

The unconstitutionality of the Supreme Court's prorogation judgment

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Executive Summary

The Supreme Court's judgment in *Miller/Cherry* [2019] UKSC 41 holds that Parliamentary sovereignty needs to be judicially protected against the power of the Government to prorogue Parliament. But the Judgment itself undercuts the genuine sovereignty of Parliament by evading a statutory prohibition – art. 9 of the Bill of Rights 1689 – on judicial questioning of proceedings in Parliament.

The Judgment was wholly unjustified by law. What it protects is not the sovereignty of Parliament, properly so called, but the practical opportunities of each House to pass Bills and scrutinise the Government – all redescribed as the “principle of Parliamentary accountability”. Those constitutionally vital opportunities, and that principle, have been protected for over 300 years, without significant mishap, by constitutional conventions which are policed politically, ultimately by the electorate. In working with the principles of Parliamentary sovereignty and political accountability, our constitutional law has always (partly under the influence of art. 9) distinguished firmly between legal rules (justiciable) and conventions (non-justiciable). The Judgment offers no plausible reason for transferring the conventions about prorogation into the domain of justiciable law.

The reason it does offer for this transformation is that, in some “extreme hypothetical” circumstance, the power to prorogue might be used to frustrate Parliamentary scrutiny of the Government (and what the Judgment miscalls Parliamentary sovereignty). The longstanding constraints on such abuse, in the form of conventions, strict legal preconditions for expenditure on maintaining government, and accountability to the electorate at legally defined intervals, constraints regarded as sufficient for hundreds of years, are suddenly assessed to be “scant reassurance.” In its content (as distinct from its law-creating effect) that assessment of risks is neither legal nor constitutional, but purely political.

Thus the Court suddenly assumes supreme responsibility for the maintenance and preservation of the pivot of the constitutional-political order. It does so without mentioning that it is replacing some main elements of a constitutional settlement that has given effect, for hundreds of years, to certain tried and tested political assessments and judgments. Those were political judgments squarely concerned with what is constitutionally necessary and sufficient to forestall and counteract abuse in the Crown's relationship to the Houses of Parliament and to the electorate.

In relation to the operation of its newly self-bestowed power, the Court says that it involves no more than defining the “boundaries” of the

proroguing power, as distinct from taking over its “mode of exercise”. But the “legal standard” the Judgment invents to define those newly-legal boundaries is immediately deployed to review the mode of exercise. The Judgment collapses the distinction on which it relies.

The Court's misconceived review, in turn, fails to apply the “standard's” main criterion, which looks to the effects of prorogation. The Judgment undertakes no serious review of effects. That would have shown that the impugned prorogation threatened nothing that Parliament could not rectify before the actual prorogation. Instead the Judgment faults the Government for providing no documented and, for the judges, sufficient reason for selecting “five weeks” rather than some lesser period which is not specified by the Judgment.

The Supreme Court's review of the decision to prorogue ignores most of the immediately relevant statutory and political constraints and contextualising factors, and illustrates the ineptitude of judicial forays into high politics. The likelihood that courts will be inept in venturing into the political realm is only one of the grounds for the historic rules of our law that the Judgment defies or rescinds, rules which clearly forbid judicial involvement in questions of high politics and preserved the distinction between conventions and law.

The Judgment should be recognised as a historic mistake, not a victory for fundamental principle. The next Parliament should exercise its authentic law-making sovereignty to reverse the Judgment's misuse of judicial power. But legislation on prorogation, or on the relations of Crown and Parliament more generally, can do little to undo the damage done to our constitutional doctrine and settlement.

Prorogation and parliamentary proceedings

1. The Supreme Court has [ruled](#) that when three Lords Commissioners prorogued Parliament – by reading a royal commission to the Lords and Commons assembled in the House of Lords about 2 a.m. on 10 September (a date undiscoverable from the Judgment) – it was all “unlawful, null and of no effect”, just “as if the Commissioners had walked into Parliament with a blank piece of paper”. In thus impeaching what was self-evidently a proceeding in Parliament, the Court was acting against an Act of Parliament which for over 300 years has been regarded as decisive in defining the constitution of the United Kingdom and the law and conventions (including judicial conventions) governing the highest organs of the realm. That Act is the Bill of Rights 1689, which by article 9 provides that “Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.”
2. The Judgment’s attempt to justify this evasion of the primary and core legal proposition in the set or complex known as “sovereignty of Parliament” – the proposition that Acts of Parliament settle the law for all organs of government – is simple: the proceeding in Parliament on 10 September “cannot sensibly be described as a ‘proceeding in Parliament’”[68]:

It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen’s bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

This is not responsible interpretation.
3. The Judgment mentions [3] that “in theory the monarch could attend Parliament and make the proclamation proroguing it in person” (the last to do so was Queen Victoria in 1854). It holds, in effect, that if she did so, having been advised by the Prime Minister, perhaps within the walls of the Houses, to prorogue the

Houses, her actions and his could be questioned and impeached in court – a court “out of Parliament” – by any voter such as the English plaintiff in this case.

4. The entire Judgment proceeds with complete indifference to another proposition in the “sovereignty of Parliament” complex: Parliament “itself” does not act except by Acts of Parliament, which are enacted (as each such Act recites) “by the Queen’s most excellent Majesty by and with the advice of the Lords..., and Commons, in the Parliament assembled...”. The Crown is an integral part of Parliament. Its assent is indispensable for the very existence of an Act. Its consent, signified by one of the Queen’s ministers, is constitutionally required for certain Bills even to be debated, though this constitutional rule, like others closely related to it, is not justiciable in the courts – a non-justiciability established by reason of that complex of rules, principles and conventions, a complex of which art. 9 of the Bill of Rights is a plain manifestation and enforcer. The Crown’s actions in Parliament are proceedings in Parliament.
5. It is no reply to say, as the Judgment says, that the Crown’s officers in Parliament “have no freedom of speech” and that their actions in Parliament are not “the core and essential business of Parliament” and therefore can be treated – for purposes of settling the boundaries of the courts’ power and litigants’ procedural rights – as not proceedings in Parliament. And the Supreme Court owed us all an answer to the argument put to it in the final submissions of counsel for the Prime Minister and the Advocate General:

In [R \(Barclay\) v Lord Chancellor](#) [2014/5]... the Supreme Court unanimously held that the granting of Royal Assent was a proceeding in Parliament. That is significant because Royal Assent may be granted by Commission, including by the same commission which provides for the prorogation of Parliament. Per Baroness Hale of Richmond at §48: “Nor is the analogy [of assent to Laws passed by the Chief Pleas of the Island of Sark] with Royal Assent to Acts of the United Kingdom Parliament exact: the Queen in Parliament is sovereign and its procedures cannot be questioned in the courts of the United Kingdom.”

So in 2014, in the Supreme Court, actions of the Crown that directly concern proceedings in and of Parliament are procedures of Parliament itself (not merely of the Crown), procedures that, echoing the Bill of Rights, “cannot be questioned in the courts”. But in 2019 they “cannot sensibly be described” as proceedings in Parliament, and can be questioned, impeached for some flaw in their antecedents, and judicially declared to be nullities even when they do take place in – within – Parliament.

6. Still, even citizens who do not know about recent Supreme Court rulings inconsistent with this Judgment, but who can read the Judgment’s “interpretative” excuses for setting aside the Bill of

Rights, will quickly realise that they and their polity are in the hands of judges operating in a way that a plain citizen, or a serious constitutional jurist, would call political. The Judgment is through and through political in its selection of irrelevant facts to record (the Prime Minister's spelling mistakes, each carefully signalled "sic" [18]; the inclusion of Dominic Cummings in circulation of documents [17], [19]; the Prime Minister's statement in Cabinet on 28 August that he was not minded to have a General Election [20]...) and of relevant facts not to record. The facts omitted include: the fact that the Prime Minister's letter to members of Parliament on 28 August was not merely "updating them on the Government's plans for its business in Parliament" [21] but was giving them and the electorate advance notice of intent to seek authority to prorogue; the obviously party-political character of various prorogations mentioned by the Divisional Court's judgment; the great length of various prorogations in what the Divisional Court rightly called modern times...

7. At [55], even the tone and movement of thought may be felt to become somewhat hasty and over-weening. By then the Judgment has set out the factual background, and has transformatively depicted the law, and from [55] onwards it will apply that re-framed law to the facts. But though paras. 55-61 will be looked back upon as coarse-grained and cursory, the Judgment's damage to the whole constitutional order comes less from them than from the previous 25 paragraphs, in which the Supreme Court attempts to refute the Divisional Court's well-reasoned finding that the case was non-justiciable because a matter of high politics.
8. It does so (1) by deploying a theory of "Parliamentary sovereignty" that ignores the constitutional definition of Parliament, (2) by suddenly transforming the historic principle of Parliamentary accountability into a legal principle, for fear of some confessedly "hypothetical" and "extreme" [43] abuse which for centuries has been judged preventable by other existing, non-judicial constraints, and (3) by applying the principles and techniques of modern administrative law to the interactions of the highest constitutional organs, interactions regulated for centuries by constitutional conventions, conventions which our established constitutional law distinguishes from justiciable legal rules.

Judicial control of government

9. The Judgment's cavalier treatment of the Bill of Rights is only a manifestation, and perhaps not the most regrettable, of the Court's treatment of Her Majesty's Government – "the Government", "the executive" – as if it were an administrative body whose acts can all – even at the highest level of interactions between the supreme components of the separation of powers – be subjected to judicial review and scrutiny on just the same basis as a local government planning officer's. At its outset the Judgment [2] gives a pinched, minimising description of what is in fact and in constitutional reality the high and burdensome responsibility of carrying on the government of the United Kingdom on behalf of the free people that has elected its government by electing members of Parliament, a majority or sufficient plurality of whom maintain confidence in the ministers appointed by the Queen on the advice of the Prime Minister. The Judgment, neglecting this, says [2] that while Parliament is not sitting –

The Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits.

Though mentioning in passing that "the central task of governing is for the executive and not for Parliament or the courts" [55], the Judgment in its working parts – in lamentable contrast to the Divisional Court's – ignores the "high politics" involved in democratic governing, at home and abroad: the open horizon of responsibility for the wellbeing of all the people of the realm, in the ceaseless flow of unpredictable events and in the glare of hostile scrutiny in which every word said and deed done by holders of office and their advisers is subject to ruthless misrepresentation.

10. To the existing, established constraints on governing that are imposed by detailed legislation and rules of common law – constraints on agents of the central government as well as of local government, and on judges – the Judgment now adds a new, indeed revolutionary, layer of judicial scrutiny that would unhesitatingly have been rejected by all previous generations of judges back to the Bill of Rights as a violation of the constitutional settlement of 1689, and a threat to the rule of law and the sustainable independence of the judiciary.

11. One implication of that is that now any citizen moved by desire to affect the political future of the country (as this English plaintiff and the Scottish MP claimants unquestionably were) can demand that every communication amongst the Queen's ministers themselves, and of them with their advisers or political or personal associates, be promptly handed over – perhaps within hours or days of their creation or occurrence – to the litigants and their legal advisers and thence, soon enough, to the whole world.
12. Had the Prime Minister been so ill-advised as to tender evidence to the courts about any of these matters, he would have been ordered by this Supreme Court – no one can doubt after reading this Judgment – to attend for cross-examination. This is a transformation of politics, and radically destabilising.

Displacing the political constitution

13. More important, both immediately and in the long term, this Judgment's transformation of our constitutional law and politics is not accomplished in the authentic application of legal rules or legal principles – or even, for that matter, of the relevant conventions and conventional principles of our constitution. There was in truth no unlawfulness (and indeed no violation of constitutionally binding convention) in the advice to prorogue or in the conduct or order of the Privy Council, or of the three Lords Commissioners (including a former Vice-President of the Supreme Court) who gave effect to it.
14. The practical opportunities of each House to pass Bills and scrutinise the Government are redescribed as the “principle of Parliamentary accountability”. Well and good. But those constitutionally vital opportunities, and that principle, have been protected for over 300 years, without significant mishap. The protection has been mainly by way of constitutional conventions which are policed politically, but partly it has been by way of ancillary legislation about many detailed aspects of government (including some aspects of prorogation), and ultimately it is by way of accountability to the electorate. In working with the principles of Parliamentary sovereignty and political accountability, our constitutional law has always (partly under the influence of art. 9) distinguished firmly between legal rules (justiciable) and conventions (non-justiciable). The Judgment offers no constitutionally plausible reason for transforming the conventions about prorogation into rules of law which, being legal, are “by definition” not “political questions” (as the Divisional Court had said, following unbroken precedent) but instead justiciable issues for courts to investigate and oversee.
15. The reason it does offer is that, in some “extreme hypothetical” [43] circumstance, the power to prorogue might be used to frustrate Parliamentary scrutiny of the Government (and what the Judgment miscalls Parliamentary sovereignty). The longstanding constraints on such abuse, in the form of conventions, strict legal preconditions for expenditure on maintaining government, and accountability to the electorate at legally defined intervals, constraints regarded as

sufficient for hundreds of years, are suddenly assessed to be “scant reassurance.” In its content (as distinct from its law-creating effect), that double assessment – first of risks, and then of the degree of need to avert them despite the side-effects of attempting to – is the very heart or core of this Judgment. That core is neither legal nor constitution-based. Like choices by constitution-drafters and legislatures, it is purely political.

16. Thus the Court suddenly assumes supreme responsibility for the maintenance and preservation of the whole constitutional-political order, and does so without mentioning that it is replacing some main elements of a constitutional settlement embodying, for hundreds of years, certain tried and tested political assessments and judgments. Those were political judgments squarely concerned with what is constitutionally necessary and sufficient to forestall and counteract abuse in the Crown’s relationship to the Houses of Parliament and to the electorate. Those political judgments included judgments about the long-term desirability of insulating the judiciary from politics, especially from the Parliamentary politics by which the legislative and executive organs of this political community are kept, and keep each other, in balanced coordination with each other and with the people.
17. Whether it is right or wrong in its own assessments of these risks, costs and benefits, the Court’s well intentioned deployment of them is a plain usurpation of constitution-making responsibility and authority. And the resultant transfer of power is entirely one-way: to itself.

Constitutional change by judicial fiat

18. The Judgment's reasoning about its self-conferred power, and its declaration of nullity, deploy the device that has transformed *administrative law*. In that domain, the device is usually kept just within or near the bounds of tolerability by rules of standing and by fairly frequent legislative adjustment to repair the damage done by excessive judicial review. In the domain of the high politics of the Crown in Parliament, the device buckles under the strain, as will be seen.
19. The device itself is on full display in [52], prepared for by [50]. Here is [50]:
 - 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*. In such a situation, the court will intervene if the *effect is sufficiently serious* to justify such an *exceptional course*.
20. That paragraph completes the Court's basic work of law-making, transforming a constitutional convention into justiciable law, and doing so, in substance, by fiat. To repeat: the operative parts of that judicial law-making are carried through without even advertent to the long-established, long-respected and constitutionally successful distinction between *law* (therefore justiciable) and *convention* (therefore non-justiciable), or to the deep-going reasons for having the distinction (remembered and upheld as recently as *Miller No 1*).
21. And here is the cover-giving device, the card-shuffle by re-description, in [52]:
 - That standard is *not concerned with the mode of exercise* of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the *limits of the power*, marking the *boundary* between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is *by definition one which concerns the*

extent of the power to prorogue, and is therefore justiciable.

22. But the para. [50] “standard”, while declared in [52] to define the power’s legal limits and boundaries rather than its mode of exercise, in fact by its own defining terms (frustrating effect, reasonable justification, sufficiently serious...) requires – or rather empowers! – the courts to examine the exercise and “mode of exercise” while all the time protesting that they are not doing so, and are not making political judgments, and are not usurping the responsibility that the law and the constitution have assigned to others. Judicial review, thus conceived, covers the entire field, at the sovereign discretion of the judges. The Judgment’s first claim, that the boundaries are legal, was a judicial fiat, and now the second claim, that the Judgment merely patrols boundaries, turns out to be a card-shuffle, a fudge.
23. No surprise, then, that the Judgment’s review of the “effects” of the prorogation on the operations of Parliament is, if not simply missing, at best perfunctory and declamatory, indeed rather unmeasured: this prorogation had “an extreme effect on the fundamentals of our democracy” [58]. A political assessment wide open to reasonable doubt. In place of a review and identification of actual effects, we find an examination of the political adviser’s letter, angled to show that she failed to justify the selection of *five weeks* rather than – what? Here the Supreme Court spares itself the responsibility of setting, or even discussing how to set, an alternative period. It omits to factor in what those making the decision knew all too well: (1) Parliament, on the timetable proposed and adopted, could act to defeat the prorogation by legislation or withdrawal of confidence and installation of a new ministry, or both; and indeed, (2) Parliament had already very recently legislated, by the Northern Ireland (Executive Formation etc.) Act 2019 mentioned way back in [20], to ensure that Parliament sat on 9 September and “on one interpretation, no later than 14th October”. The Judgment’s effect is to oblige Parliament to sit at times, and for longer, than it had deliberately chosen to.
24. And all this in the cause of preventing (or providing “reassurance” [43] against) a purely hypothetical threat to Parliamentary sovereignty by a purely hypothetical prorogation by an executive seeking to “prevent Parliament from exercising its legislative authority for as long as it pleased” [42]! The resultant usurpation by the Court of the political judgment and decision – the mode of exercise of the power to prorogue in the non-hypothetical political and legal circumstances of August/September 2019 – replaces the judicial application of the “standard” that [50] had purported to articulate as a newly justiciable rule of law defining the power’s boundaries.
25. For, once again: even if the “standard” were constitutionally appropriate in its guise as law not convention, any authentic

application of the standard would have required the Supreme Court to do what [50] makes central. It would have had to consider the real-world effects of the prorogation, and the justifiability of incurring them, in all the circumstances. It would have had to consider the effects of its pre-announcement; of its starting date; of its retention of time for parliamentary scrutiny, for replacement of the ministry, and for legislation to prevent prorogation and indeed to prevent the Government achieving its policies for delivering on a referendum that the Judgment steels itself to say “has been treated as politically and democratically binding” [7]; and of its ending date. No such examination was forthcoming, or ever attempted or intended.

26. Thus the Judgment's protestation in [1] that it is “one-off” is entirely hollow. A convention has been transmuted into law by fiat, or revolution, with no explanation of the constitutional basis for doing so. And there is now no category of high governmental responsibility and authority in any field, foreign or domestic, that is not open to litigious scrutiny as to every aspect of its mode of operation, on the pretext that any unreasonableness in the mode of exercise of the responsibility results – if a judge or enough judges choose to treat it thus – in crossing that authority's “legal” boundaries.
27. To give some savour of plausibility to all this, the Supreme Court marshals a few constitutional materials of scant relevance: a few old, great and sound cases about the established and defined legal rights of subjects (*Proclamations*; *Entick v Carrington*), and more recent, and questionable, rulings about interpretation of statutory grants of ministerial discretion (the 3:2 decision in *Fire Brigades Union*). Its own [dubious](#) 8:3 ruling (*Miller No 1*) about changing “sources of law” is now inflated beyond credibility into the claim [57] that “a fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019.” That is and remains a [misinterpretation](#) of the European Communities Act 1972, and thus of the constitutional implications of leaving the EU and repealing the 1972 Act. But mistaken or not, the Judgment's statement, just quoted, forgets that Parliament has already made full provision to carry through the so-called constitutional change, by repealing the 1972 Act. On the face of things, the only remaining question for Parliament is whether that statutorily agreed change is to come finally into effect with the accompaniment of a “deal” or without one – a difference of considerable or perhaps even great economic and political importance, no doubt, but on any view not a constitutionally fundamental difference.
28. Be that as it may, the function of the Judgment's talk of constitutional change is to lend some plausibility to the proposition that the exceptional circumstances called (legally called!) for Parliament to be more continuously in session than this prorogation would allow – if (as the Judgment fails to note) the prorogation were not

set aside by parliamentary means, by legislation or by withdrawal and transfer of confidence. With surprising inattention to the implications of what it is saying and not saying, the Judgment goes on [57]:

... that Parliament, and in particular the House of Commons as the democratically elected representatives of the people, has a right to have a voice in how that change comes about is indisputable. And the House of Commons has already demonstrated, by its motions against leaving without an agreement and by the European Union (Withdrawal) (No 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government at this time and that it is especially important that he be ready to face the House of Commons.

But in “demonstrating” all that – as readers will notice more quickly than the Judgment’s authors – the House of Commons had already demonstrated, by the time the case was argued in the Supreme Court, that the actual prorogation was carefully timed to leave its members free and able to take such measures as they saw fit, to protect the interests “of Parliament” and “its” or their concerns about the referendum’s outcome, about “the Constitution”, and about other aspects of the conduct of the Government.

29. And what has any of that to do with the *law* of the constitution as it existed until the day of this judgment? There was nothing (leaving aside the high politics of the Scottish decision) that justified the Supreme Court in taking and hearing this appeal against the Divisional Court, let alone determining it in the way it has. The whole “Westminster” system of constitutional democracy (in which art. 9 is one causally important element among others) has a well-established – and [widely and successfully exported](#) – capacity for political (and legislative) self-regulation and for enforcement of conventions and constitutional proprieties (not infrequently by legislation) without judicial intervention on the basis of “standards” unrelated to the hitherto established law about the conduct of those highest organs of the democracy.

Conclusion

30. So the Judgment is more a mistake than a victory for fundamental principle. Its consequences will be far indeed from “one-off”, or even “exceptional”. No doubt the next Parliament might appropriately exercise its authentic law-making sovereignty to reverse the Judgment’s misuse of judicial power. But legislation on prorogation, or on the relations of Crown and Parliament more generally, or on the limits of justiciability, can do little to undo the damage done to the rule of law, and to our constitutional doctrine and constitutional settlement. That could only be undone by a change of heart, a reconsideration of what it is to exercise a truly judicial power.



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