



The Supreme Court and Parliament: The Constitutional Status of Checks and Balances

There have been two competing visions of the constitution battling it out since the Brexit referendum in 2016, which [David Howarth described on this blog](#) as the Whitehall view and the Westminster view. The Whitehall view is that the UK constitution, and the relationship between Parliament and Government in particular, is designed to allow the Government of the day to deliver its promises to the electorate. Parliament's role is to scrutinise how those promises, as well the everyday decisions of Government, are delivered, no more no less. The relationship between Parliament and Government is a purely political one, and therefore raises no questions that are relevant to the courts. The Westminster view, I would argue, is based on the notion that the UK constitution is based on a number of constitutional principles that ensure that Parliament is 'the senior partner'. Those principles, despite not being codified and subject to legislative interference, are nonetheless fundamental and capable of being enforced in court. The Supreme Court's judgment in [Miller 2/Cherry](#) suggests that the Westminster view is now the legal reality. The checks and balances provided by our constitutional arrangements are not nice-to-have added extras, but instead are fundamental to how we are governed.

The Westminster v Whitehall view in practice

To appreciate the significance of the Court's overall constitutional position it is important to remember that the idea that the UK constitution is based on a system of checks and balances is far from universally accepted. The Government's legal argument in this case, and in a sense the [High Court's judgment in Miller 2](#), outlines the Whitehall view in the specific context of prorogation: the UK constitution does not supply any legal standards that a court can apply to assess a decision to advise Her Majesty to prorogue Parliament. The fact that the High Court agreed with the Government shows the extent to which the Whitehall view is accepted by some as constitutional orthodoxy. More broadly, the Government's legal position in this litigation reflects the approach taken throughout the Brexit process, which is that essentially the relationship between Government and Parliament can operate as if the Government had a working Commons majority. This approach has been reflected in the Government's position on a number of key domestic constitutional questions: the question of triggering Article 50, Parliament's role in supervising the negotiations, the meaningful vote and the non-introduction of the EU (Withdrawal Agreement) Bill.

This majoritarian approach has collided with reality on a number of occasions, which has revealed that in the absence of a working majority, the constitutional dynamic between Parliament and Government is fundamentally different. The checks and balances provided by Parliament in the present context are much stronger, and this means that the Government cannot dominate the Commons in the way it normally does. This has a knock on effect on the legitimacy of the Government's use of powers, like the power to prorogue, which do not require parliamentary consent. There is a real sense of constitutional injustice, which would not have existed to the same extent if the Government been able to show it has a sustainable majority, generated by the use of a power to circumvent the need for a majority in the Commons. The fact that this Government has repeatedly failed to show that it can command the confidence of the Commons made the power to prorogue fundamentally problematic. That sense of injustice would be shared by anyone who supported the Westminster view of the constitution. The Supreme Court's judgment, in finding that this injustice was unlawful, has made it crystal clear that the Westminster view corresponds with legal reality.

The Supreme Court's defence of the Westminster view

The Supreme Court's judgment provides a clear articulation of the Westminster view of the UK constitution. That articulation can be categorised as five interlocking constitutional propositions. Each of the five interprets the relevant constitutional principles in such a way as to prioritise Parliament's role as a check on the powers of the Government. The first was that as a matter of principle the exercise of the prerogative power to prorogue was justiciable because the 'boundaries of the power are... determined [,] by the fundamental principles of our constitutional law' (para 38). This approach was underpinned by the observation that if the power was not justiciable, its use would be insulated from both political and legal scrutiny (para 33). The second was that parliamentary sovereignty amounts to more than just a rule relating to the status of primary legislation. Parliamentary sovereignty also protects Parliament's right to make law (para 42). The principle is therefore relevant to the power to prorogue because this power must be exercised in a way that respects Parliament's constitutional right to enact legislation. The third was to recognise that the Government's accountability to Parliament is a distinct legal principle which provides a further legal standard that can be applied to the power to prorogue. Prorogation cannot be used as means to replace responsible government with 'unaccountable government' (para 48). The fourth was the test formulated by the judgment to determine whether a prorogation was unlawful: that absent reasonable justification, a prorogation would be unlawful if it prevented Parliament carrying out its core constitutional functions (para 50).

The fifth proposition was that the prorogation on 9 September was not a parliamentary proceeding and therefore not protected by parliamentary privilege under Article 9 of the Bill of Rights 1689. Parliamentary privilege, like parliamentary sovereignty and parliamentary accountability, is not always interpreted to defend Parliament's ability to scrutinise the executive. The Government's lawyers had argued that prorogation carried out by the Commission was a parliamentary proceeding, which was protected by parliamentary privilege, and therefore could not be invalidated by the court. This was a respectable and defensible interpretation of privilege. The Supreme Court rejected that argument with remarkably little fuss by simply pointing out that privilege is designed to protect the 'core or essential business of Parliament' (para 66). The act of prorogation is done to Parliament, rather than by Parliament, which brings core parliamentary business to end and so is not protected by privilege (para 68).

Conclusion

Each of these five instances of constitutional interpretation by the Supreme Court is notable for the clarity and consistency of its vision of the logic of the UK's constitutional order. Judicial review, parliamentary sovereignty, parliamentary accountability, the power to prorogue and parliamentary privilege should all be interpreted so as to give effect to Parliament's role as the principal check on the Government's power. The Supreme Court's judgment does not mean that the Whitehall vision is consigned to the history books. A future strong majority government could well reduce the centrality of Parliament and the separation of powers in practice. However, it is also possible that future Parliaments could decide to build on the constitutional foundations that the Supreme Court has so clearly articulated.

*This piece has been [cross-posted](#) from the *UK Constitutional Law Association Blog*.*

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