Judges may disagree, but history backs Boris Johnson

Henry Ergas 12:00AM September 27, 2019

The legal question of whether the UK Supreme Court, in unanimously finding against the government of Boris Johnson, was correct will be debated for decades to come.

What is striking, however, is that the court, although reaching as far back in its reasoning as the 17th century, entirely ignored the history of prorogation and its evolving place in Britain's parliamentary system.

Yet it is an undeniable fact prorogations of parliament far lengthier than that Johnson had proposed are anything but exceptional. On the contrary, long, politically motivated, prorogations were common during the heyday of parliamentary sovereignty, which stretched from the closing years of the 1700s until the consolidation of cabinet and party dominance a century later.

Far from being regarded as an assault on Britain's institutions, as the court implies, prorogation was widely accepted as a tool for managing deeply divided parliaments, with Lord Derby, for example, proroguing parliament for six months in each of the minority governments he headed in 1859-60 and in 1866-68.

Many factors underpinned the role prorogations then played. But by far the most important was that they made it possible for Britain's parliamentary system to cope, peacefully and successfully, with the enormous pressures it faced.

A dizzying economic and social transformation was under way.

Britain's population trebled between 1780 and 1860 while its share of

world industrial production leapt from less than 2 per cent in 1750 to a staggering almost 25 per cent in 1880.

Meanwhile, the proportion of the population living in urban areas more than doubled, with a burgeoning press highlighting the pervasive squalor of the rapidly expanding slums.

However, the chaotic parliamentary processes of the first decades of the 19th century could hardly respond to the political demands that transformation created. On the one hand, the waning of the "Old Corruption" meant the monarch was no longer able to control parliament through promises of patronage and preferment.

On the other, the weakness of the party system meant parliamentary majorities were hard to assemble and even harder to sustain, making it almost impossible for governments to implement a coherent legislative program.

And those difficulties were compounded by the fact the government had little or no control over parliamentary business, which was dominated by private members' bills that reflected inconsistent, narrowly defined, interests.

Prorogation acted as the political circuit-breaker that allowed the system to function, giving governments time to resolve problems by having them resolve themselves or by cobbling together new majorities.

It was in that spirit that Sir Robert Peel prorogued parliament for four months in 1841, at a time when the House of Commons was in turmoil and revolution seemed to be in the air.

And, rightly or wrongly, Peel thought custom, convention and precedent were all on his side: only three years earlier Lord Melbourne, again in an attempt to ride out a storm, had suspended parliament for almost six

months.

Lengthy prorogations certainly did not “prevent parliament from exercising its legislative authority for as long as (the government) pleased”, as the Supreme Court claims they would.

The key factor was parliament’s jealously guarded control over appropriations, which obliged governments to respect an annual budget cycle.

While the court cavalierly dismisses that requirement, saying it offers “scant reassurance”, its pivotal function in keeping governments accountable was obvious to observers, with Adam Smith explaining, in his masterly Lectures on Jurisprudence, that Britain’s annual budget cycle ensured that “the whole of the government must be at an end if the parliament was not regularly called”.

Echoing a long line of earlier commentators, Smith opined that it was parliament’s power of purse that — in contrast to the situation on the continent — preserved “a system of liberty in England” by compelling frequent parliamentary sessions. But, every bit as significantly, prorogations provided the breathing space for a new, more viable, set of arrangements to form and take root.

Three tightly interrelated elements defined those new arrangements, which were classically analysed by Victorian polymath Walter Bagehot in his 1867 book on The English Constitution.

Beginning in the 1820s, governments moved to monopolise the parliamentary agenda, dramatically curtailing the scope for private members’ bills and allowing cabinet to set and enforce legislative priorities.

That control greatly increased the importance both of the ministry as a

whole and of individual ministers, giving the prime minister, who determined cabinet appointments, vast patronage powers that could be used to impose party discipline.

And in turn, party discipline, centred on the collective commitment to a party program, reshaped political competition, reducing parliament to a rubberstamp while making general elections fought between competing national parties the linchpin of political accountability.

The result, Bagehot wrote, was "the nearly complete fusion of the executive and legislative powers", which he famously dubbed the "efficient secret" at the heart of the British constitution. And once that fusion was complete, the role of prorogation as a vital stabiliser withered, although it remained in the government's toolkit.

However, the fallout from Brexit shattered that structure, eliminating cabinet's control over parliamentary business and destroying party discipline.

As that process played itself out, the House of Commons reverted, in almost every respect, to the disarray that characterised it two centuries ago.

It was therefore entirely unsurprising that Johnson, who knows British history better than most, turned to the instrument his predecessors had so frequently relied on in similar cases — only to have that instrument snatched away.

In deciding to prohibit its use, the court paid no attention whatsoever to the precedents, although it was undoubtedly aware of their extent and significance.

Perhaps that too is unsurprising: had it acknowledged their existence it would have had to recognise that it was making law, rather than merely

interpreting it.

That, it could rightly be said, is itself scarcely unprecedented. After all, the perpetual, but also perpetually undeclared, war between the courts and the executive, in which each pledges eternal allegiance to other while snapping at its heels, is as British as warm beer and as ancient as the idyll of the sceptred isle.

But it is hardly without risks. Parliament now faces a choice between degenerating into a disgrace and an election Labour and the Remainers seem desperate to avoid. And, much as one hopes an election is called, it would be foolhardy to assume that it will yield a clear-cut result.

Ultimately, like Humpty-Dumpty, the “efficient secret” has fallen off the wall and not even the Supreme Court can put it back together again, much less wish away the dilemmas that creates.

Instead, in choosing to set Britain on a long march out of history, it has worsened today’s problems and compounded tomorrow’s.