The Supreme Court – Consistent with Burke: A Personal view

In his thoughtful piece "*The Prorogation – Lawful, but Unconservative*" *(A personal view)*[1], written before any of the Courts' decisions, Anthony Speaight QC opined that the prorogation was lawful and that it would be a deplorable intrusion into the political realm if the courts were to intervene. But, he wrote, this prorogation was contrary to the spirit of the British constitution, and what Dicey called "a whole system of political morality", not found in statute or common law but sacred in principle. He suggested that this tradition reflects Burkean philosophy. He acknowledged that some Tory lawyers might welcome the manoeuvres as a route to securing Brexit, but observed that "the ends justify the means" is a slippery slope**.**

The Divisional Court held that the issue was not justiciable. The Scottish Inner House disagreed, holding that it was justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the executive, and that it and the prorogation were unlawful and thus null and of no effect.

So, Anthony Speaight's view on justiciability was upheld in one forum but not the other.

<u>The decision [2019] UKSC 41]</u> <u>and its effects</u>
It is essential to grasp what the Court did and did not hold (figures in square brackets refer to paragraphs in the judgment):

(1) <u>Prorogation</u> [1-6] (this is not controversial):
(i) While Parliament is prorogued, neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers. They may not meet and take evidence in committees. In general, Bills which have not yet completed all their stages are lost. In certain circumstances, individual Bills may be "carried over" into the next session. The Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits (but not cannot procure the passing of Acts of Parliament or obtain Parliamentary approval for further spending).
(ii) Parliament does not decide when it is to be prorogued. This is a prerogative power exercised by the Crown on the advice of the Privy Council.
(iii) Unlike dissolution, Prorogation does not bring Parliament to an end. It is not followed by a general election.
(iv) Prorogation must be distinguished from the House adjourning or going into recess. This is decided, not by the Crown acting on the advice of the Prime

[1] https://docs.wixstatic.com/ugd/378502_5bfd9c408c7c45b3a123783bc753ecad.pdf

Minister, but by each House passing a motion to that effect. The Houses might go into recess at different times from one another. During a recess, the House does not sit but Parliamentary business can otherwise continue as usual. Committees may meet, written Parliamentary questions can be asked and must be answered.

(2) [43] The question of whether the Prime Minister's advice to the Queen was lawful is justiciable in a court of law. To hold otherwise, the court ruled, would mean that there were no circumstances whatsoever in which it would be entitled to review a decision that Parliament should be prorogued (or ministerial advice to that effect. [46]

The court founded this on the principle of Parliamentary accountability. It is long established. As Lord Bingham of Cornhill said in the case of *Bobb v Manning* [2006] UKPC 22, para 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy".

I observe: no UK lawyer would seek to deny that principle. It is not a novel proposition.

Having recorded (importantly) that it was accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers, the court noted [48] that the principle of Parliamentary accountability is not placed in jeopardy if Parliament stands prorogued for the short period which is customary, and that Parliament does not in any event expect to be in permanent session, the Supreme Court observed that the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model. So, the same question arises as in relation to Parliamentary sovereignty: what is the legal limit upon the power to prorogue which makes it compatible with the ability of Parliament to carry out its constitutional functions?

[51] As a concomitant of Parliamentary sovereignty, the power to prorogue cannot be unlimited.

I ask: surely that too must be right if our democracy is to function. But who is to correct things if the matter is put in issue and how? For Parliament by definition is not available and is powerless. It must be for the courts.

(3) The standard by which to judge the lawfulness of that advice. This was to be judged '*for the purposes of the present case*' [50] as a concomitant of Parliamentary sovereignty, so that the power to prorogue cannot be unlimited.

The emphasis is mine. The reasoning shows the court is granting any Prime Minister a generous margin of political judgment.

So [51], the extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts.

The court then had to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having those effects. It held it is [52] a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand.

(3) By that standard, was it lawful? [58] The relevant question is whether there is a reasonable justification for taking action which had such an extreme effect upon the fundamentals of our democracy, acknowledging that the Government must be accorded a great deal of latitude in making decisions of this nature. The court stressed (contrary to the decision of the Scottish Inner House) that it was not concerned with the Prime Minister's *motive* in doing what he did.

I observe, that these are important holdings. They are not revolutionary, but evolutionary to meet a novel situation. So, the court looked for reasons.

The court referred [59] to the unchallenged evidence of Sir John Major: the work on the Queen's Speech varies according to the size of the programme. But a typical time is four to six days.

I note that this of course is in exact accord with 2012 textbook of Professor Adam Tomkins, the leading Conservative member of the Scottish Parliament, cited by Anthony Speaight.

But [60], the court noted, the effect of the prorogation was to curtail what time there would otherwise have been for complex and important Brexit related business. So, was there a reason for him to do it? Why did that need a prorogation of five weeks?

Tellingly, [61] there was no evidence from the Prime Minister (or anyone on his behalf) of any reason, let alone a good reason to prorogue Parliament for as long as five weeks. The court declined to speculate on what the reasons might have been.

Of course, as Anthony Speaight opined (and was plainly right) the '*aim of the Johnson prorogation [had] been to try to prevent Parliament enacting anything*'.

In short, the Court held the effect of so long a prorogation was to abrogate impermissibly Parliamentary accountability.

(4) <u>If it was not lawful, what remedy should the court grant?</u> The court [63] rejected the submissions that it had no jurisdiction to determine the essential question: 'Is Parliament prorogued or is it not?' and that it could not declare the prorogation null and of no effect, because to do so would be contrary to article 9 of the Bill of Rights of 1688, an Act of the Parliament of England and Wales, or the wider privileges of Parliament, relating to matters within its "exclusive cognisance". That submission was founded on the assertion that the prorogation itself was "a proceeding in Parliament" which could not be impugned or questioned in any court. And reasoning back from that, neither could the Order in Council which led to it.

In so doing the court relied on *R v Chaytor* [2010] UKSC 52, and the clear principles that:

(i) it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament";
(ii) the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in Parliamentary committees. This is where the core or essential business of Parliament takes place" (para 47). In considering whether actions outside the Houses and committees are also covered, it is necessary to consider the nature of their connection to those and whether denying the actions privilege is likely to impact adversely on the core or essential business of Parliament;
(iii) "exclusive cognisance" refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament" (para 63); it was enjoyed by Parliament itself and not by individual members and could be waived or relinquished; and extensive inroads had been made into areas previously within exclusive cognisance.

Reference was also made to Erskine May: "The primary meaning of proceedings, as a technical Parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, *taken by the House in its collective capacity. …*"
[my emphasis]

So, the court held that prorogation is not a "proceeding in Parliament". It reasoned that it is not a decision of either House of Parliament, but something imposed upon them from outside and not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

Accordingly, it granted a Declaration that Parliament had not been prorogued. The rest is history!

Discussion

Anthony Speaight (and later the Divisional Court) concluded that the matter was not justiciable. Anthony however was troubled where this might lead – the 'slippery slope' of the 'ends justify the means' arguments. But on any basis, while the courts should not intervene in matters which are the proper preserve of Parliament by reason of article 9, the Prime Minister's action in advising the Crown to prorogue (for so long) fell on the cusp of what was justiciable in the courts.

I know that I am not alone in feeling anxious at the development of judicial interventions which may appear to tread on Parliament's toes. I originally shared the reservations of the Divisional Court presided over by the Lord Chief Justice, but the Supreme Court's reasoning is compelling. Further, it seems plain that a majority in this House of Commons welcomed these proceedings and their outcome. Without this intervention, the majority in the Commons would have been impotent at a time of national crisis.

At the least, the length of prorogation to exclude parliamentary scrutiny, coupled with the implausible reasons given, were troubling. If the courts in these circumstances are excluded in principle by article 9 from intervening in any way, then there would be no protection in future against the conduct of a Prime Minister who goes beyond the bounds of constitutional propriety. We must never forget how fragile democracy is in the wrong hands.

The effect of the advice to the Queen was to close Parliament down for longer than appropriate and hence not justified. That assessment is plainly right. So too, the conclusion that the (albeit political) decision and its exercise were not matters outwith the court's jurisdiction. I ask rhetorically would the framers of the Bill of Rights have been content to do nothing.

The House of Commons is now in a mess. The circumstances obtaining in late August were unusual and difficult. No majority exists for any positive course of action – save postponement through a request to Europe for delay if a deal acceptable to a majority is not advanced by mid-October.

But for the Crown, in the form of the Executive, and a minority administration at that, to have closed the place down for five weeks out of the remaining eight, with the loss of all parliamentary accountability during this crucial period was a step too far. Indeed, logic and democratic principle would suggest that a minority government

must aim for consensus and not silence effective debate. There are of course different but valid reasons why a government with a majority should not for reasons of its own act in similar fashion.

Accountability to Parliament, due process and the rule of law are fundamental principles of our constitution: "*the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy*" (per Lord Bingham above).

The decision of the court is consistent with the passage from Burke cited by Anthony Speaight. Further, if one substituted the words "King James I" or "King Charles I" for "Prime Minister" throughout the Supreme Court judgment, would critics still find the decision questionable?

Under our constitution, the courts have been together with Parliament the protectors of our freedoms. Parliament here was rendered impotent by Executive fiat. The situation required judicial intervention.

This was not a 'constitutional coup'. Attacks on the Supreme Court or individual judges are not justified. They did not bring the proceedings. They adjudicated upon the matter placed before them. On any view that came about because of the unorthodox actions of the Prime Minister who must have been aware that he would cause a storm and trigger litigation. Whatever legal advice he received – and advice that so to act would probably not be justiciable was reasonable <u>legal</u> advice, as per the Divisional Court – he must have known that he was doing something which was pushing to the limit of the constitutional boundaries. The furore during the leadership election when a long prorogation was mooted by Dominic Raab MP gave notice of a storm to come.

It has not hitherto been a tenet of Conservative philosophy or practice to take risks with the Constitution or expose the monarch to embarrassment. But that is what has happened. The Courts should not be blamed for doing their duty and adjudicating according to what they find to be the law.

Finally, I make two points.

First, I remind readers that the Labour conference passed a resolution calling for the "endowments, investments and properties held by private schools to be redistributed democratically and fairly across the country's educational institutions". We shall need fearless judges to uphold in the courts the rights to property and freedom of choice to educate our children that we hold dear. No party remains in power for ever.

Secondly, these proceedings and their outcome are not reasons to call for a written constitution or public approval hearings for Supreme Court justices. The proceedings have on the contrary shown the common law at work in accordance with hundreds of years of incremental development. This decision went as far as necessary but no further. It left the remedial steps where they belong, namely to Parliament.

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