Monarchs, judges & controversial prime ministers

The UKSC's reversal of the High Court's decision on prorogation is not in keeping with time-honoured principle, says Dr Michael Arnheim

In the recent unanimous bombshell decision by the UK Supreme Court (UKSC) sitting en banc 11 members strong, the court ruled that the prime minister's advice to the queen to prorogue Parliament for five weeks was 'unlawful, void and of no effect', that the queen's subsequent order in council ordering prorogation—an exercise of the royal prerogative—was accordingly also 'unlawful, void and of no effect', and that the prorogation ceremony itself was 'as if the Commissioners (the queen's emissaries) had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect,' *R (Miller) v The Prime Minister* [2019] UKSC 41, [2019] All ER (D) 61 (Sep), para [69].

Case of Proclamations

In reaching this decision, the UKSC placed considerable reliance on the Case of Proclamations (1611) 12 Co Rep 74. The facts of the case were as follows. King James VI and I issued proclamations prohibiting new buildings from being erected in London and also prohibiting the making of starch from wheat. The House of Commons objected to this, because it bypassed Parliament, as a proclamation did not need parliamentary consent. So the king consulted several senior judges, including Sir Edward Coke, on the legality of legislation by royal proclamation. Coke replied 'that the King cannot change any part of the common law, nor create any offence by his proclamation which was not an offence before, without Parliament'. The other judges apparently agreed with this, and: 'Also, it was resolved, that the King hath no prerogative, but that which the law of the land allows him.'

'Transcendent & absolute'

The phrase 'without Parliament' is particularly significant. The sovereignty of Parliament, which was already a time-honoured principle by then, meant that legislation was the preserve of Parliament. The king could not legislate on his own without Parliament—and there is no suggestion here that the judges could do so either. Judge-made law would have conflicted just as much as any royal proclamation with the sovereignty of Parliament. Coke was an extreme judicial activist: witness Dr Bonham's Case (1610) 8 Co Rep 107, in which he claimed the right for the courts to set aside an Act of Parliament if it was 'against common right and reason, or repugnant, or impossible to be performed'. But even in this extreme one-off opinion, Coke was not claiming the right of judges to make law, only a negative right to set aside 'unreasonable' laws. And in his reincarnation as a member of Parliament after his dismissal from the bench by the king, Coke was no longer claiming any such right but was instead quite correctly championing parliamentary sovereignty in the most extravagant language: 'Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.' (Coke, Institutes, Fourth Part 36, 1797 edition).

'Principles of the common law'

The belief that the common law has always been judge-made is a myth. Judge-made law really dates only from the famous case of the snail, *Donoghue v Stevenson* [1932] AC 562, best known for Lord Atkin's judge-made 'neighbour principle'. Lord Buckmaster, dissenting vehemently, summed up the proper approach to the common law:

'The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.'

Lord Tomlin's rejection of Lord Atkin's new 'principle' was even more pointed: 'There is, in my opinion, no material from which it is

legitimate for your Lordships' House to deduce such a principle.' And in fact neither of Lord Atkin's two Scottish wingmen, who concurred in the decision for Mrs Donoghue, even so much as mentioned the 'neighbour principle'.

Separation of powers

The claim of the courts to control the royal prerogative is even more recent, dating only from the House of Lords decision in the GCHQ case, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, reversing a unanimous Court of Appeal decision that the royal prerogative was not subject to judicial review. For the courts to intervene on the prerogative, an executive power, flies in the face of the separation of powers, which Lord Diplock, who gave the leading judgment in the GCHQ case, had earlier described as the mainstay of the constitution: 'It cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers.' *Duport Steels v Sirs* [1980] 1 WLR 142. The British constitution certainly does contain the doctrine of the separation of powers, but it is a gross exaggeration to describe it as 'firmly based' on that doctrine. Lord Diplock ought to have realised that the separation of powers—itself based on the principle of the sovereignty of Parliament—precluded judicial intervention on the prerogative.

GCHQ

In the GCHQ case, Lord Roskill took it upon himself to determine which prerogative powers were justiciable and which not: 'I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers *as well as others* are not, I think, *susceptible* to judicial review because their nature and subject matter is such as not to be *amenable* to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.' (Emphasis added).

What a wonderfully circular argument this is. What Lord Roskill is really saying here is that the listed prerogative powers are not suitable for judicial review because they are not suitable for judicial review. Prorogation is not mentioned, but if the dissolution of Parliament is non-justiciable, as Lord Roskill sensibly opined, then that must apply *a fortiori* to prorogation, which is a much less serious and more temporary measure. And, as it happens, dissolution has become even more non-justiciable since the GCHQ case. It is now governed by the Fixed Term Parliaments Act 2011, by which Parliament itself quite properly took control over dissolution.

The quoted Roskill extract (above) is unintentionally comical. After reeling off a detailed list of prerogative powers that are not suitable for judicial review, Lord Roskill then adds 'as well as others'. Who is to decide what these 'others' are? And, for that matter, what right do judges have to decide which rights are and which are not 'amenable' to judicial review in the first place? Until 1984 the judges had not dared to try to arrogate this power to themselves. What gave them the right to change the law in their own interests in this way? Any change in the law is legislation—which the principle of the sovereignty of Parliament together with its emanation, the doctrine of the separation of powers, reserves to Parliament. Moreover, arrogating power to oneself is not just legislation. It also offends against that most fundamental ancient principle of natural justice: *Nemo debet esse iudex in causa sua* (Nobody ought to be a judge in his own cause).

Power of revocation

In the instant case, the UKSC prides itself (at para [40]) on 'constitutional principles developed by the common law', including 'the principle that the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation'. For this 'principle' they cite the case of *Burmah Oil v Lord Advocate* [1956] AC 75—without mentioning that this decision, together with the 'principle' (in relation to wartime), was consigned by Parliament to the shredder—retroactively, to boot—by the War Damage Act 1965. This is an illustration of yet another aspect of the sovereignty of Parliament—the power to revoke, ie cancel, the decision of any court of law for any reason whatsoever, or none at all.

Non-justiciable questions

Another aspect of the separation of powers is the time-honoured principle of the non-justiciability of any political question, which must be left to the two branches of government with democratic accountability: the legislature and the executive. This was the basis of the unanimous decision of the Divisional Court of Queen's Bench (made up of the Lord Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division), which was overturned by the UKSC. The High Court held as follows: 'The Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case were political.' (Para 51). And: 'We concluded that the decision of the Prime Minister was not justiciable. It is not a matter for the courts.' [2019] EWHC 2381 (QB). My own view is that this was the correct decision and should have been affirmed by the UKSC. NLJ

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