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School of Law

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1.)

Facts

The case of R (Jackson) v Attorney General[1] was brought to the House of Lords on appeal from the Queen's Bench in the Divisional Court (High Court) and the Court of Appeal after they dismissed the claim based on the matter that section 2 of the Parliament Act 1911[2] allowed the enactment of legislation without the consent of the House of Lords. The appellants were interested in fox-hunting as part of the Countryside Alliance[3] and thus opposed the Hunting Act 2004[4] as they wished that activity to continue as the act "made it an offence to hunt a wild mammal with a dog"[5] in most scenarios. The appellants contended that the Parliament Act 1949[6], which was used to pass the Hunting Act 2004 without the consent of the House of Lords, was itself invalid as it did not receive consent from the House of Lords and was rather delegated legislation, rather than primary legislation and had no legal effect. They argue that the Parliament Act 1911 did not permit an Act such as the Parliament Act 1949, which changed the time the Lords could delay a bill from being passed from two years to one, to be enacted without the express consent of the House of Lords. The question, as such, to be determined by the House of Lords was on the validity of the Parliament Act 1949 and as such the Hunting Act 2004.

Key Issues

The main issues which arise from this case are presented in the question of whether the Parliament Act 1911 could create Acts of Parliament without the consent of the House of Lords, and thus whether the Parliament Act 1949 (and the Hunting Act 2004 subsequently) was valid primary legislation and not merely delegated legislation which had no significant legal standing. The legal validity of the Parliament Act 1949 and the Hunting Act 2004 was at such in question as products of section 2 of the initial Parliament Act 1911.

Judgement

The judges concluded that the Parliament Act 1911 did not limit the power of Parliament to enact the Parliament Act 1949 as the 1911 Act clearly stated that any bill passed using this act would "become an Act of Parliament on the Royal Assent being signified"[7] and that it was passed "in accordance with the provisions of the Parliament Act 1911 and by the authority of

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[1] *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262.
[2] Parliament Act 1911, s 2.
[3] Countryside Alliance, "Countryside Alliance" (*Countryside Alliance,* 11 January 2024) <https://www.countryside-alliance.org/> accessed 11 January 2024
[4] Hunting Act 2004
[5] *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262.
[6] Parliament Act 1949
[7] Parliament Act 1911

the same"[8]. As such, any bills passed with the Parliament Act 1911 were primary legislation, meaning that the Parliament Act 1949 was valid in both itself and in passing the Hunting Act 2004. The judges further emphasised that the idea of Parliamentary sovereignty defines the "right for Parliament to make or unmake any law and nobody is recognised as having a right to override or set aside the legislation of Parliament"[9]. With this, Parliament is seen as sovereign and thus has the right to make any bill primary legislation should it see fit. Furthermore, in Edinburgh & Dalkeith Railway Co v Wauchope, Lord Campbell mentioned that if a bill has:

> "Received the royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages in both Houses."

From this, the idea of Parliamentary sovereignty is thoroughly defined through the idea that nobody can question the passing of a bill other than Parliament itself, and thus it is supreme above the judiciary. This further amplifies the fact that the Parliament Act 1911 was valid in its ability to pass the Parliament Act 1949 and subsequently the Hunting Act 2004. This decision was unanimous, and thus the appeal was dismissed. While the decision regarding the validity of the acts was settled, Obiter Dicta (things said by the way) from judges brought into question the reach of parliamentary sovereignty. Lord Woolf mentioned that "if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent"[10], effectively throwing the gauntlet for the judiciary to ignore parliament's laws should they prove unconstitutional. John Laws further mentioned that he believed "the constitution, not the Parliament, is in this sense sovereign"[11] This challenges A.V Dicey's idea that Parliament can make and unmake law on any topic without challenge and thus the concept of parliamentary sovereignty as a whole.

Impact

Ultimately, the reinforced idea of parliamentary sovereignty and their ability to make or unmake any law without challenge presents a constitutional crisis. Should a party with dictatorial ideas or those with decisions which go against the UK constitution have full sovereignty it could lead to injustice, which goes against the rule of law. Lord Woolf's remark regarding the possibility of the judiciary ignoring parliament's decisions[12], should they do this, creates a question as to who the most authoritative body is to create law in the UK. The

[8] Parliament Act 1911, s 4(1)
[9] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1915)
[10] *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262
[11] Ibid
[12] Ibid

current bill regarding Rwanda's safety and the deportation of migrants[13] to the country creates the possibility of this occurring as Parliament attempts to bypass the review by the Supreme Court regarding incompatibility with the Human Rights Act 1998[14]. In conclusion, A.V Dicey's idea of complete parliamentary sovereignty is still in question.

[13] Safety of Rwanda (Asylum and Immigration) HC Bill (2023-2024) [38]
[14] Human Rights Act 1998

2.)

Introduction

There is a great need for separation of powers in the UK between the Executive (government), the Legislature (Parliament), and the Judiciary (courts). This is especially needed to preserve a balance between them, maintaining the rule of law. In principle, the rule of law is, as Lord Bingham mentions, "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made"[15], essentially entailing that all persons and parties should have equal access to the law, and should never be above the law. The separation of powers and its impact on the standing of the rule of law will ultimately help avoid a constitutional crisis, preventing injustices nationwide.

The Case

When examining the need for the separation of powers (seen as the principle that all branches of government must be separate and independently functioning of one another, with checks and balances to ensure that is so) it is important to consider the case in R(Miller) v Prime Minister [2019][16]. The Prime Minister at the time, Boris Johnson, had advised Queen Elizabeth II to prorogue parliament, which she is entitled to do under the royal prerogative, for an extended period. The royal prerogative is powers held by the King (Queen at the time) or by government ministers that can be used without the express consent of the legislature[17]. This was done in a strategic move by the Prime Minister to avoid disagreements with his no-deal Brexit which was to be decided in the October deadline period. Mrs Gina Miller believed this to be unlawful, and initially brought the case to the Queen's Bench division of the High Court. The judges of the Queen's Bench believed this case to be non-judicable as it delved into political matters and, as such, risked encroaching on the separation of powers between the judiciary and legislature[18]. They did, however, allow an appeal from Mrs Miller to the Supreme Court via a "leap-frog" appeal (one which can skip the Court of Appeal and go

[15] Thomas Henry Bingham, *The Rule of Law* (Penguin Books 2011)
[16] *Miller v Prime Minister* [2019] UKSC 41, [2020] AC 373.
[17] Parliament UK, 'Crown Prerogative' (*Crown Prerogative*, 14 January 2024) <https://www.parliament.uk/site-information/glossary/crown-prerogative/> accessed 14 January 2024
[18] *Miller v Prime Minister* [2019] EWHC 2381 (QB)

straight to the Supreme Court[19]) after the Inner House[20] (Scottish Supreme Court) had ruled the issue was justiciable[21] in contrary with them.

When initially discussing whether the question of lawfulness was justiciable, the Supreme Court judges used the example in the Case of Proclamations that political nature did not deny the courts from finding that changing the law of the land by the use of the Crown's prerogative powers was unlawful. The court in that case concluded that "the King hath no prerogative, but that which the law of the land allows him"[22], which the Supreme Court judges point to the idea that the boundaries of prerogative powers were set by common law from the courts. Furthermore, they mentioned that in Entick v Carrington, the courts were not deterred from holding that the Secretary of State was unable to search private property without authority from an Act of Parliament or common law[23]. The Supreme Court used this to determine that most of the constitutional cases in history have been related to politics and thus justiciable. The Supreme Court also mentioned that the Prime Minister is still accountable to the courts as although he is politically accountable to Parliament, he is not immune from legal accountability from the courts. Overall, they emphasise that the PM's "ministerial responsibility is no substitute for judicial review"[24] and further amplify the fact that the question of lawfulness is justiciable.

From the fact that the issue was seen to be justiciable, the question now turned to whether the advice from the Prime Minister to the Queen regarding the proroguing was lawful. The Supreme Court initially determined that the Prime Minister's action had the effect of denying the role of Parliament in holding the Government to account. As they mention: "it prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st of October"[25]. With such a fundamental change in the UK Constitution about to take place, it would be vital for Parliament to analyse any deals which may take place and the lack of ability to do this creates a distinct lack of checking between the legislature and the executive required to maintain the separation of powers effectively and cooperatively. The Supreme Court mentioned that in doing this and acting with no good reason other than to promote his

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[19] The Supreme Court, 'A guide to bringing a case to The Supreme Court' (*A guide to bringing a case to The Supreme Court,* 31 July 2009) <https://www.supremecourt.uk/files/A-guide-to-bringing-a-case-to-The-Supreme-Court.pdf> accessed 15 January 2024

[20] Scottish Courts and Tribunals, 'About the Court of Session' (*About the Court of Session*, 15 January 2024) <https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session> accessed 15 January 2024

[21] *Cherry v Advocate General for Scotland* [2019] CSIH 49

[22] *Case of Proclamations* (1611) 12 Co Rep 74

[23] *Entick v Carrington* (1765) 19 State Tr 1029; 2 Wils KB 275, 95 ER 807

[24] *Wade and Forsyth, Administrative Law,* (7th ed, OUP 1994), para 34

[25] *Miller v Prime Minister* [2019] UKSC 41, [2020] AC 373.

policies, the Prime Minister had acted unlawfully in his decision to prorogue Parliament, with this decision being unconstitutional. The Supreme Court ruled, as such, that Parliament had not been prorogued and that there was no need for a recall under the Meeting of Parliament Act 1797[26].

Impact

As mentioned previously, the separation of powers is vital in preserving the rule of law. It is a key part of the uncodified UK constitution and helps ensure that no branch of government becomes dominant over another. Checks and balances help to ensure that the separation of powers is enforced, and that is what has been seen in the case of Miller v Prime Minister [2019] with the judiciary reviewing the executive's actions. Without these checks and balances, events much like that of which the Prime Minister attempted could become commonplace; potentially allowing injustice to occur on a much grander scale and disrupting the stability of the rule of law. This case has reinforced the idea of separation of powers, albeit with a red flag presented about the dangers of breaking the balance of powers and its unconstitutional impacts. This has been put to the test recently with the Safety of Rwanda Bill[27] which is currently on passage through Parliament. The current Conservative Party government – executive - has sought to deport illegal migrants to Rwanda, with the judiciary (The Supreme Court) seeing this as unlawful[28] concerning the Human Rights Act 1998[29] as a result of Rwanda's lack of safety. As a result of this, the executive has begun to pass a bill which would declare Rwanda "safe" and any legal matters around this non-justiciable. With the executive's party having a clear majority in Parliament, and the increased chance of the bill passing due to this alongside the lack of judiciary checks due to the non-justiciable nature, this creates a clear violation of the separation of powers with the executive exceeding the balance of powers required to uphold the rule of law. Whether the legislature will limit the executive's ability to exceed these balances is in question, however, the rule of law is most certainly at risk of collapse with one branch of government becoming dominant over the others. The question remains as to whether Lord Woolf's suggestion that "if Parliament did the unthinkable, then… the courts would also be required to act in a manner which was without precedent"[30] would come to life, with the judiciary refusing to interpret any law they find to undermine the rule of law and thus be unconstitutional, creating a constitutional crisis.

Cases

[26] Meeting of Parliament Act 1797
[27] Safety of Rwanda (Asylum and Immigration) HC Bill (2023-2024) [38]
[28] *R v Secretary of State for the Home Department* [2023] UKSC 42
[29] Human Rights Act 1998
[30] *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262

- *Case of Proclamations* (1611) 12 Co Rep 74
- *Cherry v Advocate General for Scotland* [2019] CSIH 49
- *Entick v Carrington* (1765) 19 State Tr 1029; 2 Wils KB 275, 95 ER 807
- *Miller v Prime Minister* [2019] EWHC 2381 (QB)
- *Miller v Prime Minister* [2019] UKSC 41, [2020] AC 373
- *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262
- R v Secretary of State for the Home Department [2023] UKSC 42

Statute

- Human Rights Act 1998
- Hunting Act 2004
- Meeting of Parliament Act 1797
- Parliament Act 1911
- Parliament Act 1949
- Safety of Rwanda (Asylum and Immigration) HC Bill (2023-2024) [38]

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