Supreme Court Decisions and Parliamentary Sovereignty: Analytical Essay

1. How did the Court reach its decision in the case? (50%)

The unanimous decision of the Supreme Court was handed down by Lady Hale and Lord Reed and decided whether the Prime Minister's advice to prorogue Parliament was justiciable and if so, lawful. A Divisional Court within the High Court dismissed the application on the grounds that it was not justiciable but granted a "'leapfrog' certificate" to allow the case to go directly to the Supreme Court (para 25).

The Justices' decision was predicated on four assumptions. Firstly, the power to prorogue Parliament is a prerogative power recognised by common law and exercised by the Crown (para. 31). Secondly, that the courts are unable to decide on political matters but disputes about the conduct of politicians are a matter for the Courts. There's "supervisory jurisdiction" (para.31) for the courts over the executive. Thirdly, although the Prime Minister is accountable to Parliament, it does not exclude the courts in having a role to play (para.33). Finally, if justiciable there will not be an offence to the separation of powers. It is the constitutional function of the Courts, as it prevents concentrated power.

Lady Hale then posed three questions; firstly, does the prerogative power exist and if so, does it fall within the Court's jurisdiction? It was held that the prerogative power was justiciable (para.35). Secondly, what are the limits of that power? As there is no statute or documents, the Court considered the lawfulness of the PM's advice in the context of common law principles, namely, Parliamentary Sovereignty (para.46) and Government Accountability (para.47). Mr Johnson claimed that this power was of higher policy and fell within an excluded category. Thirdly, if it would be open to legal challenge on another basis. These questions then lead onto the main crux of the issue, what is the legal limit? Is the power within or over that legal limit?

An unlimited prorogation would be incompatible with Parliamentary sovereignty as prorogation prevents the passage of any laws and the passage of law is underpinning of Parliamentary sovereignty. Lady Hale decided the longer the period of prorogation the increased risk of unaccountability offending the principle of Parliamentary accountability as MPs and the like would be unable to scrutinise the government of the day. In essence, the Court had to decide whether the decision to prorogue was unlawful if the effect was to "frustrate or prevent" Parliament from carrying out its function (para 51). Lady Hale then considered whether the Prime Minister's advice was lawful. They decided that the effect was to frustrate and prevent Parliament carrying out the function of holding the Government to account. The Prime Minster argued it was necessary due to exceptional circumstances surrounding the membership of the European Union. However, Lady Hale held that these exceptional circumstances made it more important that the government were held to account (para 51).

The Prime Minister failed to provide reasons to support a reasonable justification or any analysis of reason, John Major considered that prorogation would usually only last four to six days (para 59). The Justices' concluded that the advice was unlawful and outside the Prime Minister's power to do so. The Court declared that Parliament was not prorogued.

2. Do you find the Court’s decision to be convincing? Give reasons for your answer. (50%)

On first analysis, the judgement is surprising as it appears that the judiciary are trespassing in the political arena and eroding the separation of powers between the judiciary and executive. I found it surprising that within the judgement the determination for the extent of the prerogative power burden was upon the Prime Minister. This contrasts ordinary judicial review process where the burden is placed upon the applicant. It seems to me that the Court has created a new burden of justification in relation to the exercise of prerogative powers.

Furthermore, upholding the sovereignty of Parliament as the Justices’ claimed meant they would also be upholding essentially the will of Parliament, as sovereignty is ultimately having the unchallengeable ‘will’. However, without a statute or legal documentation the true will of Parliament ceases to be understood. No court can comprehensively determine the will of Parliament without the existence of the relevant documents, meaning neither the golden rule nor the mischief rule could possibly be used.

In contrast, this judgement goes right into the very heart of the United Kingdom’s democracy and constitutional principles which have been forged over centuries. The Court’s decision is underpinned by the constitutional principles, the rule of law and Parliamentary sovereignty. It would be an afront to democracy to allow for a constitutional change of this magnitude to occur but to prevent the elected representatives a voice in the decision-making period. These representatives provide a vital role in scrutiny, placing real pressure on the government of the day, underpinning Parliamentary accountability.

Moving on from this, Mr Johnson did not provide any substantial evidence as to why the prorogation was needed for such a period. Without providing the court with the essential piece of evidence it became almost impossible for the courts to decide in Mr Johnson’s favour, as they do not know why. It cannot be expected for Mr Johnson to win if he is unwilling to provide the main substance of his argument.

Overall, I do find the Court’s decision be convincing as to deny the democratic voice of the representatives in the a monumental moment of British history would be an offence to democracy and the constitutional values of the British system. The remedy given by the courts was the only appropriate action. It is logical that as the advice was unlawful everything that was based on the advice should be undone. As the prorogation had already occur, this time could not be regained, therefore the declaration of nulling that proroguing and requesting that Parliament should meet was correct. Potentially, the Justices should have declared the prorogation illegal but allowed the ministers to decide the correct cause of action. However, for the Court to decide it’s illegal and then not to enforce its judgement, that would undermine the Court completely. Therefore, the court’s decision is a convincing one; along with the remedy.

Bibliography

Cases:

1. R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513, 572-573

2. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
3. R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61, para 249
4. R v Secretary of State for the Environment, Ex p Nottinghamshire County Council [1986] AC 240, 250
5. R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409

Quotation from the case:

1. 'to decide whether the Prime Minister’s explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation”, Paragraph 51