

The Case of Prorogation



The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court

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About the Author

Martin Loughlin is Professor of Public Law at the London School of Economics & Political Science. His publications include *The Idea of Public Law* (OUP, 2003), *Foundations of Public Law* (OUP, 2010), *The British Constitution: A Very Short Introduction* (OUP, 2013) and *Political Jurisprudence* (OUP, 2017). He is a Fellow of the British Academy.

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Introduction

The Supreme Court's declaration that the Prime Minister's decision to seek a five-week prorogation of Parliament was unlawful is of major constitutional significance. It is also highly controversial. Many, for obvious political reasons, will welcome the decision. Their views are eloquently expressed by Sir Stephen Sedley, formerly of the Court of Appeal, who has suggested that the decision 'as much by its unanimity ... as by its reasoning, has re-lit one of the lamps of the United Kingdom's constitution: that nobody, not even the Crown's ministers, is above the law'. He suggests, further, that the judgment is 'of lambent cogency' and 'ought to become required reading for students, whether of law or politics or for that matter the English language' (*London Review of Books*, 10 Oct 2019).

I happily defer to Sedley's assessment on the judgment's literary qualities but disagree both as to the cogency of its reasoning and of its suitability for general readership – at least without a word of warning about the innovative pitch that the Supreme Court is making. This judgment is also an intervention in a highly-charged political matter so it is difficult to assess its merits without getting entangled in those broader debates. The article that follows is an attempt to avoid those contentious political aspects by adopting an unusual technique: it is drafted as a judgment of the (hypothetical) United Kingdom Constitutional Council hearing an appeal against the Supreme Court's decision. This might at least have the value of subjecting the Court's legal reasoning and constitutional analysis to close examination within the disciplinary restraints of the conventions of court judgments.

The objective of the exercise is to present the Constitutional Council's judgment as a 'mirror' of the British constitution in contrast to the Supreme Court's 'lamp'. The basic outlines of the Supreme Court's reasons are not difficult to discern. First, the prohibition on judicial review of the prorogation decision provided in Article IX of the Bill of Rights 1688 does not apply because, although it was a decision effected by a proceeding in Parliament, it was not a decision of Parliament. Second, the Government's claim that prorogation is not justiciable because there are no 'judicial standards' by which to assess the decision is rejected on the ground that the limits of this power must be determined by 'constitutional principles'. Third, it is for the Court to determine the meaning of these constitutional principles. Finally, the Court's determination of the meaning of these principles trumps all practical, policy and political considerations.

The cogency of the Supreme Court's reasoning on these points is examined in the Constitutional Council's 'judgment' that follows. But I should also say a few words about two of Sedley's broader claims: that the judgment marks a triumph

of legality over politics and that the fact of its unanimity is itself a marker of its cogency and authority.

I have argued elsewhere that constitutional interpretation involves an interplay between the relative authority of text, precedent, and principle. Constitutional review is such an intensely contested exercise because although lawyers have rigorous methods for interpreting texts, following precedents and balancing principles, they do not have any authoritative method for evaluating the relative importance of these different factors (*Political Jurisprudence*, OUP, 2017, esp. 4-7). This is an intractable difficulty. It makes constitutional review intrinsically political, not least because each of these factors expresses different conceptions of law. To suggest, as Sedley does, that the Supreme Court's judgment vindicates the law-based character of the British constitution begs the question: it assumes, without demonstrating it, the truth of the Court's conclusions.

The problem is: what conception of law drives the result? According to a traditional, common law understanding, law is a type of 'artificial reason' acquired through deep immersion in source-based legal materials and judges, the guardians of the law, maintain their independence as 'lions under the throne' by acknowledging that the law has its limits. That is, judges recognise a distinction between matters legal and matters political. On an alternative, modern, understanding, law is an expression of will of the sovereign authority and the Act of Parliament is the highest expression of law. In this respect, judges are the precision instruments of legislative intention. Recently, however, a third conception has become influential. This is a conception of law as a set of fundamental principles. In place of the common law as an expression of artificial reason acquired through practical experience or the modern sense of law as an expression of will, law-as-principle is the elaboration of a type of scholastic reason that limits the range of legitimate expressions of will by governing majorities.

Constitutional review is so contentious because the more the issue in dispute touches central questions about how political authority is constituted, the more the dispute turns on the relative authority of conflicting conceptions of law. The Supreme Court's judgment is a case in point. It sets aside clear precedents concerning justiciability, adopts creative reasoning to avoid being bound by legislative will expressed in the Bill of Rights, and asserts the authority of certain newly-minted 'constitutional principles'. The techniques of common law reasoning through precedents and statutory interpretation of Acts of Parliament are displaced by an assertion of the priority of principles. This conception of law has been gaining influence in judicial review, but now the Court has made a paradigmatic shift. It claims that, rather than consisting of a set of rules and practices, the British constitution rests on some overarching framework of constitutional principles of which the Court acts as guardian.

Many will welcome this manoeuvre. But we should not pretend that this is anything other than a political act. It is deceptive to claim that the judgment merely signifies that somehow 'the rule of law' has been vindicated.

It is the paradigmatic character of the shift that explains the unanimity of the Court's judgment. In order to establish the primacy of constitutional principles, the Court was obliged to remove the Crown from its status as a source of authority. Since 1688, the British constitution has evolved around the

pivot of the Crown. The Crown-in-Council expresses governmental authority, the Crown-in-Council-in-Parliament signifies ultimate legislative authority, and judges acquire their commission from appointment by the Crown. Asserting its absolute independence after a decade of existence, the Supreme Court now conceives of Parliament primarily as the forum of (qualified?) democratic legitimacy and the Government as an entity that depends on Parliament for its legitimacy. Nowhere in its ruling does the Crown figure as a symbol of authority. For such a transgression, as with the senatorial assassination of Caesar on the Ides of March, all must be implicated; figuratively, all must have blood on their hands.

These broader political and constitutional considerations will continue to excite the interest of commentators for years to come. The purpose of the opinion that follows, however, is more limited: it offers a critical analysis of the cogency of the Court's reasoning on which this important shift in the basis of authority is being made.

The Case of Prorogation

In the Grand Chamber of the UK Constitutional Council

Neutral Citation Number: [2019] UKCC 1

On appeal from *R(Miller) v Prime Minister/Cherry v Advocate General* [2019] UKSC 41, which heard appeals from [2019] EWHC 2381 (QB) and [2019] CSIH 49.

Judgment

The factual background

1. At 1.40 am on 10 September 2019 the Lord Privy Seal announced in Parliament that ‘by virtue of Her Majesty’s Commission ... in Her Majesty’s name, and in obedience to Her Majesty’s Commands’, Parliament is prorogued until 14 October. This was further to an Order in Council issued on the advice of the Prime Minister (PM) by Her Majesty at a meeting of the Privy Council on 28 August held at the Court at Balmoral. The legality of the PM’s decision to seek this prorogation is the subject of these proceedings.

2. Prorogation is a prerogative power the exercise of which brings a parliamentary session to a close. Parliamentary sessions are of no fixed duration; they normally last for about a year but the Parliament that was ended by the impugned prorogation had been in session for over two years. Prorogation is to be distinguished from the dissolution of Parliament which precedes the holding of a general election. It should also be distinguished from periods of adjournment when Parliament resolves to adjourn for holiday periods, such as the summer recess which this year ran from 25 July till 3 September (41 calendar days). In recent years, Parliament has also adjourned for three weeks in September for the party conference season. Just as there is no fixed duration of a session, there is no prescribed period of prorogation. Prorogation periods have usually been of 7-10 days duration but there have been five occasions since 1980 when Parliament stood prorogued for more than ten days, with the longest being 21 days, and during the first half of the 20th century prorogation commonly ran for longer periods than the current standard: [2019] EWHC 2381 (QB), 13 (hereafter QB). The present proposed

prorogation was for up to 34 calendar days. However, the number of sitting days that would be lost, the Government has suggested, was only seven days; this is because it incorporated the period of the expected conference recess. Recess is, of course, different in that it is voted on by Parliament, but it was noted that ‘there was no record of the House of Commons sitting in late September or early October since the start of the 20th century’ (QB 13).

3. In a paper on the mooted prorogation drafted by the Director of Legislative Affairs at 10 Downing Street and submitted to the PM on 15 August 2019 it was noted that ‘the current session was the longest since records began and that all the bills announced in the last Queen’s Speech had received Royal Assent or were paused awaiting the next session’ (QB 10). Consequently, it had become difficult for the Government to fill parliamentary time and, given that the PM had been appointed only in July, there was an expectation that he would want to set out a new legislative agenda. Parliament was due to reconvene on 3 September and time would then be needed to complete the passage of bills before the conference recess; it could not therefore complete its business till 9-12 September. If prorogation commenced in the period 9-12 September and ended on 7 October that would interrupt the SNP conference, which does not traditionally benefit from the conference recess. The paper further noted that ‘politically it is essential that Parliament is sitting before and after the EU Council’ on 17-18 October since MPs ‘must be in a position to consider what is negotiated, and hopefully pass the Withdrawal Agreement Bill’ (QB 12). Holding the Queen’s Speech on 14 October, it concluded, would allow Parliament the opportunity to debate the Government’s Brexit strategy ‘in the run up to the EU Council and then vote on this once we know the outcome of the Council’ (QB 12).

The legal proceedings

4. Parallel proceedings challenging the legality of the PM’s provision of advice were pursued by way of judicial review in England and Scotland. On 4 September, in *Cherry v Advocate General* [2019] CSOH 70 Lord Doherty in the Outer House of the Court of Session dismissed the Scottish application on the ground that it was not justiciable. On 11 September in *R(Miller) v Prime Minister* [2019] EWHC 2381, a powerfully constituted Divisional Court, comprising the Lord Chief Justice, the Master of the Rolls and the President of the Queen’s Bench Division, similarly held that ‘the decision of the Prime Minister to advise Her Majesty the Queen to prorogue Parliament is not justiciable in Her Majesty’s courts’ (QB 68). On an appeal from the Outer House decision to the Inner House of the Court of Session, however, it was held that

‘the true reason for the prorogation is to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance’ ([2019] CSHI 49, 53 – hereafter, IH), that it is ‘impossible to see that it could serve any other rational purpose’ (IH 117) and that this is ‘an egregious case’ in which ‘there is a clear failure to comply with generally accepted standards of behaviour of public authorities’ (IH 91). The court granted a declarator that the advice to prorogue was unlawful, null and of no effect.

5. The rulings of the Divisional Court and Inner House were appealed to the UK Supreme Court. On 24 September, an eleven-member Court issued a unanimous ruling allowing the appeal from the Divisional Court judgment and dismissing the appeal from the Inner House: [2019] UKSC 41 (hereafter SC). It held that ‘a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive’. Further, that the court would declare it to be the case ‘if the effect is sufficiently serious’ (SC 50). Holding that in this case it was, the Supreme Court issued a declaration that it was outside the powers of the PM to issue the advice to prorogue, that this vitiated the Order-in-Council, and that the actual prorogation, ‘which was as if the Commissioners had walked into Parliament with a blank piece of paper’, was similarly ‘unlawful, null and of no effect’ (SC 69).

6. The Grand Chamber of the Constitutional Council has now been petitioned to review the judgment of the Supreme Court. It has determined that the Supreme Court’s judgment is founded on a misunderstanding of constitutional requirements and errors in legal reasoning and must be set aside. The reasons are set out in the following paragraphs.

Article IX of the Bill of Rights

7. The first issue concerns the question of whether the Supreme Court’s judgment is contrary to an Act of Parliament, specifically to the Bill of Rights of 1688. Article IX of the Bill of Rights states, inter alia, that ‘proceedings in Parliament ought not to be impeached or questioned in any Court’. As a matter of form, the act of prorogation, a ceremony in which a Royal Commission of Privy Counsellors instructs Black Rod to summon the House of Commons to attend the Lords Chamber to prorogue Parliament, is manifestly a proceeding in Parliament. However, holding that it is for the Court and not for Parliament to determine the scope of this privilege (SC 66), the Court concluded that although prorogation takes place within Parliament it is not a ‘proceeding in

Parliament'. Since prorogation is not something on which MPs can deliberate, far from being a decision of Parliament 'it is something which is imposed upon them from outside' (SC 68). Rather than being part of Parliament's core business, it is an act that brings that business to an end. The Court therefore held that Article IX did not preclude it from considering the validity of the prorogation and, finding that that act was based on unlawful advice, they held the prorogation null and of no effect (SC 69).

8. On reviewing its reasoning, this Chamber holds that the Court has erred in reaching this decision. Adopting a purposive interpretation of Article IX the Court equated 'proceeding in Parliament' with a 'decision of Parliament' and implied that the parliamentary proceeding of prorogation is a mere ceremonial form. The error arises from the broad sweep of the Supreme Court's judgment, in which they stated that it was 'as if the Commissioners had walked into Parliament with a blank piece of paper' (SC 69). This failed to appreciate that their ruling had specific substantive effects on the conduct of parliamentary business. First, it obliged the Speaker on 25 September to issue a statement that it was necessary retrospectively to alter the official record of Votes and Proceedings in Parliament. This now records that, rather than Parliament being prorogued, at the close of business on 9 September: 'The Speaker suspended the sitting' (HC Session 2017-19, Votes and Proceedings No 341). That might appear to some to be a minor consequential interference in parliamentary proceedings. But the second effect is not. At the prorogation ceremony, the Royal Commissioners signify that the Queen gives her Assent to Bills that need to be enacted before the close of the session. It thus became part of the Commissioners' duty under the authority of the Order in Council that the Court has now quashed to signify Royal Assent to the Parliamentary Buildings (Restoration and Renewal) Bill, which consequently was duly enacted on 10 September 2019 (HL Debs Vol 799, col 1400). The effect of the Supreme Court's ruling is that that Act of Parliament has been removed from the Parliament Roll and the Speaker and Lord Speaker have ruled that Royal Assent for the Bill now needs to be re-signified.

9. The Supreme Court's decision unsettles two fundamental principles of constitutional law. The first is that the granting of Royal Assent is a proceeding in Parliament. This principle was re-affirmed by the Supreme Court in 2014: *R (Barclay) v Secretary of State for Justice* [2014] UKSC 54. The second principle is that a court of justice must accept the authority of Acts entered on the Parliament Roll: *Edinburgh and Dalkeith Railway Co. v. Wauchope* (1842) 8 Cl. & F. 710; *Pickin v BRB* [1974] AC 765. It has been argued before this Chamber that the acts of Royal Assent and prorogation, though presented in the same document, are severable: see Yuan Yi Zhu, *Putting Royal Assent in Doubt?* (Policy Exchange, 2019). But this is a formal and conceptualistic argument that runs contrary to the

Court's own purposive approach. This Chamber therefore holds, first, that the Supreme Court ruling was determined *per incuriam* and, secondly, that in accordance with its plain meaning Article IX of the Bill of Rights precludes the Court from considering the validity of the prorogation order.

Justiciability

10. The ruling on Article IX disposes of the petition. But given the constitutional significance of the other aspects of the case, the Chamber proceeds to address these issues. The next question is whether the legality of the Prime Minister's advice to the Queen is justiciable in a court of law. The power to prorogue Parliament is a prerogative power. This is an executive power that vests intrinsically in the Crown and in this instance is exercised by the sovereign in person on the advice of her principal Secretary of State. Prerogative powers are acknowledged by the common law. Traditionally, it was accepted that the appropriate role of the courts was to determine the existence and extent of the Crown's prerogative powers but not to review the manner of their exercise. But in *CCSU v Minister for the Civil Service* [1985] AC 374 it was held that public powers should be subject to general principles of judicial review irrespective of their source in statute or prerogative. Thereafter, the approach to review depended on the subject matter of the decision rather than the source of the power being exercised. At the same time, it was accepted that certain high policy matters that are exercised through prerogative powers, such as the dissolution of Parliament, were 'excluded categories' that remained non-justiciable. Since 1985, the courts have adopted an incremental approach in reviewing the exercise of various prerogative powers. The question in the present litigation is whether the Crown's decision to prorogue Parliament is a justiciable matter.

11. It is common ground that most governmental decisions will have a political aspect and that does not mean they are not susceptible to judicial review. The issue of non-justiciability is more specific: the relevant test is whether there exist judicial standards by which to assess the legality of governmental action. This test was authoritatively laid down in the joint judgment of Lords Neuberger, Sumption and Hodge in *Shergill v Khaira* [2015] AC 359. The Supreme Court held that the issue under consideration in that case was non-justiciable because it was political and it was political first because 'it trespassed on the proper province of the executive' and secondly because of the 'lack of judicial or manageable standards' by which to undertake an assessment. This ruling influenced the Divisional Court in reaching its decision that prorogation was non-justiciable. It concluded (QB 51):

The Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case were political. They were inherently political in nature and there are no legal standards against which to judge their legitimacy. The evidence shows that a number of considerations were taken into account... They included the need to prepare the Government's legislative programme for the Queen's Speech, that Parliament would still have sufficient time before 31 October 2019 to debate Brexit and to scrutinise the Government's conduct of the European Union withdrawal negotiations, that a number of days falling within the period of prorogation would ordinarily be recess for party conferences, and that the current parliamentary session had been longer than for the previous 40 years. The Prime Minister had also been briefed in [the Director of Legislative Affairs'] submission that it was increasingly difficult to fill parliamentary time with appropriate work and, if new bills were introduced, either the existing session would have to continue for another four to six months at a minimum or they would be introduced knowing that they would fall at the end of the session. All of those matters involved intensely political considerations.

Overtaking the Divisional Court judgment, the Supreme Court ruled that the question of whether the Prime Minister's advice to the Queen was lawful is justiciable.

12. The relative cogency of these conflicting rulings in part turns on jurisprudential questions of form and function. Whereas the Divisional Court's judgment is based on a categorial distinction, the Supreme Court focuses on purpose. The former treats the issue as a matter of classification: is this ultimately a question for executive or judicial judgment? The latter regards it a matter of degree whereby high policy issues should have light touch review but the closer the executive decision comes to interference with individual rights the greater becomes the degree of appropriate scrutiny. One consequence of the adoption of a purposive approach by the Supreme Court is that the issues of justiciability and review standards are conflated. In para. 52 of their judgment, the Supreme Court held that they were determining the extent of the prerogative power by applying *standards*, and they maintained that the standards are directed not to the mode of exercise of the power within its lawful limits but to determining the limits of the power. What is striking about this novel deployment of a purposive method is that the standards to which the Court refers are not 'judicial' standards; they are derived from what they call 'constitutional principles'.

13. This Chamber recognises the merits of each of these competing

methods. It notes that in the opinion of FW Maitland, one of our greatest constitutional historians, lawyers are skilled at drawing differences of kind where others see only differences of degree. And we would add that if too much of the formal technique of classification is jettisoned, too much of what is distinctive about legal reasoning is lost. Further, the Chamber remains perplexed by an unexplained change in method implicitly adopted by several Supreme Court justices. Lord Hodge offers no explanation for the apparent shift in approach from his own judgment in *Shergill* in 2015. The method Lord Carnwath now endorses differs from that he adopted in reviewing prerogative powers in *R(Youssef) v Foreign Secretary* [2016] AC 1457 and *R(Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 (*Miller No 1*). And in *Miller No 1*, Lord Reed stated that:

For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary. [240]

Lord Reed now appears to have abandoned this method and, as has already been noted, this has had unfortunate consequences on principles of constitutional law. This Chamber would proceed more cautiously: we hold that the type of prerogative power here being challenged meets the tests of non-justiciability laid down by the Supreme Court in *Shergill v Khaira* and followed by the Divisional Court in these proceedings. But we recognise that once the principle of justiciability is conceded (as it apparently was by the Government in the Inner House: IH 103), a series of issues are raised about the nature and degree of judicial scrutiny that can appropriately be undertaken. It is to these issues that we now turn.

Constitutional principles

14. In *Miller No 1*, Lord Reed warned against basing judicial review doctrines on assumptions foreign to our constitutional traditions. But in the present case (*Miller No 2*) the Supreme Court adopted the novel purposive method of using standards derived from ‘constitutional principles’ to determine the extent of the power of prorogation. This is innovative in two respects, both of which are contentious.

15. The first innovation can only be identified through close analysis of the judgment. The Supreme Court asserts: (i) ‘every prerogative power has its limits, and it is the function of the court to determine ... where they lie’; (ii) since the prerogative power ‘is recognised

by the common law ... [it] has to be compatible with common law principles'; and (iii) 'the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law' (SC 38). The first claim is thoroughly orthodox but the second, which provides the justification for the third abstract and novel claim, expresses a contentious non sequitur. It does not follow that because the common law recognises prerogative powers, the manner of exercise of those powers must comply with 'common law principles' (whatever they may be). As a general claim, this is an assertion of judicial supremacy. It might not seem so contentious when prerogative powers are exercised in a manner that affects individual rights and intensive scrutiny is applied, but it does become so when presented as a general and unqualified principle. Yet it is this more general claim that enables the Court, without explanation, to conflate 'common law principles' and 'fundamental principles of our constitutional law'. It operates to vindicate the maxim of former US Chief Justice Hughes that: 'We are under a Constitution, but the Constitution is what the judges say it is'. The innovation made by the Supreme Court in this case is not made explicit and it is, in Lord Reed's words, 'foreign to our constitutional traditions'.

16. The second innovation concerns the Court's account of the British constitution, especially with respect to the foundation of its constitutional principles. Despite the functional approach adopted with respect to review of the issues of 'proceedings in Parliament' and justiciability, when turning to constitutional analysis the Court adopts a formal approach. This is controversial because, as many constitutional scholars have shown, the application of a formal method to the British constitutional arrangements is liable to lead to distortion. Important though they are, the basic legal rules of the British constitution are simple, formal and few. But as AV Dicey acknowledged, an analysis of these rules does not yield an account of the constitution; it provides only an account of the 'law of the constitution'. It is generally accepted that the character of the British constitution, especially with respect to the arrangements of parliamentary government, is expressed in myriad political practices which have evolved in accordance with functional necessities. In an innovative manoeuvre, the Supreme Court converts these practices into principles and, having now vested them with normative – and, implicitly, legal – authority, the Court asserts that it has the duty authoritatively to interpret the meaning of these constitutional principles and therefore, more generally, to act as the primary guardian of the British constitution. If the Constitutional Council were convinced that this is appropriate, they would readily cede authority. But the Court's competence to perform their asserted role must first be examined.

17. In 1867, Walter Bagehot wrote his classic account of *The English Constitution* for the purpose of rescuing the constitution from distortions

in the hands of lawyers. He maintained that the formal legal account was permeated by two erroneous interpretations: that the constitution was founded on the separation of powers and that it operated through a balance between monarchy, aristocracy and commons. Critical to Bagehot's method is the distinction between the 'dignified' and the 'efficient' versions of the constitution. The dignified version focuses on the ancient formal aspects of the constitution whereas the efficient version focuses on the modern functional aspects. Bagehot's functional analysis was intended to show that, far from being founded on separation and balances, the constitution's 'efficient secret' is the 'close union, the nearly complete fusion, of the executive and legislative powers'. This realistic, functional approach has permeated the thinking of constitutional scholars ever since.

18. In the present case, the Supreme Court asserts that the two fundamental principles of constitutional law of relevance to the case are parliamentary sovereignty and parliamentary accountability. The first has always been understood to be a formal legal rule that grants supremacy to the laws enacted by the Crown in Parliament. The claimant's attempt to give it a wider meaning in this case, extending it to a principle that Parliament must be able to conduct its business unimpeded, was rejected by the Divisional Court (QB 62). The Divisional Court's position is entirely orthodox; as Lord Carnwath expressed the point in *Miller No 1* [255] 'the House of Commons is not the same as "the Queen in Parliament"', whose will is represented exclusively by primary legislation'. But starting with an orthodox analysis of the relationship between an Act of Parliament and a prerogative power (SC 41), the Supreme Court engages in hypothetical analysis – claiming that the sovereignty of Parliament would be undermined if prorogation was used for an indefinite period – in order to justify extending its supervision of the limits of that prerogative power by reference to the sovereignty principle (SC 42-44). This attempt to transform a formal principle into a functional principle converts orthodoxy into heterodoxy and is, in our judgment, misconceived. This Chamber can do no better than adopt the formulation of the Divisional Court: 'We do not believe that it is helpful to consider the arguments by reference to extreme hypothetical examples, not least because it is impossible to predict how the flexible constitutional arrangements of the United Kingdom, and Parliament itself, would react in such circumstances.' (QB 66).

19. The Supreme Court's engagement with hypotheticals serves a particular purpose. In the context of constitutional review, the way in which 'facts' are presented has the effect of generating constitutional realities. That is, the ways in which political occurrences are described by the court influence the manner of presentation of constitutional narratives, which in turn shape and even determine constitutional requirements. There is clear evidence of these techniques being deployed

in the Court's consideration of the second fundamental principle, that of parliamentary accountability.

20. The Supreme Court held that 'the extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts' (SC 51). In determining whether the PM's justification for prorogation is reasonable, it sets the scene by presenting as facts the foundations of Britain's constitution:

We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts.

Following this formal and tendentious presentation, the Court had no difficulty in answering the question of whether the prorogation frustrated the constitutional role of Parliament in holding the Government to account in the affirmative.

21. An alternative, more realistic, account to this formal presentation of constitutional foundations would be appropriate. A more realistic account of the facts might have stated that our system of representative democracy works through a party political arrangement in which party affiliation effectively determines parliamentary representation. In this world of party politics, people do not commonly vote for an individual as such; they vote for a party representative standing on a manifesto commitment which they pledge to deliver should their party acquire a majority and form a government. Considered functionally the Government in Britain is as directly elected by the people as in other democracies (which invariably elect only a President and not a Government). And although the Government is certainly accountable in accordance with conventions to the House of Commons, it should not be overlooked that one of the primary functions of the majority of MPs – a function that does much to determine the organisation of Commons business – is to maintain the Government and its supply. With respect to recent administrations, it might be noted that a Conservative Government obtained a majority in the 2015 election on a manifesto commitment to 'hold an in-out referendum' on EU membership. Authorisation for that referendum was granted by Act of Parliament in 2015 supported by 90 per cent. of MPs and the referendum of 2016 resulted in a majority

voting to withdraw from the EU. In the 2017 election, both governing and opposition parties had pledged to respect the referendum result and yet three years after the referendum, and following the resignation of two PMs, the voting down of the negotiated Withdrawal Agreement by Parliament three times and two extensions to the exit date being negotiated with the EU, the UK has still failed to reach an agreement on exiting. The Supreme Court noted that prorogation ‘might not matter in some circumstances’ but in this case the circumstances were ‘quite exceptional’ because a ‘fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019’ (SC 57). The circumstances may be exceptional, but this assertion takes the Court into the contentious territory of political and economic considerations. With due deference to the Supreme Court, the determination of ‘constitutional facts’ is demonstrably not so straightforward as ‘other questions fact routinely decided by the courts’. Constitutional ‘facts’ are generated by interpretative schemes that, in our constitutional tradition, cannot be other than infused with political considerations. Courts must therefore remain vigilant to ensure that the presentation of the ‘constitutional facts’ of the case are not skewed towards particular political objectives.

22. The formality of the constitutional analysis outlined by the Supreme Court in this case shows why it has been commonly assumed that the Court is an inappropriate forum to engage in general constitutional review. By asserting this jurisdiction, the Court is in danger of determining that one particular interpretation of these ambiguous and flexible political practices is authoritative. This exposes it to the criticism of engaging in a political judgment. That the Court is ill-equipped to assume this jurisdiction is illustrated by its attempt in the present case to convert political practices into constitutional principles. Once the concrete is elevated to the abstract, experience indicates that in the course of determining the true meaning of the abstract principle, judges invariably end up discovering their own values. In our judgment, the case for the Supreme Court taking over the review tasks assigned to this Constitutional Council is not proven.

Review standards

23. The Supreme Court determined that the exercise of the prerogative power of prorogation was justiciable, that it was for the Court to determine the extent of that power, and that this exercise was to be undertaken by applying standards derived from constitutional principles. But as courts with experience of constitutional review recognise, it is necessary also to determine the degree of intensity of review. The Court noted this when stating that the question of ‘whether

the Prime Minister's advice trespassed beyond that limit ... is closely related to the identification of the standard by reference to which the lawfulness of the Prime Minister's advice is to be judged' (SC 37). It then identified the constitutional principles to be applied and determined that the court will intervene if the prorogation frustrates the ability of Parliament to carry out its functions (SC 50). But in claiming that to be a question of fact (SC 51) it avoided direct consideration of the critical question of the appropriate standard of review.

24. In its 'factual' analysis the Court, noting that this was not a normal prorogation, concluded that 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 October'. It added that Parliament 'might have decided to go into recess for the party conferences' but 'its members might have ... declined to do so' or 'might have curtailed the normal conference season recess' (SC 56, emphases supplied). And from that factual analysis it determined the standard of review: 'The ... question is whether there is a reasonable justification for taking action which had such an *extreme effect upon the fundamentals of our democracy*' (SC 58: emphasis supplied).

25. Applying that standard, the Court first acknowledged Sir John Major's evidence that 'he has never known a Government to need as much as five weeks to put together its legislative agenda' (SC 59) and then noted that the memorandum from the Director of Legislative Affairs does not suggest that prorogation was needed for that purpose, fails to address the competing merits of recess and prorogation and 'wrongly gives the impression that they are much the same' (SC 60). On the presentation of that evidence, the Court found that: 'It is impossible for us to conclude ... that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks' (SC 61). Consequently, the prorogation decision was unlawful.

26. When engaging in constitutional review, the Court is obliged to establish a method for determining intensity of scrutiny. Standard scrutiny, sometimes called rationality review, presumes the constitutionality of governmental action and determines that such action will not be struck down unless the claimant can demonstrate that it does not bear any rational relationship with a legitimate governmental interest. In strict, or anxious, scrutiny review, by contrast, the presumption is reversed: action will be invalidated unless the government can demonstrate that it is precisely tailored to achieve a compelling public interest. In this case, it would appear that, despite the fact that on orthodox public law reasoning the order was non-justiciable, the Supreme Court has not only determined that it is justiciable but also that it is not appropriate simply to engage in light touch review of this high policy power. The Court thus proceeded to engage in strict scrutiny. Whereas the Divisional

Court deferred to the government by accepting the evidence presented in the memorandum of the Director of Legislative Affairs (para 11 above) which laid out a number of considerations that were taken into account, the Supreme Court analysed that memorandum as though it were a formal legal text, criticised certain apparent omissions within it and, in a reversal of presumption, drew the conclusion that the PM had no good reason for deciding to prorogue Parliament. Establishing itself as the forum of constitutional principle, the Supreme Court determined that the principle of parliamentary accountability it asserts in this case trumps all pragmatic, practical, policy and political considerations.

27. This Chamber must examine whether this is the appropriate standard of review. Consider, for example, the 1945-51 Labour Government's action to limit further the Lords' powers to delay legislation under the Parliament Act 1911. Under the 1911 Act, a non-money Bill could be enacted without the Lords' consent only if passed by the Commons in three successive sessions. Wanting to limit this delay power to two sessions, which was being resisted by the Lords, the Government was obliged to use – for the first time – the 1911 Act provisions. But it recognised that delaying enactment for three successive sessions might jeopardise the Bill itself. Consequently, the Government exploited the fact that parliamentary sessions have no fixed duration and in 1948 arranged for a session of minimal length. On 13 September 1948, Parliament was prorogued to the following day and, after the Commons passed the Parliament Bill, on 25 October 1948 Parliament was again prorogued. This most surely was a prorogation for political purposes that frustrated the principle of Parliamentary accountability and it might even be said to have had an impact on the Supreme Court's now extended meaning of Parliamentary sovereignty. The Divisional Court in the present case stated that this 'is not territory in which a court can enter with judicial review' (QB 55); the Supreme Court maintains otherwise with consequences yet to be understood.

28. Consider also the actual parliamentary circumstances prior to the prorogation that was held to have an 'extreme effect upon the fundamentals of our democracy'. Following the announcement of the proposed prorogation on 28 August, Parliament – duly placed on notice – returned from summer recess on 3 September. The Commons then took control of the order paper from the Government and on 4 September introduced a Bill to prevent a no deal exit from the EU. In the face of Government opposition, this Bill passed all its stages in one day and received Royal Assent on 9 September. During the same period, the PM twice failed to secure an agreement from two-thirds of the Commons in accordance with the Fixed-term Parliaments Act 2011 to hold a general election. Parliamentary accountability is undoubtedly a central element of British constitutional practice, but as the Divisional Court stated: 'The ability of Parliament to move with speed when it chooses to do so was

illustrated with clarity and at the same time undermined the underlying premise of the cases advanced by both the claimant and the interveners, namely that the prorogation would deny Parliament the opportunity to do precisely what it has just done' (QB 57). The actions taken by the Commons in the period between 3 and 10 September demonstrates that, had Parliament felt its position jeopardised by the prorogation, it possessed sufficient resources to supply a remedy.

29. The Grand Chamber concludes that even if it is accepted that the PM's decision on prorogation is justiciable, the Supreme Court has failed to provide adequate reasons for undertaking such intensive scrutiny of that decision. Contrary to the decision of the Divisional Court, it not only accorded no deference to the considerations that were taken into account in the Director of Legislative Affairs' memorandum but also reversed the presumption and required the PM to present evidence for his decision. Given the high policy character of the decision, a more balanced standard of review of the PM's decision was required.

Conclusion

30. In *Secretary of State for the Home Department v. Roth* [2002] 1 CMLR 52, Laws LJ stated that: 'In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy' [71]. In the case under consideration, the Supreme Court takes the next step of establishing the principle of 'constitutional supremacy' and assigning to itself the role of constitutional guardian. This is a bold manoeuvre and it is one in which the limitations of its ability adequately to discharge those responsibilities are demonstrated. The Court's interpretation of Article IX of the Bill of Rights is novel and it is beyond doubt that its judgment on that matter has resulted in an interference with proceedings in Parliament contrary to the Article. Its ruling on the justiciability of the power of prorogation makes light of the lack of judicial standards to supervise the exercise of the power and its conversion of judicial standards into standards derived from 'constitutional principles' results in a major – and not properly justified – extension of the court's jurisdiction with respect to constitutional matters. Its use of constitutional principles blurs the distinction between the extent and manner of exercise of the prerogative power and leads to an intensity of review of high executive matters unprecedented in British constitutional law. And the partiality of its presentation of the character of the British constitution highlights the dangers of which Lord Reed spoke when he held that 'the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary' (above para 13).

31. This Chamber is in no doubt that the Prime Minister has used the power of prorogation in a forceful manner and in politically contentious circumstances. But we hold that a court should not rush to intervene in such matters until it has been demonstrated that the political practices embedded within the British parliamentary system are unable to do their work. As the Divisional Court's ruling in this case has indicated, recent developments in Parliament have revealed Parliament's ability to continue to hold the Government to account and, in doing so, they have undermined the premise on which the claimant's case is founded. The Constitutional Council would overturn the Supreme Court's ruling that the prorogation was unlawful.



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Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

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