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THE SUPREME COURT'S PROROGATION DECISION: GUARDIAN OF THE CONSTITUTION OR ARCHITECT OF THE CONSTITUTION?

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A. INTRODUCTION

The EU referendum result was always going to place severe strain on the UK constitution. Yet, who would have predicted that the defining constitutional battles of the Brexit process would turn on the ancient tension between the Crown and the UK Parliament, with the Crown acting as proxy defender of the will of the people as expressed in the referendum, against a Parliament determined to secure for itself the decisive say in the timing and manner of the UK's departure from the EU.¹ As a result, the Brexit process has turned out to be topped and (perhaps) tailed by two major Supreme Court cases about the legality of prerogative decision-making,² in both of which the court has sided with Parliament against the Crown.

For all the political and academic controversy it generated, with the benefit of hindsight, the first *Miller* case looks relatively conventional in legal terms, involving a familiar question of the relationship between prerogative powers and statute. The only complicating factor was the fact that the relevant statutes were silent on the precise question before the court – namely, who had the authority to decide whether to trigger the EU withdrawal process?

The second case – *Cherry/Miller No 2* – involved a challenge to the legality of the Prime Minister's decision to prorogue Parliament from 9 September to 14 October 2019. Although justified as being necessary to bring what had been an unprecedentedly long parliamentary session to an end and allow for a new Queen's Speech, the timing of the prorogation in the run up to the UK's intended departure from the EU on 31 October, and its unusual length, were widely seen as intended to prevent Parliamentary action to delay or revoke Brexit. This was a much more challenging decision for the court. Here, the judges were asked to rule at great speed, on a high-stakes political issue (where the relevant decision had already been taken and was not merely proposed), in an area where judicial control was unprecedented and which raised important questions of justiciability, and where there was perceived to be a real risk that the government might not comply with the court's decision.

Nevertheless, in a unanimous judgment, which was clearly and beguilingly reasoned, the Supreme Court held that the Prime Minister's advice to the Queen to prorogue Parliament was unlawful and therefore null and of no effect. It followed, according to the court, that the Order in Council authorising the prorogation and the actual prorogation itself were also unlawful and null – it was “as if the Commissioners had walked into Parliament with a blank piece of paper”.³ Thus, the court carefully side-stepped the risk of non-compliance, by making it clear that was for Parliament itself to decide how the interruption to the session should be handled.⁴

The elegance and skill with which the court handled the problem that had been presented to it should not, however, blind us to the fact that its decision was far from inevitable, and that it engaged in considerable creativity in casting itself as the guardian at common law of constitutional values hitherto

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¹ Cf. A Greene, 'Not a Normal Prorogation: Parliament, the Courts, the Crown and the People', DCU Brexit Institute Blog, 25 September 2019.

² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v The Prime Minister/Cherry and others v Advocate-General for Scotland* [2019] UKSC 41.

³ [2019] UKSC 41 at [69].

⁴ *Ibid.*, at [70].

regarded as grounded in the political rather than the legal constitution. This brief note seeks to expose the various argumentational sleights of hand employed by the court, and also considers the broader constitutional implications of the decision. First, though, it explains the background to the case, and outlines the Supreme Court's reasoning.

B. THE ROUTE TO THE SUPREME COURT

The path the case took to the Supreme Court was somewhat complex. The origins of the litigation lay in Spring 2019 when it began to be suggested – in the run up to the first intended Brexit day, 29 March – that the government, in the absence of a majority in the House of Commons, might use various prerogative powers, including prorogation of Parliament and withholding of Royal Assent, to frustrate attempts by MPs to delay or block Brexit.

Following the extension of the Art 50 negotiating period until 31 October, and Theresa May's replacement by Boris Johnson as Prime Minister, three separate sets of litigation were begun in summer 2019 in anticipation that the threat of prorogation might arise again. Proceedings were raised in Scotland by a group of parliamentarians, led by Joanna Cherry MP, in England, by the pro-Remain campaigner, Gina Miller, and in Northern Ireland, by the victims' rights campaigner, Raymond McCord.

Cherry was heard first. Permission was granted on 8 August, and an accelerated timetable fixed, which was further accelerated after the prorogation Order in Council was made on 28 August. On 30 August, Lord Doherty refused interim remedies,⁵ and then dismissed the substantive petition on 4 September, holding that the decision to prorogue was non-justiciable.⁶ On 6 September, a powerfully-constituted Divisional Court gave judgment in *Miller No 2*, reaching the same conclusion as Lord Doherty, holding that the decision to prorogue was essentially political, and that there were no legal standards against which to judge its legitimacy.⁷

It came as a considerable surprise, therefore, when on 11 September (by which time Parliament had already been prorogued), the Inner House granted an appeal in *Cherry*.⁸ According to the court, the prorogation decision was not only justiciable, but had been made unlawfully because it had been motivated by an improper purpose, namely to reduce the time available for parliamentary scrutiny of Brexit-related government action. The court therefore granted declarator that the advice to prorogue and the prorogation itself was null and of no effect. However, anticipating a further appeal to the Supreme Court (a leapfrog appeal already having been granted in *Miller No 2*), the court declined to make any further orders, and – the Parliamentary authorities being nervous about the practical implications of resuming the session in reliance on a decision which might be reversed – Parliament remained prorogued.

Meanwhile, the High Court in Belfast, for reasons of case management, refused to hear the prorogation aspect of the *McCord* case.⁹ Instead, McCord was permitted to intervene in the Supreme Court proceedings in *Cherry/Miller No 2*,¹⁰ which took place from 17 to 19 September, with judgment handed down on 24 September.

⁵ [2019] CSOH 68.

⁶ [2019] CSOH 70.

⁷ [2019] EWHC 2381 (QB).

⁸ [2019] CSIH 49.

⁹ *McCord et al v Prime Minister and Secretary of State for Exiting the European Union* [2019] NIQB 78.

¹⁰ Along with the Lord Advocate, the Counsel General for Wales, Sir John Major, Baroness Chakrabarti, and the Public Law Project.

C. THE SUPREME COURT'S DECISION

According to the Supreme Court, there were four issues to be decided:

- “(1) Is the question of whether the Prime Minister’s advice to the Queen was lawful justiciable in a court of law?
- (2) If it is, by what standard is its lawfulness to be judged?
- (3) By that standard, was it lawful?
- (4) If it was not, what remedy should the court grant?”¹¹

On justiciability, the court pointed out that, although judges cannot decide political questions, the mere fact that a legal dispute concerns the conduct of politicians or arises out of political controversy was not a sufficient reason for courts to refuse to consider it.¹² Nor did the Prime Minister’s accountability to Parliament justify the conclusion that the courts have no legitimate role to play.¹³ On the contrary, the proper function of the court was to ensure that the prorogation power was used lawfully, and by doing so, it would be giving effect to, not offending against, the separation of powers.¹⁴

In relation to prerogative powers, two kinds of issues could arise. The first is whether a claimed prerogative power exists, and if so, its extent; the second concerns whether a power exercised within its lawful scope is open to challenge on some other basis.¹⁵ The former were clearly justiciable, with authority for the proposition that the limits of prerogative powers are questions of law for the courts stretching back to the *Case of Proclamations*.¹⁶ The GCHQ case had established that questions of the second type could also be subject to judicial review, but with the proviso that the exercise of certain prerogative powers might not be justiciable depending on their nature and subject matter.¹⁷

The current case had been treated in the lower courts as concerning the lawfulness of the *exercise* of the prorogation power. However, according to the Supreme Court, the issue was actually to be understood as relating to its *scope*. Hence, no question of justiciability arose.¹⁸

As regards the standard by which lawfulness was to be judged, there were no statutory limits on the scope of the prorogation power which were relevant in this case. Although the Northern Ireland (Executive Formation etc) Act 2019 had been amended to ensure that Parliament could not be prorogued continuously until after 31 October, the current prorogation had been carefully timed to comply with the Act. Nevertheless, according to the Supreme Court, since prerogative powers are recognised by the common law, they also have to be compatible with common law principles, including fundamental principles of constitutional law.¹⁹

Two constitutional principles were said to be relevant to this case: parliamentary sovereignty and parliamentary accountability. According to the court, the legal effect of parliamentary sovereignty is not limited to judicial recognition of the status of Acts of Parliament as the highest form of law; rather

¹¹ [2019] UKSC 41 at [27].

¹² *Ibid* at [31].

¹³ *Ibid* at [33].

¹⁴ *Ibid* at [34].

¹⁵ *Ibid* at [35].

¹⁶ (1611) 12 Co Rep 74.

¹⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹⁸ [2019] UKSC 41 at [52].

¹⁹ *Ibid* at [38].

the courts have repeatedly protected parliamentary sovereignty from threats posed to it by prerogative powers, and sovereignty would be undermined if the executive could, through prorogation, prevent Parliament from exercising its legislative authority for as long it pleased.²⁰ Similarly, the duty of ministers to account to Parliament for their policies would be put in jeopardy if Parliament could be prorogued indefinitely. This principle was, according to the court, no less fundamental to our constitution than parliamentary sovereignty, and was also one which “has been invoked time and again throughout the development of our constitutional and administrative law”.²¹

Nevertheless, since the prorogation prerogative undoubtedly existed, neither principle could be an absolute constraint on executive power. Instead, the relevant limit was to be expressed as follows: “a decision to prorogue Parliament ... will be unlawful if [it] has the effect of frustrating or preventing, *without reasonable justification*, the ability of Parliament to carry out its constitutional functions” of enacting legislation and scrutinising the executive (emphasis added).²² The application of this standard was a question of fact, albeit the court would “have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution.”²³

Applying that standard, the court concluded that the decision was *not* lawful. To begin with, it considered that, in the exceptional circumstances of an impending fundamental constitutional change in respect of which the government lacked the House of Commons’ support, a five-week prorogation had “an extreme effect on the fundamentals of our democracy”.²⁴ Secondly, the government had failed to offer any reason why such a long prorogation was necessary, given the evidence provided by Sir John Major that only four to six days was normally required to prepare a Queen’s Speech.²⁵

Finally, the court rejected the argument that nullifying the prorogation would breach Article IX of the Bill of Rights 1689. Although the prorogation itself took place in Parliament, it could not sensibly be described as a “proceeding in Parliament”, since it was a decision imposed upon Parliament from outside and which, rather than affecting Parliament’s core or essential business, had the effect of bringing that business to an end.²⁶

D. CRITIQUE

The Supreme Court’s judgment was carefully crafted, on the one hand, to send a strong message to a minority government with a tenuous hold on the confidence of the House of Commons which was exploiting its prerogative powers in – at best – a constitutionally dubious manner, while, on the other hand, seeking to protect itself against accusations of political decision-making. The unanimity of the decision was important to the achievement of this balancing act,²⁷ as was the clever side-stepping of the justiciability problem, the avoidance, through its focus on the effects and justification of the prorogation, of direct criticism of the Prime Minister’s motives, the appeal to well-established judicial authority and constitutional principles, and the stress on the exceptional nature of the case. However, the attempt at depoliticisation was – perhaps predictably – unsuccessful, with the popular reaction to

²⁰ Ibid at [41] – [42].

²¹ Ibid at [46] – [48].

²² Ibid at [50].

²³ Ibid at [51].

²⁴ Ibid at [56] – [58].

²⁵ Ibid at [58] to [61].

²⁶ Ibid at [63] – [69].

²⁷ See C Barnard, ‘The Unanimity in *Cherry/Miller*’, *Judicial Power Project*, 3 October 2019.

the case largely divided along political lines; criticisms of the judges' impartiality and calls for court-curbing, on one side, being met with unseemly hero-worship, on the other.

Criticisms of "political" decision-making are, of course, too simplistic. The court had to take a stance on a contested constitutional question, and had it refused to intervene that would also have involved taking a stance on a contested constitutional question. Nevertheless, the court has chosen an outcome that makes it more rather than less likely that it will be asked to rule on politically contentious questions in the future, and it has done so on the basis of reasoning that is far from unassailable.

To begin with, the approach to review adopted by the court is problematic in several respects. First, its reasoning appears to collapse the distinction between review of the *scope* of prerogative power and review of its exercise, since any constraint on the exercise of power can potentially be recast as a limit on its scope.²⁸ It also appears to reduce non-justiciability to a tautology – the absence of relevant legal limits on power – rather than being an independent constraint on the availability of judicial review deriving from the nature of the power in question. And it becomes a highly malleable standard where, as in this case, the justiciable limits on power may be "discovered" by judges in the common law rather than clearly imposed by Parliament.

Secondly, the incorporation of a "reasonable justification" test into the scope of the prorogation power meant that the court did in fact engage in review of the exercise of the power – and review of a particularly searching kind. Indeed, Sendut argues that *Cherry/Miller No 2* should be understood as the application of a proportionality test as a common law ground of review.²⁹ While the court claimed that the application of the test it articulated was simply a question of fact, it is clear that it actually involved important questions of judgment – both as to the effects of the prorogation on the exercise of Parliament's functions, and the adequacy and weight of the reasons offered. It is contestable whether the impact on parliamentary scrutiny was in fact "extreme" or that the five-week prorogation was not adequately justified. The Divisional Court disagreed,³⁰ as have a number of commentators.³¹ Moreover, the vagueness of the test applied by the court gives little guidance on what will be regarded as reasonable justification, or when the effects of prorogation will be seen as excessive. Is it only an unusually long prorogation that requires justification, or would this also apply to a dubiously-timed prorogation (for example, one which killed a particular Bill, or which quickly followed a previous one, so as to permit, say, Parliament to reconsider a defeated motion, or to speed up the use of the Parliament Act procedure)?

The other problematic aspect of the Supreme Court's judgment is its use of constitutional principles to place limits on the prorogation power. The use of parliamentary sovereignty to argue that the government had a duty not to frustrate, not merely the *expressed will* of Parliament, but also Parliament's *ability to express* that will, was entirely unprecedented. In addition, the court turned previous authority, which had recognised the principle of responsible government *as a justification for judicial restraint*, on its head in order to convert the government's *conventional* duty to account to Parliament into a legally-enforceable obligation.

²⁸ See D Tomkins, 'The *Anisminic* of Justiciability', *Judicial Power Project*, 30 September 2019.

²⁹ J H Sendut, 'The Prorogation Case: Proportionality in All But Name?', UK Const Law Blog, 8 October 2019.

³⁰ [2019] EWHC 2381 (QB) at [57].

³¹ See, e.g., J Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment', *Judicial Power Project*, 28 September 2019, at 6, 15; S Tierney, 'Turning Political Principles into Legal Rules: the Unconvincing Alchemy of the *Miller/Cherry* Decision', *Judicial Power Project*, 30 September 2019; P Yowell, 'Is *Miller (No 2)* the UK's *Bush v Gore*?', UK Const Law Blog, 7 October 2019.

A number of questions arise here. The first is whether it was appropriate for the court to extend legal controls over the executive-Parliament relationship in this way. For many, the decision was legitimate because it supports parliamentary control over the government, rather than displacing it.³² Others, though, question the necessity of judicial intervention, pointing to existing legal and political checks on abuse of the prorogation power which the Supreme Court dismissed, without explanation, as offering “scant reassurance”.³³ Indeed, a key feature of the exceptional constitutional circumstances in which we find ourselves is the fact that Parliament *has chosen not to* exercise its key control over the executive – namely to deprive it of office by passing a vote of no confidence. In addition, it ought to be recognised that, although the court presented its analysis of the executive-Parliament relationship as being entirely orthodox,³⁴ it was in fact taking sides in a dispute about the proper understanding of that relationship.³⁵ In so doing, it arguably failed to recognise the important tensions arising from the constitutional fusion of executive and legislative authority – a fusion famously described by Bagehot as the “efficient secret” of the constitution.³⁶

The nature of the constitutional order articulated and defended by the court is also problematic in other ways. While judges in this and other Brexit-related cases³⁷ have been creative in upholding the rights of Parliament, they have been unwilling to accept constitutional recognition claims made by other actors – the authority of people in the referendum, the special status of Northern Ireland guaranteed by the Good Friday Agreement, or the rights of devolved institutions under the Sewel Convention. The emerging judicial view of the constitution is, then, a rather conservative one, at odds with the increasingly plural understandings of constitutional legitimacy being articulated elsewhere. At the same time, the new interpretation of parliamentary sovereignty advanced in *Cherry/Miller No 2*, as a doctrine with substantive and not merely formal implications, may have radical implications as a cover for, rather than a brake upon, judicial constitutional activism.³⁸

E. CONCLUSION

Clearly, we are not living in normal constitutional times. Multiple constitutional understandings have been upset since the EU referendum, and it remains to be seen what Brexit’s lasting constitutional effects will be. It would, though, be ironic in the extreme if one legacy were to be a further enhancement of the constitutional role of judges in the name of defending parliamentary democracy.

³² See, eg, C Gearty, ‘The Supreme Court Judges are Oiling the Democratic Machine, Not Telling It What to Produce’, *LSE Brexit Blog*, 25 September 2019; A Young, ‘Deftly Guarding the Constitution’, *Judicial Power Project*, 29 September 2019.

³³ [2019] UKSC 41 at [43].

³⁴ See *ibid* at [55].

³⁵ See, eg, D Howarth, ‘Westminster versus Whitehall: Two Incompatible Views of the Constitution’, *UK Const Law Blog*, 18 April 2019; M Loughlin, ‘The Case of Prorogation’, *Judicial Power Project*, 15 October 2019, 15 – 18.

³⁶ W Bagehot, *The English Constitution* (2nd edn, 1873) 48.

³⁷ See also, *Miller No 1*, [2017] UKSC 5; *Wightman v Secretary of State for Exiting the European Union* [2018] CSlH 62; *Reference Re The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

³⁸ Cf the *Continuity Bill Reference* ruling that the Scottish Parliament could not seek to condition the exercise of Westminster’s legislative power.