

Commentary

## MILLER 2: A POLITICAL DECISION OR A SAVIOUR OF THE UK CONSTITUTION?

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### I. Introduction

The simple outcome of *Miller 2* is that the Executive lost, and Parliament returned to work. However, the impact of the judgment on the UK constitutional principles of relative separation of powers and judicial activism is arguably far reaching has led scholars to debate at length the Supreme Court's decision.

On the one hand, Loughlin<sup>2</sup> views the decision as politically motivated, while on the other, Elliot<sup>3</sup> views the decision as upholding the basic constitutional principles. I agree with Elliot that the Supreme Court's decision is in line with the basic principles of the UK uncodified constitution. I will cover five relevant constitutional principles that support Elliot's view: separation of powers, Parliamentary sovereignty, Bill of Rights, justiciability and rule of law. Before concluding, I shall highlight areas where the SC decision could have been drafted better for both Whitehall and Westminster.

### II. Separation of Powers

The Supreme Court did not shy away from discussing<sup>4</sup> the constitutional principle of the separation of powers, stating: "Under the separation of powers, it is the functions of the courts to determine them." This establishes the judiciary authority in defining the separation of powers.

The SC had set a specific two step test<sup>5</sup>, which we could name the *Miller 2* test. The prorogation is unlawful if it is without reasonable justification which frustrates Parliament's ability to carry out its constitutional functions. If we break the test into two parts, the frustration part is undisputable, however, the justification or lack of it is. The standard applied to this case is that if "...there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9<sup>th</sup> or 12<sup>th</sup> September until 14<sup>th</sup> October... It follows that the decision was unlawful."<sup>6</sup>

This leads us to the next level of analysis, which is: does the Executive require a justification? Is it the judiciary's constitutional role to question the Prime Minister's reasons for prorogation? While I appreciate Loughlin's argument on the politics of *Miller 2*, I wish to emphasise the SC

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<sup>1</sup> [2019] 3 W.L.R. 589

<sup>2</sup> Martin Loughlin, 'The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court' (*Policy Exchange*, 2019) <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf>> accessed 1 March 2020.

<sup>3</sup> Mark Elliot, 'The Supreme Court's judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?' (*Public Law for Everyone*, 24 September 2019) <<https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/>> accessed 1 March 2020.

<sup>4</sup> *Miller 2* (n 1) [36]

<sup>5</sup> *Ibid* [50].

<sup>6</sup> *Ibid* [61].

description: “This was not a normal prorogation.”<sup>7</sup> The prorogation would have stopped the elected MPs from debating Brexit, a topic that was the main British news headline until coronavirus started in February 2020. As Bagehot<sup>8</sup> puts it, an Executive that is free on matters its ruling classes will not hear about is the ‘most dull’ government.

McHarg<sup>9</sup> claims that the SC has failed to recognise the fusion between the Executive and Parliament. This is what Bagehot famously referred to as the ‘efficient secret’ of the constitution. The failure of fusion in *Miller 2* could have arguably been caused by the polarity of both the Executive and a divided Parliament on Brexit. There was arguably no fusion in this case and the third side of the UK power triangle needed to act.

Bagehot<sup>10</sup> uses an interesting expression when he says: “The mode in which the regulating wheel of our constitution produces its effect is plain”. If the UK constitution is a wheel, who would sit in the centre of the wheel after *Miller 2*? I would say none of the three powers.

Leyland<sup>11</sup> argues that the British Government is formed from within Parliament. This makes the separation of powers between the Executive and Parliament a theoretical concept. However, this depends if there is a majority government. I am inclined to agree with Leyland that the UK version of the separation of powers is “an untidy concept.”<sup>12</sup> Unlike the USA constitution that is prescriptive on what needs to be done, by who and how, the UK constitution is somehow relatively vague.

The decision of *Miller 2* could be seen as a message not only to the Executive but also to MPs. The message could be interpreted as: if you don’t act within the powers granted by the law, the judiciary will intervene in separating the powers. However, judicial review is not self-initiated, as in other jurisdictions, and a member of the public needs to make an application for it to happen. This in turn means that the UK judiciary review will always be reactive rather than proactive. Similarly, Parliament legislation could also be seen as reactive as it usually looks to the Executive to initiate bills for it to consider. Some academics such as Lord Bryce argued that the decline of the legislature is due to the effects of the party and its influence.<sup>13</sup> However, The Constitutional Reform Act 2005 helped reinforce the separation of powers and post 2009 the SC judges no longer have the right to sit in the House of Lords.<sup>14</sup> Thus, separation of powers’ public law reform is happening but at a slow rate.

### III. Parliamentary Sovereignty

The second principle is Parliamentary sovereignty, which opponents of the SC ruling argue it has been undermined by *Miller 2*. Loughlin argues that the SC has engaged in a hypothetical analysis in order to justify extending its power to constraining the prerogative power by reference to the sovereignty principle. The SC analysis is not hypothetical because if Parliament can’t meet to debate and legislate, it cannot be sovereign.

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<sup>7</sup> Ibid [56].

<sup>8</sup> Walter Bagehot, *The English Constitution* (1st edn, Longmans 1915).

<sup>9</sup> Aileen McHarg, ‘The Supreme Court’s prorogation judgment: guardian of the constitution or architect of the constitution?’ (2020) 24 *Edinburgh Law Review* 88.

<sup>10</sup> Paul Smith, *Bagehot: The English Constitution* (1st edn, Cambridge University Press 2001).

<sup>11</sup> Peter Leyland, *The Constitution of the United Kingdom A Contextual Analysis* (3rd edn, Hart Publishing 2016).

<sup>12</sup> Ibid 82.

<sup>13</sup> Philip Norton, ‘Parliament: the best of times, the worst of times’ in Jeffery Jowell and Colm O’Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019).

<sup>14</sup> Smith (n 10).

*Jackson*<sup>15</sup> provides some clarification on the court's application of the principle of Parliamentary sovereignty. Lord Steyn states Dicey's concept of pure and absolute supremacy of Parliament is now out of place<sup>16</sup>, however, he maintains that Parliamentary sovereignty is still the general principle of the UK constitution. He then makes a bold statement that the judges created this principle. This statement indicates growth in judicially developed common law constitutionalism. Lord Hope<sup>17</sup> uses the term 'qualified' supremacy of Parliament. Both Lords statements reflect the current position of the sovereignty being qualified and not absolute. *Miller 2* further confirmed this position. However, could the Parliament ignore the PM prorogation, without the *Miller 2* judgment? If the Parliament is absolutely sovereign, could it resist the Executive decision without an Act? The answer is no, as the UK has a system of balance and checks between the three powers.

Caird<sup>18</sup> analysis shows that the Westminster view of the UK absolute Parliamentary sovereignty has been reinforced by the SC judgment. He predicts this may not be the case in the future if there is to be a majority government which in turn would reduce the centrality of Parliament and potentially ignite 'constitutional injustice'. This refers back to the idea of 'elective dictatorship' raised by Lord Hailsham in 1976. Elective dictatorship refers to Executive dominance which happens when Parliament is dominated by the Executive. This makes it arguably easier for the Executive to push its own agenda on the legislator.

In *Miller 2*, the SC confirmed Parliamentary Sovereignty by leaving it to the Speaker of the House of Commons and the Lord Speaker to take the next steps to meet and follow the Court's ruling. It further emphasized that it is not for the Court to get involved in this proceeding of Parliament. This makes one assume the Court wanted to adhere to the orthodox view of Dicey that Parliament is sovereign, and no one is above the law, including the Prime Minister.

I tend to agree with Young that it is better to describe "whatever the Queen-in-Parliament enacts as a statute is law"<sup>19</sup> as a component of the rule of recognition rather than a rule of Parliamentary sovereignty. The rule of recognition concept by Hart is observing the legal system officials' actions. Building on this view, Young establishes that both the legislature and the courts share sovereignty in relation to constitutive rules and neither has ultimate power. This type of analysis places more emphasis on constitutive rules that are not solely in the hands of the Parliament. This counters Loughlin's argument that the Parliamentary Supremacy has been undermined by *Miller 2* decision because the constitutive rules need both the courts and the Parliament. Furthermore, Tierney<sup>20</sup> makes the point that Parliament could have constrained the power of the Executive to prorogue Parliament through legislation. I think this argument is theoretical and goes back to the essence of the UK Parliament representing the Executive and the whip system which would possibly stop legislation against the PM's declared ideas.

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<sup>15</sup> [2006] 1 A.C. 262.

<sup>16</sup> Ibid [102].

<sup>17</sup> Ibid.

<sup>18</sup> Jack Simson Caird, 'The Supreme Court and Parliament: The Constitutional Status of Checks and Balances' (UK Constitutional Law Association Blog, 27 September 2019) <<https://ukconstitutionallaw.org/2019/09/27/jack-simson-caird-the-supreme-court-and-parliament-the-constitutional-status-of-checks-and-balances/>> accessed 1 March 2020.

<sup>19</sup> Alison L. Young, 'Sovereignty: Demise, afterlife, or partial resurrection?' (2011) 9 International Journal of Constitutional Law 163.

<sup>20</sup> Stephen Tierney, 'Prorogation and the Courts: A Question of Sovereignty' (UK Constitutional Law Association Blog, 17 September 2019) <<https://ukconstitutionallaw.org/2019/09/17/stephen-tierney-prorogation-and-the-courts-a-question-of-sovereignty/>> accessed 2 March 2020.

#### IV. Bill of Rights

Turning to the third argument against the SC's decision which is the alleged violation of the Bill of Rights of 1689. The Bill established the supremacy of Parliament over that of the Kings.<sup>21</sup> Similarly, in 1215 Magna Carta was drawn up to put limits on the royal power. From the case of *Proclamations*,<sup>22</sup> we can see that the limits of prerogative powers have been debated since 1610. The essence of the case is the King has no prerogative, but that which the law of the land allows him. This counters Loughlin's argument in which he believes that the SC has unsettled the principle of granting Royal Assent being equivalent to a proceeding in Parliament and that a Court is obliged to accept the authority of Parliamentary Acts. Loughlin's argument here weighs on the Royal Assent which, according to Bingham,<sup>23</sup> is now a mere formality. The second aspect of the argument is also flawed as the SC didn't reject Parliamentary authority but rather reinforced it.

Finnis<sup>24</sup> quotes Article 9 of the Bill of Rights: "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament". It can't be claimed that the decision to prorogue Parliament was made in Parliament. The argument that the Crown's actions in Parliament are proceedings in Parliament need to be taken in context. The Crown provides a source of prerogative power, but is the Prime Minister the Crown? More importantly, if we focus on the wording 'Place out of Parliament' in Article 9, we will find that this also includes the Executive and not just the courts. Accordingly, Finnis has selected part of Article 9 and ignored an important part of the article in reaching his conclusion.

#### V. Justiciability v Juristocracy

Turning to the principle of justiciability, *Miller 2*<sup>25</sup> raises the question of what are the limits of justiciability under the UK constitution? Loughlin argues that prorogation is not justiciable. In *Cherry*,<sup>26</sup> the Court made a link between the sovereignty of Parliament, the accountability of the Executive and the rule of law to reach a decision. It is arguable that the power to prorogue is justiciable and if it was not that would be against the rule of law. This is because the judiciary has a constitutional power to review if the power to prorogue is being used properly. As the government could not show why it wanted to prorogue Parliament, this equated to stopping Parliament from holding the Executive to account.

One of the arguments of Finnis<sup>27</sup> is a convention is non-justiciable while law is. The counter argument to this what if the convention has not been tested in the past where it neared an area of law. However, I do agree with Finnis that the Court didn't provide a legal time limit to the period of prorogation. Perhaps the SC wanted to leave this to Parliament to decide or legislate. Another possible reason is defining a maximum prorogation period may go against the fluidity of the UK constitution.

Further to scholar's view on constitutionalism ensuring that government's power is legally limited, Alberts<sup>28</sup> argues that this helps make democracy work. The action of the judges can be

<sup>21</sup> Leyland (n 11).

<sup>22</sup> (1610) 77 E.R. 1352.

<sup>23</sup> Tom Bingham, *The Rule of Law* (1st edn, Penguin Group 2011).

<sup>24</sup> John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment' (*Policy Exchange*, 2019) <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>> accessed 1 March 2020.

<sup>25</sup> [2019] 3 W.L.R. 589.

<sup>26</sup> [2019] C.S.I.H. 49.

<sup>27</sup> Finnis (n 24).

<sup>28</sup> Susan Alberts, 'How Constitutions Constrain?' (2009) 41 *Comparative Politics* 2: 127-43. <[www.jstor.org/stable/40599206](http://www.jstor.org/stable/40599206)> accessed 22 March 2020.

justified as not only helping democracy work but ensuring it is not overtaken by the Executive. This applies to *Miller 2* as it stopped the MP from proroguing Parliament.

The SC referred to *Entick v Carrington*<sup>29</sup>, in which the judgment states: “it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject.”<sup>30</sup> This ruling demonstrates that judicial activism existed as far as 1765 where the judges wanted to end and did end the warrants granted by the Secretary of State.

An alternative view to this is that we are experiencing ‘Juristocracy’, as described by scholars as the growth of judicial powers. However, we need to acknowledge that this judicially developed ‘common law constitutionalism’ falls under the substantive approach of the rule of law which is the next principle to analyse.

## VI. Substantive Rule of Law & Accountability to Parliament

Turning to the fifth principle; accountability to Parliament, McHarg<sup>31</sup> believes that the SC has sided with Parliament against the Crown and used ‘considerable creativity’ in acting as the guardian of constitutional values. However, I think we need to bear in mind that Parliament may not be viewed by the public as its guardian. In 2009, a poll found that only one in five people trust MPs to tell the truth.<sup>32</sup>

On the other hand, Monaghan<sup>33</sup> argues that the decision of the SC could be viewed as one that protects the principle of Parliamentary accountability which underpins the political constitution. This is particularly important when we consider the rule of law basic principle that no one is above the law. As Hobbes said long time ago, on every point, there must be a supreme authority.<sup>34</sup> Unlike the American system, where the President can veto a law, he does not like,<sup>35</sup> the Prime Minister does not have such powers. Only Parliament can repeal an act. However, when the Prime Minister tried to prorogue the Parliament, he was in a way vetoing it from passing new bills.

It is important to ask whom do the Members of Parliament represent; the public or the party? This leads to concluding that the dispute, in *Miller 2*, is not between Parliament and the Executive, nor Parliament and Judiciary, but rather between the Executive and the Judiciary.

Monaghan<sup>36</sup> uses a valid analogy in seeing the prerogative as Latin, by which he means no new powers can be created. This explains the limits of power of prorogation whether it is under or over inclusive. In *Entick v Carrington*, it was said at the end of the judgment “tyranny is better than anarchy, and the worst Government better than none at all.”<sup>37</sup> The second part of the sentence applies hundreds of years later to collapsed states that we have seen in recent times in the Middle East, which emphasise the importance of rule of law for a State to function.

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<sup>29</sup> [1765] 95 E.R. 807

<sup>30</sup> Ibid [283].

<sup>31</sup> McHarg (n 9).

<sup>32</sup> Ipsos, ‘Ipsos MORI Expenses Poll for the BBC’ (2009) <<https://www.ipsos.com/ipsos-mori/en-uk/ipsos-mori-expenses-poll-bbc>> accessed 4 April 2020.

<sup>33</sup> Chris Monaghan, ‘The prorogation litigation: “which was as if the Commissioners had walked into Parliament with a blank piece of paper”’ (2019) *Coventry Law Journal*, 2019, 24(2), 7-24.

<sup>34</sup> Smith (n 10).

<sup>35</sup> Ibid.

<sup>36</sup> Monaghan (n 33).

<sup>37</sup> [1765] 95 E.R. 807 [283].

## VII. Improvement to the Judgment

There are areas in the judgment that could arguably have been worded better to allow both Whitehall and Westminster views to be more aligned, if possible.

The SC reasoning shows some contradictions. On the one hand, the SC<sup>38</sup> stated it is aware of the importance of having the Prime Minister pressurise the European Council to agree a deal by showing a no deal is an option for which he didn't want Parliament to stop him. On the other hand, the Court says there was no reason for him to prorogue Parliament for five weeks.<sup>39</sup> The PM was applying the Game Theory in his negotiations and to say there is no reasonable justification for the prorogation is not entirely true.

The SC decision did qualify the judgment by using the words 'without reasonable justification.' This leaves the door open for potentially not taking the same decision if the Executive had given a 'reasonable justification' as to why it wanted to prorogue Parliament. This could be interpreted as going beyond reviewing the exercise of law and judges exceeding their constitutional powers.

Finnis<sup>40</sup> suggests that the next Parliament may reverse the SC judgment by exercising its law-making authority. I believe this would create a standoff between the Judiciary and Parliament. Two wrongs do not make right, and if the SC was wrong in its judgment, the answer is not to reverse its ruling. While the judgment is not perfect, it is important to respect it to maintain rule of law and in turn democracy.

## VIII. Conclusion

I concur with Descartes, as quoted by Bagehot, that intense self-examination and reason would progress everything.<sup>41</sup> Perhaps the intense scrutiny by the Supreme Court is in line with Descartes' philosophy and not entirely political.

The decision of the Court is significant and will be debated for years to come. However, it is important to remember that the judiciary decision only stopped the prorogation and didn't stop the Executive from achieving its Brexit strategy. The margins of the separation of powers allow each of the Executive, the Judiciary and Parliament to have relative independence and power within areas that are solely within their jurisdictions.

*Miller 2* reinforced the rule of law and that no one is above the law. The decision should have influenced the Executive's appetite for exceeding its powers, however, the sweeping powers granted to the government under the Coronavirus Act 2020 make this statement questionable.

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<sup>38</sup> *Miller 2* (n 1) [53].

<sup>39</sup> *Ibid* [58].

<sup>40</sup> Finnis (n 24).

<sup>41</sup> Smith (n 10).