THE PROROGATION – LAWFUL, BUT UNCONSERVATIVE: A PERSONAL VIEW

For a Conservative lawyer there are both valid and invalid reasons for the prorogation of Parliament to cause concern.

I take the invalid first. It is fully in accordance with our constitutional law for the Prime Minister to advise the monarch to prorogue Parliament, and for her to act on that advice. Whilst a lay person might imagine that the UK Parliament simply exists, the true constitutional position is that Parliament is summoned by the Crown. This role of the Crown, known as a prerogative, extends to suspending, or "proroguing", its business from to time. The Crown's sole right to summon and suspend Parliament is attested by constitutional writers from Blackstone[1], through Maitland[2] to Hood Phillips[3]. In Erskine May this remains the foundation of Parliament's existence:

> "Just as Parliament can commence its deliberations only at the time appointed by the Queen, so it cannot continue them any longer than she pleases"[4].

This royal role in convening Parliament is, however, a fiction. The Queen exercises prerogative powers on the advice of her Prime Minister. In 2015 the Deputy Private Secretary to the Queen stated in a letter to a parliamentary committee that she would always act on the advice of the Government as to setting the first meeting of a Parliament[5]. She is surely likely to adopt the same policy as to advice for a prorogation.

It has been suggested that the court by judicial review might review the Prime Minister's advice to the Queen. But there are profound problems in this route. Even if such a case had reached court before it had been acted on and whilst there was still time to mandamus the Prime Minister to change his advice, on what basis could a court so act? The grounds for judicial review are classically stated to be illegality, irrationality and procedural impropriety. The advice was not procedurally incorrect; and, whilst it may or may not have been wise, it was not irrational. So a court could intervene only if the advice was unlawful.

Such a proposition would be unprecedented in this country, since no comparable situation has previously arisen here. But there was such discussion by academic lawyers in another leading common law jurisdiction, namely Canada, where a strikingly similar political crisis erupted in 2008. The background was a general election on 14th October 2008: the Conservative Party minority Government increased its seat count from 127 to 143, but still fell just short of an overall majority. Six weeks later the opposition parties, which had widely varying positions, suddenly formed an alliance and threatened to bring down the Government by voting against its money bill. The Prime Minister, Stephen Harper, responded by requesting the Governor-General to prorogue Parliament until January. The

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[1] Sir William Blackstone "Commentaries on the Laws of England" 1756 book 1, ch 2 p.181

[2] "Constitutional History of England" F W Maitland 1908 p.422

[3] Hood Phillips "Constitutional and Administrative Law" 1973 p.99

[4] Erskine May 25th ed para 8.5

[5] Letter of 16th March 2015 reported in "Government Formation Post-election" Political and Constitutional Reform Committee 2014-15 HC 1023 26th March 2015 appendix 4.

vote which the opposition parties were poised to win was due 4 days later.

The Governor-General acceded to the prorogation request, so that the vote could not take place. Unsurprisingly, this caused an uproar. The prorogation thwarted Parliament from a vote which would have caused the Government to fall. The timing was critical. By January the Conservative Government had modified its financial proposals and regained the acquiescence of the Liberal Party. Harper survived: indeed, he remained premier for the next 7 years. Despite the activist reputation of the Canadian Supreme Court there was no judicial intervention.

Reflecting on Harper's use of prorogation, a Canadian law professor, Mark Walters, suggested a route to a legal challenge in such situations[6]. This was that a prime minister who does something which is undemocratic does something which is unlawful. Put more elegantly, the argument is posited on a constitutional principle of democracy elevated to a canon capable of invalidating Government action. One needs only to state that proposition to realise that its vagueness and subjectivity would open a door to judges adjudicating on the most political of questions. Any conservative lawyer will be persuaded by the riposte from another Canadian jurist, Mr Warren Newman[7] :

> "conventions, although they will usually influence and control the exercise of legal powers and discretion, are still, at heart, rules governed by politics, not law, and their fluidity of scope and application may at times defy precise legal conclusions."

The same principle should apply to the proceedings currently being brought in the UK to challenge the prorogation here. It would be a deplorable entry into the political realm if the UK Supreme Court were to allow itself to be persuaded that it can give any legal remedy to halt the prorogation.

But, despite all those considerations, there are other, valid, concerns which may trouble a conservative lawyer in our present situation. The nature of this 5-week prorogation is, to put it mildly, unusual. As Professor Adam Tomkins, now a leading Conservative member of the Scottish Parliament, describes prorogation in his textbook as,

> "suspending Parliament's proceedings, on the advice of ministers, normally <u>for a few days</u> at the end of each parliamentary session"[8]
> (emphasis added)

Nor is the 8-week Canadian prorogation a precedent wholly helpful to the British Government. The Harper prorogation enabled parties in Parliament to hold discussions across the floor leading to the enactment of a compromise: the aim of the Johnson prorogation has been to try to prevent Parliament enacting anything. Indeed, the Johnson Government has gone as far as expelling some of its own MPs to try to thwart cross-party co-

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[6] Law Times "Speaker's Corner" 25th January 2010

[7] "Of Dissolution, Prorogation and Constitutional Law, Principle and Convention" Warren J Newman published at http://www.europarl.europa.eu/cmsdata/150492/Newman%20Article%20on%20Prorogation%20NJCL%20VOL%2027.pdf

[8] "British Government and the Constitution" Turpin and Tomkins 7th ed 2012 p.385

operation leading to legislation. The Harper prorogation was to avoid an early general election: an early general election is now the main objective of the Johnson Government. At its root the aim of today's prorogation is to frustrate Parliament in its proper role of holding the executive to account.

It must, therefore, be debatable whether this manoeuvre is quite in keeping with our traditions. Mr Rees-Mogg, who is not a lawyer, has made a point this week of quoting Dicey. Dicey is certainly relevant. It was largely through Dicey that there came to be accepted the concept of constitutional "conventions" operating alongside the hard law of the constitution:-

> "We now have a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the statute or the common law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right."[9]

As the UK Supreme Court has recently restated in *Miller*[10], conventions are non-justiciable. But that does not mean that there is no obligation to respect them. Conservatives in particular should understand their value.

What Dicey called a system of political morality based on longstanding, accepted practice reflects Edmund Burke's theory of the prescriptive type of constitution:-

> "Our constitution is a prescriptive constitution, it is a constitution whose sole authority is that it has existed time out of mind.... It is a prescription in favour of any settled scheme of government against any untried project that a nation has long existed and flourished under it.... This is ... a deliberate election of the ages and of generations, it is a constitution made by what is ten thousand times better than choice; it is made by peculiar circumstances, occasions, tempers, dispositions and moral, civil and social habitudes of the people which disclose themselves only in a long space of time."

Similar thinking may be found in the thinking of the leading American 20th century conservative theorist, Russell Kirk[11], whose second principle was: "the conservative adheres to custom, convention and continuity".

There is in addition an intensely topical and pragmatic case for respecting traditional norms of political behaviour. We face today a real and imminent risk of Mr Corbyn entering 10 Downing Street. If Tories bend conventions, we may have little doubt that the hard left will gleefully follow our Party's example.

Nowhere is this readiness of the hard left more pronounced than in its ingenuity to twist procedures of governance. In the 1970s I grappled with this at first hand when I was national Chairman of the Federation of Conservative Students. Then the revolutionary left persuaded

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[9] "Introduction to the Study of the Law of the Constitution" A V Dicey ch XIV Nature of conventions of Constitution

[10] *Miller v Secretary of State for Exiting the EU* [2017] UKSC 5 at [148]

[11] author of "The Conservative Mind" (1953): see "Ten Conservative Principles" published by the Russell Kirk Center at https://kirkcenter.org/conservatism/ten-conservative-principles/

student unions in universities to transfer decision making from elected bodies to general meetings open to all. This was done in the name of enhancing democracy: the result was to give power to left wing activists, who were the only people with an appetite for devoting hours of their spare time to tedious meetings. The next move was to use the new left-wing control to vote money out of the union budgets, which came from taxpayers, to left-wing political campaigns[12].

There will be some Tory lawyers who feel inclined to welcome the Johnson Government's manoeuvres as a route to securing the UK's exit from the EU. But "the ends justify the means" is a slippery slope argument.

The very fact that conventions are unenforceable by the courts means that respect for fair and decent constitutional practice can be assured only by a climate of behaviour. Therefore, our own self-interest as much as political morality ought to make Tories diligent in upholding constitutional traditions.

There is perhaps an analogy to the Laws of Cricket, which begin by stating that the game should be played "not only according to the Laws, but also within the Spirit of Cricket". Conservatives should uphold the spirit of our constitution.

ANTHONY SPEAIGHT Q.C.

[12] an abusive practice described in *Baldry v Feintuck* [1972] 1 WLR 552