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Railroaded by the Judges: Boris Johnson Fails in the UK Supreme Court

By Dr. Binoy Kampmark
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It delighted Labour supporters and party apparatchiks who had been falling over each other in murderous ceremony at the party conference in Brighton: Prime Minister Boris Johnson would come to the unwitting rescue with his own version of a grand cock-up. This involved a now defeated attempt to circumvent parliamentary scrutiny and interference ahead of the Brexit date of October 31 through a prorogation of parliament.

Johnson still felt he was in with a chance, and with good reason. The UK Constitution is a nebulous muddle of conventions, documents and interpretations, a body of constitutional law without a constitution. It is a 350-year old absurdity that relies on good behaviour, toe-tipping judges and sensible MPs. But as Caroline Lucas, Green MP for Brighton Pavilion argues, Britain faces "a Prime Minister with no respect for the rules and a downright contempt for the law."

Some decisions had favoured the government. On September 6, London's Divisional Court held that the advice to the monarch to suspend parliament was distinctly a no-go area for judges, purely a matter for rowdy political assertion. As Lord Bingham noted in 2005, "The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision." It was, however, accepted "that decisions of the Executive are not immune from judicial review merely because they were carried out pursuant to an exercise of the Royal Prerogative".

In the case of Johnson's prorogation, it was "impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure". The same decision was also reached in the Belfast High Court, which proved similarly hesitant to step on the toes of the Executive.

The Scottish Court of Session expressed no such reserve, with Lords Carloway, Brodie and Drummond Young unimpressed by a process seemingly designed to stymie parliamentary scrutiny of the executive. Tactics deployed in achieving such prorogation might well be considered by a court to be improper. This, the judges claimed to be the case.

The UK Supreme Court seemed well irritated by the presumptuousness of the Prime Minister's position. Courts do not always take kindly to suggestions of incompetence, even in such a fields as political manoeuvring and skulduggery. In a unanimous judgment, the eleven judges ruled that it was "impossible to conclude, on the evidence which has been put before us, that there had been any reason – let alone good reason – to advise Her Majesty to prorogue Parliament for five weeks".

The judgment is littered with well-directed grenades of disapproval, starting with the poke that it arose "in circumstances which have never risen before and are unlikely ever to arise again." (Judicial optimists, evidently.) The Prime Minister had a constitutional responsibility "to have regard to all relevant interests, including the interests of Parliament" in advising the monarch. Nor could the mix between law and politics necessarily render judges incapable of intervening for, going back to 1611, "the King hath no prerogative, but that which the law of the land allows him".

More juicily, the Supreme Court justices were clear on the point that prorogation, in its effect, prevented the application of ministerial responsibility during that period. This had the effect of making the PM "unaccountable by Parliament until after a new session of Parliament had commenced". This could lead to the case of Parliament "closing the stable door after the horse had bolted." (A true equine beast is Brexit proving to be.)

What, then, of the standards in assessing such a prerogative power? Other courts had been reluctant, claiming vagueness and impossibility. It was not, in the classic idiosyncrasies of this sceptred isle, scripted. No matter: "every prerogative power has its limits" to be determined by the court; and such a power had to be exercised in accordance with common law principles and the operation of Parliament itself. Each branch of government, accordingly, had limits that required curial assessment; it was not for the courts to "shirk that responsibility merely on the ground that the question raised is political in tone or context."

This led to an almost stirring defence of the court's role in defending Parliamentary sovereignty, which has been threatened since the 17th century "time and time again" by undue exercises of prerogative powers. In this case, Parliament's exercise of legislative authority for the duration it pleased would be subverted by the executive's use of the prerogative. "An unlimited power of prorogation would therefore be incompatible with the legal principles of Parliamentary sovereignty." Not could the executive avoid its own responsibilities to parliament in being scrutinised.

At times, the judgment moves into a tone of discomfort and concern. One point stands out: the prospects of long prorogation periods. The longer the duration, the greater the likelihood of tyranny, "that responsible government may be replaced by unaccountable government".

To the government's argument that the prorogation was "a proceeding of Parliament" that could never be impugned or challenged by a court, the judges retorted that it was for them to decide, not parliament, how far such privileges extended. Nor could the prorogation be sensibly termed a parliamentary proceeding, not being a decision of either House of Parliament.

All in all, it followed that Johnson's advice to the Queen had been unlawful, having "the effect of frustrating or preventing the ability of parliament to carry out its functions without reasonable justification", thereby rendering the entire process behind prorogation void.

As is in keeping with such matters, disgruntled Tories felt that the irritations of law had intervened with the populist measures of Johnson's agenda. The "people" were being muzzled and mocked by the court's aggrandized constitutional functions. Jacob Rees-Mogg expressed a distinctly unconservative view in a cabinet call with the prime minister calling the decision a "constitutional coup". (He obviously had not read the part of

the judgment that the court was performing its functions without offending the separation of powers.) *The Spectator* fumed at this "constitutional outrage".

Brexit Party MEP Belinda de Lucy was similarly snooty on the court's power on the mater. "We believe the sovereignty lies with people" judicial swerving into matters political suggests a move into "dangerous territory". (The point missed here is the court's understanding that Parliament remains, in its form, the arbiter of that sovereignty and should, therefore, not be improperly restricted from its oversight.)

The result of the ruling means that Parliament will return to Westminster for a Wednesday reconvening. While that institution has not impressed with its vacillations, confusions and periods of paralysis, it remains one worth defending before the demagogues and the shifty, something President Lady Hale and the rest of the judges were more than willing to do. Should Brexit ever be realised, Parliament might well consider a little bit of constitutional codification.

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Dr. Binoy Kampmark was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. He is a frequent contributor to Global Research and Asia-Pacific Research. Email: bkampmark@gmail.com

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