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## **Parliamentary Sovereignty and Democratic Accountability: Matters of Prerogative Powers and Legal Reasoning**

### **ABSTRACT**

*When do politically motivated initiatives constitute an abuse of powers? Even where it appears to be in the public's interests and general mandate to pursue such policies – amidst written or unwritten constitutional rules and responsibilities? The UK's Supreme Court recent landmark ruling in which it was unanimously held that the Monarch's decision to suspend Parliament - based on the Prime Minister (executive)'s advice, was unlawful, also brings to light the importance of considering underlying rationales for pursuing unprecedented constitutional policies, justifications of such a move – as well as possible conflicting goals between the originally intended wishes of the mandate – as reflected and evidenced by one of the primary reasons for the 2016 Referendum, namely the need to preserve Parliamentary sovereignty in the UK – against the backdrop of the consequences emanating from proroguing Parliament for five weeks – and more precisely for the duration of the period in which it was intended that the UK would leave the EU – with or without a deal.*

In the same vein, the announcement by the Speaker of the U.S House of Representatives of a formal and official impeachment inquiry – considered to be necessary as a system of checks and balances against the abuse of powers by the executive, is not only reflective of the foundational elements needed to uphold democracy within a system of powers delegated between the judiciary, legislature and executive, but also serves as a reminder that even where a written constitution still prevails, the spirit and manner in which it is laid out, may present serious matters of statutory interpretation and the need for judicial intervention -since the executive could consider grounds of justification in interpreting such rules in a way which is regarded as reflecting the interests of the mandate , even though this may still be regarded by legislature as constituting serious grounds for abuse of powers – to the extent of attracting such draconian punitive responses in the form of impeachment investigations – and ultimately, possible grounds for impeachment.

This paper aims to contribute to the extant literature on the matter by highlighting how and why it is necessary to delineate between matters of public interests, national security – and ultimately the need to balance interests of democratic accountability and parliamentary (legislative) sovereignty from a background of the context, content and prevailing matters of public policy and constitutional relevance – even as intended by the rule of law and the application of separation of powers. Further, it highlights why the role of the judiciary becomes all the more important in ensuring that an appropriate balance and favorable consensus is reached between politically motivated goals and the need to uphold democratic accountability – particularly given the fact that the legislative and executive branches are more intricately linked – such that there are greater possibilities of conflicts of interest between these two branches.

Key words: democratic accountability, rule of law, separation of powers, parliamentary sovereignty, Congress, parliament, Brexit

## **Parliamentary Sovereignty and Democratic Accountability: Matters of Prerogative Powers and Legal Reasoning**

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### **Introduction and the Background to the topic**

Unlike the situation which prevailed in the period leading to October 31<sup>st</sup> 2019 in the United Kingdom, whereby great uncertainty had had been anticipated within the political and economic spheres – not only given the increased possibilities of a “No Deal Brexit Scenario” under the new Prime Minister’s leadership and tenure, which commenced from the 22<sup>nd</sup> July 2019, following the announcement of the resignation of the previous Prime Minister on the 7<sup>th</sup> June 2019,

In the United States, possibilities of an impeachment inquiry had always loomed and threatened the current administration. Perhaps what was less anticipated was the manner of timing during which such an event would manifest.

Legislature it would appear, represents particular significance within the United Kingdom from the perspective and the fact that that the legislative and judicial branches, as represented by Parliament (the law making body), and respectively the House of Commons and the House of Lords (Parliament comprising the Crown, House of Commons and House of Lords), are fused.

Such a structure can be contrasted to the United States Congress (the legislature) which embodies the House of Representatives and the Senate. The United States Supreme Court represents the judiciary. Even though the United Kingdom also has its Supreme Court, the House of Lords still engages in statutory – as well as exercises judicial functions.

Hence the United Kingdom’s Supreme Court ruling on the 24<sup>th</sup> September 2019, widely considered to be a “one-off” was also significant in the sense of exercising checks and balances on powers of an already powerful Parliament.

However, conflicts of interests between the legislative and executive branches – given greater links between these branches – as evidenced by recent events in the United States – as well as greater possibilities of these occurring during impending political elections, necessitate the intervention of the judicial branch in ensuring that adequate levels of democratic accountability are incorporated in deciding matters of public policy interests – as well judicial and legal matters of importance.

Summary of main points relating to the UK Supreme Court’s ruling on the 24<sup>th</sup> September 2019 are as follows:

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- That the suspension or prorogation of Parliament was unlawful
- Implications of this included the supremacy of Parliament (parliamentary sovereignty)
- The importance of separation of powers
- That the rule of law prevails
- That no member of government or even the Monarch, is above the law.

The Supreme Court held that the Prime Minister had acted unlawfully to prorogue Parliament. Further fundamental legal questions related to the legal requirement which had been put in place just a week before, that in the absence of a deal by the 19<sup>th</sup> October 2019, a request should be made for an extension to avoid a “No Deal Brexit Scenario) and that such an extension should take place between the 19<sup>th</sup> October (if a deal was not in place by then) and January 2020.

In unanimous decision in which the Supreme Court whilst maintaining that Parliament was not prorogued and that the situation “did not involve a normal prorogation”, the landmark ruling was considered a victory for democracy:

- “The decision to allow Her Majesty to prorogue Parliament was unlawful. The Prime Minister’s advice to the Queen to suspend Parliament was null and void...Order suspending Parliament must be quashed.”

The above mentioned remarks were reverberated in the judgment given by Lady Hale, President of the Supreme Court) who remarked that whilst the prorogation of Parliament took place in exceptional circumstances, that:

- This court has already concluded that the Prime Minister’s advice to Her Majesty was unlawful, void and of no effect. The prorogation was also void and of no effect. Parliament has not been prorogued. This is the unanimous judgment of the eleven judges....”

The fact that Parliament was suspended for five weeks – precisely scheduled around the planned date of Brexit (the UK’s departure from the EU), also highlights its specificity to Brexit – hence it could not totally be said that the decision had nothing to do with Brexit and that the court ruling had no bearing on Brexit and the originally intended departure date of October 31<sup>st</sup>.

Was the landmark ruling by the UK Supreme Court purely related to Brexit?

The argument is not entirely one-sided.

Although the Supreme Court held that the case “ was not about Brexit, but about prorogation”, and that therefore the judiciary had a say, it is also interesting to note that one of the reasons which instigated Brexit. Relates to the need (as reflected by the wishes of the mandate during the 2016 Referendum) for the preservation of UK Parliamentary sovereignty. Hence, permitting a

suspension of Parliament would have defeated this objective and initiative – as well as undermined the notion and principle of Parliamentary sovereignty.

Further implications of the connotation “unlawful” also highlight that whilst it was held that reasons propagated by the Prime Minister to the Queen were false, the judgment did not highlight or make references to “misleading information” provided to the Queen.

The legal aspects of the judgment also relate to Article 50’s provisions that the UK will leave the EU on the 31<sup>st</sup> October 2019 *unless* something happens to prevent it (emphasis included) – thus a provision had already made for the recent events and current state of the law – as passed by MPs a week before the landmark ruling that an extension should be requested if deal was not reached by the 19<sup>th</sup> October 2019 (to avoid a No Deal Brexit scenario). Hence it was not possible to leave without a deal, between certain stipulated dates, namely between the end of October 2019 and January 2020, under the current state of the law.

#### Matters of Public Interest

Other considerations which the judicial branch may take into account in deciding whether there has been an abuse of powers by the executive – as well as the need to execute mechanisms of accountability, relate to public interest matters – and particularly economic concerns.

It seemed obvious – at least appeared to be – based on widely held consensus, that leaving the EU without a deal, would not be in the best interests of the United Kingdom – economically – even though the mandate’s desire to leave the EU – also had to be respected and this had been one of the motivating factors behind the Prime Minister’s decision to leave on the 31<sup>st</sup> October – with or without a deal

This background bears stark contrast to the situation in the United States where matters of national security could ultimately prove to be the deciding factor in evaluating whether there has been an abuse of powers, pursuant to the prevailing Article 2 of the Constitution in matters relating to impeachment inquiries. This is also evidenced by the decision of the House of Representative’s Speaker to limit the scope of the inquiry just to certain dealings and correspondence between officials of a particular jurisdiction. Ironically, matters of national security constituted one of the fundamental questions and topics which revolved and provided the platforms for 2016 Presidential nominations – and possibly, as well as deciding factor for the eventual outcome of the elections.

Were the voters not aware that certain factors or revelations which appear to be unfolding, also existed prior to the 2016 elections? This is very much doubted. The voters were fully aware of many facts and it is highly likely that they just wanted change and someone capable of delivering electoral promises. The nature and manner of dealings – as well as many unconventional and unprecedented surprises which were to be revealed in the weeks after the new administration came

into power, should hence, not have come as a major surprise. As long as the election campaign promises were (and are) delivered, this appears to be all that will matter.

### Official Launch Into Impeachment Inquiry as formally Announced by the House of Representatives

On the same day that the UK Supreme Court gave its landmark ruling and re iterated that “That no member of government or even the Monarch, is above the law”, it was decided that inquiries would be instigated based on “an abuse of the Presidential powers and on the assumption that he could do whatever he wanted under Article 2 of the Constitution” – thereby breaching his constitutional duties.

As well as highlighting the need for accountability, the Speaker of the House of Representatives also added “ No one is above the law” and further, that “ engaging foreign intervention in presidential elections was against constitutional duties’.

It is also interesting to note that 163 House Democrats called for the impeachment inquiry.

In facilitating an impeachment, the following criteria need to be met:

- A majority vote through which the United States House can instigate the process
- Thereafter followed by a trial in the Senate

The final deciding process then takes place in the Senate whereby a two-third of the Senate votes is required to “convict” and remove the President (unless he resigns before removal). Historically, no President has ever been convicted in the Senate – since only one case of resignation (Richard Nixon).

Further points of observation made by the House Speaker in deciding whether there had been an abuse of powers are as follows:

- Betrayal of oath of office
- Betrayal of national security
- Betrayal of the integrity of elections.

### **Issues to be Addressed: The Need for a Written Constitution and Unambiguous Statutes?**

Following the UK Supreme Court's unprecedented ruling, it was widely held that this accentuated the need for a written constitution – such as to mitigate situations whereby abuses of power by the executive, particularly, could occur.

However the recent developments in the U.S have also demonstrated that possibilities of impeachment could still be instigated even where a written Constitution exists – particularly where the Constitution is characterized by ambiguous wordings which leave a great scope for different interpretations.

Under Article 2 of the U.S Constitution, which underlines and highlights conditions under which it is possible for impeachment to occur, particular focus is made, in the current investigations, to the phrase “qui pro quo”

And its interpretation will indeed have a significant bearing on the eventual outcome of the case – not only because of the subjective nature involved in its determination, but also given the circumstances in which unfolding events have taken place – such that what is considered as being equivalent to a “quid pro quo” consideration will be dependent on an entirety of many factors and the surrounding facts, nature and circumstances of the case.

#### **The Role of the Judiciary in Statutory Interpretation**

As evidenced under the UK doctrine and notion that only Parliament “can make or unmake” the law (doctrine of Parliament supremacy) and that courts are merely to interpret the law,

Such is the state of the case law in the United States.

It would therefore be interesting to see what decision is reached by the Senate – even though the Supreme Court (judiciary branch) is not assuming such a fundamental role in the current investigations – as is the situation in the UK.

This leaves possibilities of the involvement of the US Supreme Court in fostering greater democratic accountability – even though it seems, as the present case stands that it will be difficult for the Democrats in Senate to secure a two third vote needed to convict the President. Where legislative matters are embroiled with highly charged politically motivated interests – such that it may appear to outweigh public interests, then there are plausible justifications for judicial intervention in the quest to ensure that the doctrines of the “rule of law”, separation of powers, democratic accountability is fostered – whilst upholding Parliamentary supremacy.

## Conclusions

A written constitution may not completely address issues relating to abuse of powers, particularly by the executive – however, it should mitigate fundamental policy issues which could threaten the facilitation of measures aimed at ensuring that democratic accountability is executed in the manner and for the purpose for which such a safeguard has been established. The clarity and manner in which a Constitution has been written will also help ensure that cases of ambiguity in the words within the Constitution does not generate such a wide scope of interpretation such that it becomes more difficult to accurately assess whether decisions which have been taken lean in the direction of public interest considerations, or are geared more towards personal and politically motivated interests.

This applies particularly to the executive – as well as the legislative branches. It also then emphasizes the importance of the role of judicature in ensuring that the rule of law is adhered to – as well as maintaining the goals and objectives of separation of powers.

It is expected that Parliamentary officials will undertake responsibility for further action as regards ongoing Brexit procedures. However, it is also possible for the executive to request for extension (from the EU) beyond the October 31<sup>st</sup> 2019 timeline. As it stands, it is also possible for the Prime Minister to resort to the Order of the Privy Council, judicial review, or even consult the Civil Contingency Act to circumvent parliamentary procedures. These options existing – even amidst possibilities of a general election or even a change in party leadership or government.



**References**

Article 50 of the Treaty on European Union

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Article 2 of the United States Constitution