

Executive Conduct in the UK and U.S.

by Michael Curtis



Here's that rainy day in UK. People laughed at the thought that political events in the country would turn out this way. Besides the unusual deadly flooding, with a month's rain in London in one day, that hit the country, the political system has been engulfed by a constitutional crisis, the use of power, and the problems of implementing the "will of the people" in a representative democracy. The immediate problem stemmed from the "advice" given by Prime Minister Boris Johnson to Queen Elizabeth to prorogue, suspend, Parliament for five weeks. It has involved a reconsideration of executive power, parliamentary sovereignty and political accountability.

Curiously, the U.S. is presently involved in a similar reconsideration of these powers, adopting a concept, the process of impeachment, inherited from Britain. The process of

impeachment, involving treason, bribery, or other high crimes and misdemeanors started in the 14th century in the UK to remove government officials for abuse of power. After an intense impeachment of Warren Hastings in 1788, the last one was that of Henry Dundas, Lord Melville, acquitted in 1806. Since then impeachment has been regarded in UK as an obsolete power of Parliament.

Not so in the U.S. where Nancy Pelosi, Speaker of the House of Representatives announced on September 24, 2019 the start of a formal impeachment investigation of President Donald Trump, and that the House was "moving forward with an official impeachment inquiry." Though there is uncertainty about the exact definition of "high crimes and misdemeanors," and also about the rules of inquiry, the charge apparently will focus on Trump betraying his oath of office, and the nation's security.

The U.S. constitution states that the Senate shall have the sole power to try all impeachments. However, political consequences of impeachment remain uncertain. It is wise to remember the words of Alexander Hamilton in the Federalist 65 of March 7, 1788 that an impeachment, which may be denominated political, "will seldom fail to agitate the passions of the whole community and to divide it into parties more or less friendly or inimical to the accused, and there is the danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."

It is disturbing that the leaders of the U.S. and UK, the two great democracies, should both be facing opposition for abuse of power. The claim of Speaker Nancy Pelosi is that President Trump asked a foreign leader for a "favor" in relation to a rival American politician. The problem in the UK is more complicated than in the U.S., the result of the existence of prerogative power, of which there is no accepted or official

definition, and its scope is notoriously difficult to define.

The Royal Prerogative stems from the history of the monarch in medieval Britain acting as head of the kingdom, and able to make decisions in both internal and external matters. However, as a result of constitutional conventions, government ministers exercise the majority of prerogative powers either in their own right or through the advice they provide to the Queen which by these conventions she is bound to follow. Complexity occurs because the courts have restricted the circumstances in which the prerogative can be used, and also determined when prerogative powers are subject to judicial review.

In a case in 2017, the prerogative was defined as encompassing the exercisable "residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with parliamentary legislation." It is accepted that the monarch has the right to advise, encourage, and warn government ministers, and will assent to legislation. Nevertheless, the exact content of the prerogative is controversial. It has also been accepted since the 19th century that the advice of the PM or ministers is needed for the prerogative to be exercised. The understanding is that powers that historically resided with the monarch are exercised by government ministers.

In the turmoil over the issue of Brexit, and the sea of troubles it has caused, PM Boris Johnson, while he may not be suffering as did Prometheus having his liver every day pecked away by an eagle, has been inundated by these constitutional as well as political problems. Was his advice to the Queen to prorogue Parliament lawful? The government held that prorogation was a political issue, and not one for the courts. Yet, courts have long had the power to decide if actions are legal. In 1611, the court proclaimed that the king had "no prerogative

but that which the law of the land allows him." Since then, judges have declared they had the right to determine the limits of prerogative power.

In the present case the Supreme Court found the PM's action was unlawful and had the effect of frustrating or preventing the ability of parliament to carry out its constitutional function. The prorogation was void, without reasonable justification, and therefore was of non-effect. All 12 justices agreed that Parliament has not been prorogued, and could meet.

A number of factors were involved. The SC argued it ensured that the executive branch of government carries out its function in accordance with the law. Therefore, people in principle must have unimpeded access to the courts so the SC can do this. The government had not justified its action in proroguing Parliament. The SC declared the suspension is void and effectively ended.

The UK Supreme Court held it could decide whether the PM's decision to prorogue was lawful. In an unprecedented ruling, the UK Supreme Court, the top court, ruled unanimously that Johnson was unlawful in advising the Queen to prorogue, suspend, meetings of the House of Commons for five weeks since it was attempt to silence MPs on the issue of Brexit. Johnson had hoped that during the five weeks that Parliament was prorogued, he could renegotiate a deal with the EU. The Court held that he did not have a legal basis or reasonable justification, or indeed any reason, let alone a good reason, for prorogation. It did not accept the government view that the House of Commons refused, twice, its request to reconsider Brexit by holding a general election in October. Prorogation was unlawful because it prevented Parliament from exercising its functions.

Is the UK Supreme Court, created in 2005, moving toward the role of the U.S. Supreme Court? Is the President of the Court,

the brilliant Lady Hale, the 74 year old former Justice of the High Court and Lord of Appeal the British equivalent of Ruth Bader Ginsburg? A crucial question is whether the Supreme Court judges, unelected judges, went beyond its appropriate role of applying the law and upholding the right of Parliament not to be prorogued, thus intervening in a political issue. Were the courts involving themselves in the relationship between government and parliament? Did it stage a constitutional coup, or as it said defending democracy? Is this a crucial moment in the nature of the British constitutional system?

The SC, was set up to make clear that the judicial function of the House of Lords, was separate from the legislative function of the House. It replaced the Appellate Committee of the House of Lords, and is explicitly separate from both government and Parliament. It is the final court of appeal in the UK for civil cases, and also for criminal cases in England, Wales, and Northern Ireland. It also hears cases of constitutional importance affecting the whole population.

From its creation, the criticism was that judges might arrogate greater power. The SC cannot overturn primary legislation passed by Parliament, but it can override secondary legislation if that is contrary to the primary legislation , or can declare that the legislation is incompatible with the European Convention on Human Rights.

It is premature to argue that the SC decision is a seismic shift in power from the executive to the judiciary though it affirmed an old saying that the government "hath no prerogative but that which the law of the land allows it."

Finally, the question of public agreement with the SC. Public opinion polls show that 60% thought Parliament had a plenty of time for discussion of Brexit, but a majority agreed that the SCs had right to rule on the issue. The country is divided on the rather arcane constitutional issue, and on the simpler

issue whether the PM acted lawfully or attempted to silence Parliament. Did the Supreme Court strike a blow for democracy or was its decision too arbitrary?