# *Britain's current constitutional crisis: The Supreme Court's judgement on the prorogation of Parliament*

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Sumario

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## Introduction

For many people the British Constitution is an abstract but dynamic creature which lives and works in the background of our country's political, social and justice system. The lack of understanding with regards to our Constitution, particularly anything broader than the fact that it is «unwritten», has encouraged some misconceptions about its operation and how it intertwines with our three pillars of democracy: the legislature, executive and judiciary. In today's fraught political framework, the recent Supreme Court judgement on the prorogation of Parliament (Cherry and Miller N.º 2)[1] has generated a diverse range of strong reactions, not only towards the judgement itself, but also towards the implications the decision will have on the Constitution. At a time when the country is divided into «Leavers» and «Remainers», it is unsurprising that the judgement has generated yet another division of public and scholarly opinion; was this a legal question or was it purely a political one? While many believe that the Supreme Court's judgement is an

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1 R (on the application of Miller) *v.* The Prime Minister, Cherry and others *vs*. Advocate General for Scotland [2019] UKCS 41.

illustration of improper judicial overreach, including the Prime Minister himself, this essay seeks to establish that a lack of deeper recognition of the multifaceted character of the constitution has resulted in the mistaken belief that the Supreme Court «was wrong to pronounce on what is essentially a political question at a time of grave controversy»[2].

## 1. Prerogative powers & The Courts

Those who oppose the Supreme Court's decision have plainly stated that the issue of proroguing parliament was a controversy for politicians to settle, not the courts. As stated by the Prime Minister, judges should «think twice about entering the political arena»[3]. However, treating the central issue as non-justiciable because it is a «political» question is a stark oversimplification of the association between prerogative powers and the law, in addition to showing an incompatibility with the «tenor of modern case law in this area»[4]. The relationship between the prerogative powers of the Crown and the courts is not a novel concept, Sir Edward Coke famously stating in the seventeenth century that, «The King hath no prerogative but that which the law of the land allows him»[5]. Subsequently, the conveyance of the prerogative powers from the Monarch to the government depended upon the maintenance of two relationships: the government and Parliament on the one hand, and the government and the *courts* on the other[6]. Until recently, the interaction between the

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2 Hansard: «Prime Minister's Update», Hansard, UK Parliament, 25-09-19, https://hansard.parliament.uk/Commons/2019-09-25/debates/AD2A07E5-9741-4EBA-997A-97776F80AA38/PrimeMinisterSUpdate.

3 Ekins, Richard: «Judgement day: the danger of courts taking over politics», *The Spectator*, 21-09-19, https://www.spectator.co.uk/2019/09/judgment-day-the-danger-of-courts-taking-over-politics/.

4 Elliot, Mark: «Prorogation and justiciability: some thoughts ahead of the Cherry/Miller (N.º 2) case in the Supreme Court», Public Law for Everyone, 12-09-19, https://publiclawforeveryone.com/2019/09/12/prorogation-and-justiciability-some-thoughts-ahead-of-the-cherry-miller-no-2-case-in-the-supreme-court/.

5 *Case of Proclamations*, 1611 12 Co. Rep. 74.

6 Hadfield, Brigid: «Judicial Review and the Prerogative Powers of the Crown» in Maurice Sunkin and Sebastian Payne, *The Nature of the Crown: A Legal and Political Analysis.* Oxford University Press. 1999.

prerogative and the courts was a relatively modest one; judicial review was limited to deciding whether a particular power exists[7] but «[the] law would not inquire into the manner in which that prerogative was exercised…»[8]. Case law emerging in the 1960s exhibited a turning point in redefining the relationship between the prerogative powers and the courts in that sense. As Ekins cynically notes, «the rot has been setting in for years»[9].

Although the earlier cases of *ex* parte Lain[10] and Padfield[11] instigated the emergence of an «interventionalist judicial attitude»[12], the GCHQ[13] case is frequently quoted as the pivotal case in UK constitutional law (until now perhaps), which reformulated the scope of judicial review with regards to prerogative powers. While earlier cases had based the source of the prerogative power as being the determinative factor regarding reviewability, their Lordships found an alternative criterion in the notion of *justiciability*. Lord Roskill listed a number of powers which were not reviewable by the courts because, for example, «the courts are not the place wherein to determine whether (…) Parliament dissolved on one date rather than another»[14]. This was the basis for the Prime Minister's argument in the present case. However, the problem with this is two-fold.

Firstly, there is no such thing as a non-justiciable prerogative, rather there are issues arising from the exercise of the prerogative which the courts may consider *themselves* unable to adjudicate[15]. Thus, since the formulation of justiciability is a judge-made constraint which the court had set themselves by their own standards, they should be entitled to alter it if they consider the

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7 Elliot, Mark and Thomas, Robert: *Public Law*. 2.nd Ed. Oxford University Press. 2014.

8 Hanratty *v.* Lord Butler (1971) 115 (1) s.j. 386.

9 *Ibid*., 3.

10 R *vs*. Criminal Injuries Compensation Board, *ex parte* Lain [1967] 2 Q.B. 864.

11 Padfield and others *v.* Minister of Agriculture, Fisheries and Food [1968] UKHL 1.

12 Hadfield: op. cit.

13 Council of Civil Service Unions *v.* Minister for the Civil Service [1984] UKHL 9

14 *Ibid*., at 418.

15 Elliot and Thomas: op. cit., p. 513.

exercise of the prerogative to be a suitable or proper issue to be made the subject of a legal decision[16]. This is of course the very nature of the common law within our legal system[17]. Furthermore, the doctrine of non-justiciability, as Elliot notes, is concerned with «limiting judicial involvement in the evaluation of the exercise of governmental powers whose use is capable of giving rise to questions that are unsuited, under the separation of powers, to analysis by courts on legal grounds»[18]. However, the nature of the questions raised in the present case concern the scope of the prerogative powers, raising legal questions about how these legal powers can and cannot be lawfully used. Not about the nature or the source of the power and what its legal boundaries are[19].

Secondly, Lord Roskill's view presumed that there were certain prerogative powers which would never raise justiciable issues. It is almost certain that when Lord Roskill gave his judgement in GCHQ, he would have thought it unfathomable that a mundane power used for «good housekeeping»[20] would have caused such constitutional controversy. Whilst proroguing parliament may have been looked upon as being non-justiciable and lying «deep in the political field»[21] at the time of GCHQ, this is not to say that: first, everything to do with proroguing parliament was non-justiciable and second, that it would never enter the judicial field at any time in the future[22]. Lord Roskill certainly could not have predicted the political environment our country finds itself in today. As Harris notes, an advantage with using the notion of justiciability as a tool of analysis is that «it invites a "big picture" constitutional appreciation of whether or not the decision is an appropriate one for the

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16 Marshall, Geoffrey: *Constitutional Conventions.* Oxford University Press. 1984, p. 210.

17 White, Robin; Willock, Ian and MacQueen, Hector: *The Scottish Legal System.* 5.th Ed. Bloomsbury Professional. 2013, p. 297.

18 Elliot: op. cit.

19 *Ibid*.

20 Twomey, Anne: «When is prorogation 'improper'?», *LSE Blogs*, 19-09-19, https://blogs.lse.ac.uk/brexit/2019/09/19/when-is-prorogation-improper/.

21 R (Wheeler) *v.* Prime Minister [2008] EWHC 1409.

22 *Ibid*., 15.

courts»[23]. Thus, the main problem with using GCHQ as precedent is that it prioritises «medieval» categories over modern issues and standards[24].

## 2. The rule of law & separation of powers

From a constitutional perspective, Cherry and Miller (N.º 2) is seminal in reinstating fundamental constitutional principles and yet entirely ordinary in the sense that it only reassesses what is already understood as well-established British public law, such as the doctrine of the rule of law[25]. Perhaps the controversial political context in which this judgement finds itself has compelled people to believe the decision is it is somewhat more provoking than the reality of its implications. The rule of law is a well understood component of the British constitution both as a political principle and a legal one. At the same time, there is some scholarly and judicial disagreement about what the rule of law actually means. It is a rather elastic device which Shklar argues to be «one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians»[26]. In a more evaluative study, Bingham breaks the rule of law into eight sub-rules, the sixth one being «ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers»[27]. More simply, the rule of law informs political discourse and determines the validity of government action while at the same time making them answerable to the courts, who can police the boundaries of such governmental

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23 Harris, B.V. «Judicial Review, Justiciability and the Prerogative of Mercy» in *Cambridge Law Review*. Vol. 62. 2003, 631.

24 Poole, Thomas: «The Supreme Court should repair the tear in the fabric of the constitution that prorogation has opened up», LSE Blogs, 17-09-19, https://blogs.lse.ac.uk/brexit/2019/09/17/the-supreme-court-should-repair-the-tear-in-the-fabric-of-the-constitution-that-prorogation-has-opened-up/.

25 Elliot: op. cit.

26 Shklar, «Political Theory and the Rule of Law» in Allan C. Hutchinson and Patrick Monahan, *The Rule of Law: Ideal or Ideology.* Carswell. 1987, p. 1.

27 Lord Bingham: «The Rule of Law» in *The Cambridge Law Journal*. Vol. 66, N.º 1. 2007, pp. 67-85.

power. To be able to apply this to the present case, it is necessary to conduct a brief inquiry as to the motives behind such an unprecedentedly long prorogation. The Supreme Court somewhat democratically avoided this point by approaching the issue using the «effect-test»[28] rather than considering the purpose behind the Prime Minister's advice to the Queen. However, in scrutinising the Prime Minister's motives, something which the court was unable to do, a clear incompatibility between his actions and the rule of law becomes very apparent.

The Prime Minister's desire for a swift and successful Brexit is common knowledge after he recently stated he would «rather be dead in a ditch, than agree a Brexit extension»[29]. To be able to fulfil his claim to «get Brexit done», his minority government decided to pursue a no-deal Brexit policy. As such, it became clear that the unprecedented period of a five-week prorogation was a scheme to try and avoid Parliamentary scrutiny of the executive by purposely avoiding the Brexit deadline of the 31st of October as previously fixed by the European Council. This was particularly obvious, given that there was (and still is) disagreement in the House of Commons about the terms by which the United Kingdom should exit the EU. Gearty calls this the «Johnson Factor»; asserting that the prorogation had nothing to do with Brexit, while at the same time treating «that very same prorogation as a vital part of his Brexit strategy»[30]. This «weaponization»[31] of prorogation as a method of gaining political advantage for the purposes of your party's own

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[28] Khaitan, Tarun: «The Supreme Court ruling: why the effects test could help save democracy (somewhat)», *LSE Blogs*, 24-09-19, https://blogs.lse.ac.uk/brexit/2019/09/24/the-supreme-court-ruling-why-the-effects-test-could-help-save-democracy-somewhat/.

[29] Proctor, Kaye and Walker, Peter: «Boris Johnson: I'd rather be dead in a ditch than agree Brexit extension», *The Guardian*, 05-09-19, https://www.theguardian.com/politics/2019/sep/05/boris-johnson-rather-be-dead-in-ditch-than-agree-brexit-extension.

[30] Gearty, Conor: «The Supreme Court Judges are oiling the democratic machine not telling it what to produce», *LSE Blogs*, 25-09-19, https://blogs.lse.ac.uk/brexit/2019/09/25/the-supreme-court-judges-are-oiling-the-democratic-machine-not-telling-it-what-to-produce/.

[31] *Ibid*., 24.

political policy is wholly undemocratic, inappropriate and an entirely arbitrary use of the powers held by the executive, in addition to being contrary to the constitutional theories of good governance. This, among other things, means that Governments and those individuals who work in governments have no legitimate interest of their own when acting in official capacities[32]. This is perhaps a speculative, although not unparalleled, approach towards the issues surrounding the length of the prorogation, but the Supreme Court reached a similar conclusion, albeit by following a different route. Namely, that the result of the prorogation was silencing Parliament and particularly the House of Commons, preventing them from discussing important «Brexit related business»[33] including the «special procedures for scrutinising the delegated legislation necessary to achieve an orderly withdrawal»[34] with or without a deal.

Twomey furthers this argument by stating that the controversy behind the prorogation rests in the fact that the government had neither explicitly nor implicitly held the confidence of the House[35]. Instead of the Houses of Parliament and the government operating cooperatively, it has been clear for some time that they are at odds with each other. As stated above, prorogation has been used as a means of preventing Parliament from acting for a period of time against the will of a government which has ceased to hold its confidence[36]. Consequently, it is critical to acknowledge the importance of a supervisory independent judiciary. As Allan notes, when the idea of the rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power. At the heart of the ideal of the rule of law lies an original model of «law», tacit in the traditional understanding of the doctrine of separation of powers; it is essential that there should be an independent judiciary

32 Elliot and Thomas: op. cit., p. 349.

33 R (on the application of Miller) *v.* The Prime Minister, Cherry and others *v.* Advocate General for Scotland [2019] UKCS 41, Lady Hale at 60

34 *Ibid*.

35 Twomey: op. cit.

36 *Ibid*.

to ensure that the law is fairly and strictly enforced[37]. The historic role of the courts in checking excesses of executive power has expanded recently due to the «increased complexity of government»[38] and the readiness of the modern public to challenge governmental decisions; Gina Miller is an eminent illustration of this. As Bingham explains, although there is an inevitable tension between the government and the judiciary, the separation of powers under our constitution is crucial in guaranteeing the integrity of the court's performance in checking executive behaviour[39].

## 3. Parliamentary sovereignty & accountability

The Supreme Court primarily rested its case on the grounds that the prorogation was unlawful as it been used improperly and without reasonable justification so as to prevent Parliament from discharging its constitutional functions. Critics have argued that Parliamentary Sovereignty simply means that Acts of Parliament are the highest sources of law not that Parliament must always be in session[40]. In addition, Parliamentary Sovereignty requires only that the legislation that Parliament *actually* passes should be the respected as the highest source of law, the doctrine does not extend to whether Parliament has been in session to enact legislation in the first place. Notwithstanding the respect that such opinions deserve, they are incomplete as they fail to acknowledge the penumbral implications that can properly be associated with the principle of Parliamentary Sovereignty, something which the court alluded to in their judgement[41]. If Britain is a Parliamentary democracy, then surely the most important feature is the operation of Parliament itself, of which enacting legislation is a central, but not sole, function.

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37 Allan, T. R. S.: *Constitutional Justice.* Oxford University Press, 2001, p. 32,

38 Bingham: op. cit., pp. 67-85.

39 *Ibid*.

40 Ekins: op. cit.

41 Elliot, Mark: «The Supreme Courts judgement in Cherry/Miller N.º 2 – A new approach to constitutional adjudication?», *Public Law for Everyone*, 24-09-19, https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/ .

The issue then turns to executive accountability to Parliament. Without the Supreme Court judgement, the consequences would be two-fold with regards to Parliamentary Sovereignty and accountability. Firstly, allowing for a five-week prorogation of Parliament without valid reasoning would imply that the executive has legally unrestricted authority to prorogue Parliament. This would exhibit an incompatibility with the principle that Parliament is sovereign within our democracy. Secondly, this attributed legally limitless power would also be incompatible with the theory of executive accountability to Parliament. In a very convincing argument, Elliot offers that, because the UK acts as a Parliamentary democracy in which the executive government is not «directly elected but rather formed out of, sustained by and held to account by Parliament», allowing them the power to prorogue parliament with limitless control would be a constitutional perversion[42]. Even Lord Sumption, who opposed the idea of the Supreme Court ruling on the prorogation, called the acts of the executive «constitutional vandalism» and that «it was better than leaving a void governed by neither convention nor law, in which the government can do whatever it likes»[43]. Conversely, Ekins argues that the constitutional balance has been thrown off by the rising power of the courts[44]. Quite the opposite, the courts have re-balanced our constitutional democracy by reinstating the Parliamentary model as the pinnacle of the UK's constitutional architecture. The Prime Minister's disregard for our paramount political debating forum at the most controversial time in British political history is the entire premise on why the courts should have acted. Taylor has called this «complementary accountability» and stated that perhaps the result has been dual accountability, with «Parliament strengthening legal accountability in the same way as the Supreme Court has strengthened political accountability»[45].

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42 *Ibid*.

43 Lord Sumption, Jonathan «Supreme Court ruling is the natural result of Boris Johnson's constitutional vandalism», *The Times*, 24-09-19, https://www.thetimes.co.uk/article/supreme-court-ruling-is-the-natural-result-of-boris-johnson-s-constitutional-vandalism-kshrnrt55

44 *Ibid*. 40.

45 Taylor, Robert: «The Prorogation ruling has strengthened the political accountability of those in power», *LSE Blogs*, 26-09-19, https://blogs.lse.ac.uk/brexit/2019/09/26/the-prorogation-ruling-has-strengthened-the-political-accountability-of-those-in-power/.

## Conclusion

It is clear that Britain is living in a time of Brexit frenzy where the public, «Brexiteers» and «Europhiles» alike, have lost confidence in the political system and have seen the courts as the place to turn. However, this does not show an undermining of our political constitutional structure. This might have been a legal decision with political consequences, just as the Prime Minister's advice to the Queen was a political decision which turned out to have legal consequences. Scholars who treat our political constitution as a dichotomy between distinct political and legal principles are, with respect, out of step with the very nature of our constitution. At the beginning of this essay, it was stated that the British constitution is a dynamic creature with both political and legal characteristics which intertwine in balance to make it as it stands today. The Supreme Court judgement is an illustration of the Court's emerging approach and commitment to applying constitutional principles: the rule of law, separation of powers and parliamentary sovereignty. They achieved this through a structured analysis consistent with the recognition of competing but coalesced constitutional imperatives. It is important that the nation and those representing the nation do not try and further divide the three pillars of our democracy at this time of political storm. They must uphold the separation of powers in a way that support themselves and each other. As stated by Lord Neuberger, «despite their different constitutional roles, the three branches of government have the common aim of ensuring that our country remains a healthy, just, prosperous democracy, committed to the rule of law»[46]. It is with this that this article concludes: the Supreme Court was right to pronounce on the highly contentious prorogation of Parliament.

[46] «Judges and policy: A delicate balance», The Institute for Government, YouTube, 20-06-13, https://www.youtube.com/watch?v=i2bje3jClDo.

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**Resumen**: La autora comenta la última decisión de la Corte Suprema británica en relación con el Brexit. Tal decisión genera repercusiones constitucionales vinculadas con el rol judicial y político de la Corte, así como sobre la separación del poderes.
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