon matters of privilege inconsistent with the determination of either House of Parliament thereon is contrary to the law of Parliament, and is a breach and contempt of the privileges of parliament" (State Trials, n.s., III: 737-78).

Thomas Pemberton (later Pemberton Leigh) was a contemporary lawyer who sat in the Commons and resisted this privilege claim. Pemberton's account in his *Letter to Lord Langdale on the Recent Proceedings in the House of Commons on the Subject of Privilege* (1837) makes it clear that lawyers immediately realized that they were in the crosshairs: the demands of the Commons might require them to abandon their duty to pursue their clients' interests. Disobeying the orders of the Commons could lead (ironically) to Newgate. Judges, too, were in jeopardy: if they did not defer to the Commons in its understanding of privilege, they would be in contempt of Parliament and subject to similar punishment. Pemberton thought the profession immediately perceived the only true course of action: to defy the Commons' claims to jurisdiction to declare the existence and extent of its own privileges, to declare when its privileges were breached, to punish everyone it found to have breached them, and to punish "all persons, suitors, attornies, counsel, and judges, who may be concerned in bringing those privileges into discussion in a court of justice directly or incidentally."

With Stockdale's second action facing them, the Hansards were now in a bind that tightened over the next few years. No one was supposed to challenge the Commons' declaration of privilege in court, but someone had, and they were the target. Could they defend themselves, and thus make King's Bench into the forum for the discussion of these claims? On June 8, 1837, the Commons permitted the Hansards to appear and plead, and directed the attorney general, Sir John Campbell, to conduct the defence.

The Hansards pleaded, first, that all they had done had been duly directed by the House of Commons, and, second, that they were protected by the May 31 resolution, which established, or declared, that the privileges of the House of Commons protected them. Stockdale, who now had a lawyer, responded in no uncertain terms, asserting "that the known and established laws of the land cannot be superseded, suspended, or altered by any resolution or order of the House of Commons: And that the House of Commons, in Parliament assembled, cannot, by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land; and that, if such power be assumed by them, there can be no reasonable security for the life, liberty, property, or character of the subjects of this realm" (State Trials, n.s., III: 741). Joinder was taken with the demurrer on July 14, 1837, and there things sat for close to two years.

Argument in Queen's Bench on the Hansards' demurrer took place over four days in April and May 1839 (see *Stockdale v Hansard* (1839), 9 Ad & E 1, 112 ER 1112). The attorney general's argument took almost three days to deliver and cited a multitude of authorities. The judges, led

by Denman, delivered their judgments on May 31, 1839. Almost 100 pages long – almost half of it argument – the case takes pride of place in that volume of law reporting, appearing first. Denman was scathing, demolishing the attorney general's arguments one by one: he began by saying Campbell's argument that the House of Commons was the supreme power in the state and could therefore authorize any act it liked was "wholly untenable and abhorrent to the first principles of the Constitution of England," which made Parliament as a whole supreme (ER 1153-54). "Abhorrent" is a bad beginning, if you are the party advancing the proposition. Denman's rejection of the attorney general's case proceeded brick by brick, for twenty pages of small print. The other three judges followed suit. As Justice John Patteson explained, the House of Commons could not of its own accord protect "the grossest libels," and the rights of individuals could not be invaded with impunity by the House. Patteson observed,

> If the doctrine be true that the House, or rather the members constituting the House, are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists to their assuming any new powers and privileges which they may think fit to declare. I am far from supposing that they will knowingly do so; but I see nothing to prevent it. Some mode of ascertaining whether the powers and privileges so declared be new or not must surely be found; and, if it be conceded that the Courts of Law, when that question of necessity arises before them, may make the enquiry, then the doctrine that the resolution of the 31st of May 1837 precludes enquiry by this Court must fall to the ground. (ER 1184-84)

The House of Commons had violated individual rights in the past, and it could not be the case that the wronged individual lacked a remedy in court. Parliament was the supreme power, not an individual House. Queen's Bench declared its jurisdiction to determine whether or not asserted powers and privileges existed.

The Hansards were out of luck, and round two now began. The Commons refused to stand down, and the Hansards found themselves unable to defend against Stockdale's proceedings. Orders to execute on judgments were made, along with orders barring execution. Sheriffs and lawyers found themselves caught in the battle. Much, much more paper flew, until finally a kind of détente was reached about 1845, neither side having decisively won or lost. In 1844, with proceedings still ongoing, Thomas Erskine May wrote, in the first edition of his *Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, "[t]he precise jurisdiction of courts of law in matters of privilege, is one of the most difficult questions of constitutional law that has ever arisen" (113). Even in the early twentieth century, William Holdsworth, in his *History of English Law*, called the question "not perhaps finally settled" (I: 192). But that the courts had jurisdiction of some sort was no longer in doubt.

As with Britain's shifting relationship with the European Union now, larger transitions were taking place in the background in the 1830s and 1840s. Over the previous few decades, and especially more recently, Parliament had come to understand its doings as public. Notionally, and in the past, the House of Commons had operated behind closed doors to shield its members from the prying eyes of the Crown. The 1689 Bill of Rights protected that function in protecting the proceedings of Parliament. In 1839 it was still, at least formally, a breach of privilege to print its doings without specific authorization. However, the Commons had in fact for two generations

been tolerating parliamentary reporting, and now it was publishing its proceedings and reports for profit. How could a privilege – understood to rest on immemorial principle and practice – which had previously protected the secrecy of the Commons have transformed into a privilege to publish its doings widely? The solution Thomas Pemberton proposed was a statute to protect publishers and perhaps indemnify those whose reputations were improperly damaged, and eventually he worked with others to shepherd such a statute through Parliament in 1840. The need for an outward-facing Parliament, responsive to the public and no longer cowering in fear of the Crown, had prevailed; but for the privilege to be legitimate and legally operational, Parliament had to establish this constitutional renovation by statute – so said Queen's Bench, whose self-positioning as the forum in which individual rights are most properly defended has prevailed.

The UK appears now to be at a similar sort of crossroad, as the Supreme Court finds itself the forum for struggles between the executive and the legislative branches. We may hope that the headlines suggesting that judges may be the "enemies of the people" sound overly dramatic and unpersuasive. Similar danger probably was in the mind of Lord John Coleridge, who finished his judgment in *Stockdale v Hansard* with these conciliatory words:

> The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people. (ER 1203)

It worked then.

This post may be cited as: Lyndsay Campbell, "Judges, Parliament, Brexit and Constitutional Chang: Echoes of Stockdale v Hansard (1839)" (October 21, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/10/Blog_LC_Stockdale.pdf