

A Note on Craig on *Miller/Cherry*

Paul Craig's long article in defence of the much shorter judgment by a unanimous, eleven-member Supreme Court is presumably motivated by the importance of the *Miller/Cherry* ruling and the desire to rebut any criticism of it. His argument is mostly directed towards criticisms made by two of his Oxford colleagues. Had it remained an in-house argument I would have had no cause to respond. But he states that its focus is on 'three longer critiques' (p.2), apparently including a paper by me, though I am relegated to the fringes of his analysis with such formulations as 'Martin Loughlin voices an analogous critique' (p.38) or 'Martin Loughlin's critique is similar' (p.46). Professor Craig claims that in addressing these three critiques 'no element of the critique ... is omitted' and that his method 'brings the elements of the criticism into better focus' (pp.7-8). With regard to my arguments, however, this is simply not the case. I refer to six of them which his analysis overlooks.¹

The first concerns the effect of Article IX of the Bill of Rights on the reviewability of the prorogation. Putting aside the continuing debate over whether prorogation is a 'proceeding in Parliament', we might recall that the Court ruled that it was as if the Royal Commissioners 'had walked into Parliament with a blank piece of paper' ([2019] UKSC 41 [69]). But the piece of paper the Commissioners presented did not just prorogue Parliament; it also granted Royal Assent to the Parliamentary Buildings (Restoration and Renewal) Bill. This unavoidably complicates the issue. Although the Supreme Court had previously held that Royal Assent is a proceeding in Parliament,² the Court's ruling in *Miller/Cherry* in effect nullified that Royal Assent. It led to an Act of Parliament being removed from the Parliament Roll and required the Speaker to rule that Royal Assent for the Bill needed to be re-signified. I argue that the Court misunderstood the significance of the proceeding on which it had ruled, that its decision was contrary to established law, and that it was decided *per incuriam*.

The second issue relates to justiciability, not the principle on which there is still disagreement but on the Court's reasoning process. The Court held that (i) 'every prerogative power has its limits, and it is the function of the court to determine ... where they lie'; (ii) since the prerogative power 'is recognised by the common law ... [it] has to be compatible with common law principles'; and (iii) 'the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law'

¹ See Martin Loughlin, 'The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court' *Policy Exchange*, October 2019: <https://policyexchange.org.uk/publication/the-case-of-prorogation/>

² *R(Barclay) v Secretary of State for Justice* [2014] UKSC 54.

[38]. The first statement is uncontentious, but the second is a non-sequitur. One cannot infer from the fact that prerogative power is *recognised* by common law that it must be *exercised* in accordance with (so-called) common law principles. The Court should surely have explained how it managed to draw this conclusion from those premises. The difficulties are further compounded with the third statement, in which the Court elides ‘common law principles’ and ‘fundamental principles of constitutional law’. Through what appears to be faulty reasoning, the Court in effect lends its imprimatur to the controversial thesis that ours is a ‘common law constitution’.

In addition to this lack of cogency, the Court’s judgment raises questions about the consistency of its reasoning. Fidelity to law, not least to the common law, requires respect for previous rulings. My analysis referred to discrepancies in the positions adopted by the judges of the Supreme Court but here I mention only one. In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, Lord Reed was one of the minority who maintained that Article 50 TEU could be triggered by an exercise of prerogative power. He stated [240]: ‘For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions’. This is a clear statement of the orthodox position. Yet it is not at all reconcilable with the views expressed in the Court’s reasoning mentioned above. Since Lord Reed was one of the two signatories to the *Miller/Cherry* ruling, it is not unreasonable to expect some explanation of how and why ‘our constitutional traditions’ have now been given such an innovative re-interpretation.

Craig’s didactic style suggests that the Court is simply discovering the constitution’s true meaning. So my fourth point concerns the status of precedents. Craig shows little appreciation of past practice with respect to prorogation.³ For instance, in 1948 the Labour Government encountered stiff opposition when seeking to limit the Lords’ power under the Parliament Act 1911 to delay legislation by reducing it from three successive sessions to two. To achieve its objective, the Government was obliged, for the first time, to use the 1911 Act procedures. Recognising that delay over three sessions might jeopardise having the reform enacted, it exploited

³ Craig argues that the claim that Article IX of the Bill of Rights could be construed as ‘protect[ing] the executive from external scrutiny whenever it prorogues Parliament’ would have been rejected at the time of its enactment; it would have meant that the ‘very idea of parliamentary sovereignty as it emerged from the Glorious Revolution is thereby radically curtailed at the outset’ (pp.48-9). This argument is anachronistic. Not only was there then no agency of ‘external scrutiny’ of the Crown’s action but this type of argument takes no account of the use of prorogation of the period. Consider only the dates of the six sessions of the 1690-95 Parliament: 20 Mar. 1690-23 May 1690 (sits 2 months; adjourned/prorogued 4 months); 2 Oct. 1690-5 Jan. 1691 (sits 4 months, adjourned/prorogued 9 months); 2 Oct. 1691-24 Feb. 1692 (sits 5 months, adjourned/prorogued 8 months); 4 Nov. 1692-14 Mar. 1693 (sits 5 months, prorogued 9 months); 7 Nov. 1693-25 Apr. 1694 (sits 6 months, prorogued 6 months); 12 Nov. 1694-3 May 1695 (sits 6 months – dissolved). Source: <https://www.historyofparliamentonline.org/volume/1690-1715/parliament/1690>.

the fact that parliamentary sessions have no fixed duration by arranging for a session of minimal length. Consequently, on 13 September 1948 Parliament was prorogued to the following day and on 25 October, once the Commons had passed the Parliament Bill, it was again prorogued. This six-week session was most surely a prorogation for political purposes. It frustrated the principle of Parliamentary accountability and the Supreme Court's now extended principle of Parliamentary sovereignty. On a strict interpretation, this prorogation must also have been unconstitutional but with implications that remain unaddressed.

With respect to its general constitutional significance, the Supreme Court in *Miller/Cherry* converts political practices into constitutional principles, investing them with normative (and legal?) authority so as to assert the power to determine their meaning. The Court is making a pitch to become the primary guardian of the British constitution. My fifth point, then, asks whether the Court is competent to assume this role. Consider its description of Britain's constitutional foundations:

We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts.[55]

By any reckoning this is a less than astute account. Any student 'who looks at the living reality will [continue to] wonder at the contrast to the paper description'.⁴ The justices have offered us a twenty-first version of Bagehot's dignified version of the British constitution. It masks 'the nearly complete fusion of executive and legislative powers'⁵ and ignores the fact that 'modern democracy is unthinkable save in terms of [political] parties'.⁶ This account obscures any direct source of governmental authority, trips over itself by implying that 'democratic legitimacy' justifies governmental accountability to the Lords and peddles the standard nostrum about the separation of powers just a few days after Parliament had directed the PM to send the President of the European Council a letter whose precise terms they had dictated. None of this inspires much confidence that the judiciary is competent to assume the extended role they now claim.

Moving on from constitutional narratives to constitutional facts, after the proposed prorogation was announced on 28 August, Parliament, duly placed on notice, returned from its

⁴ Walter Bagehot, *The English Constitution* (1867) Miles Taylor ed (Oxford: Oxford University Press, 2001), 5.

⁵ Bagehot, *ibid.* 11.

⁶ EE Schattschneider, *Party Government* (New York: Holt, Rinehart & Winston, 1942), 1.

summer adjournment on 3 September. The Commons immediately took control of the order paper from the Government. On 4 September, it introduced a Bill to prevent a no deal exit from the EU and mandated the Government to request an exit day extension from the European Council. Despite Government opposition, this Bill passed all its stages in one day and, on 9 September, received Royal Assent as the European Union (Withdrawal) (No 2) Act 2019. During that same period, a Government motion to hold a general election twice failed. As the Divisional Court stated, these events both clearly demonstrated the ‘ability of Parliament to move with speed when it chooses to do so’ and also ‘undermined the underlying premise of the cases ... namely that the prorogation would deny Parliament the opportunity to do precisely what it has just done’: [2019] EWHC 2381[57]. In the light of actions taken by the Commons between 3 and 10 September, it is unclear how, later that same month, the Supreme Court could hold that the prorogation had an ‘extreme effect upon the fundamentals of our democracy’[58].

Each of these arguments is presented in my paper on *Miller/Cherry*. All raise serious questions about the cogency of the Supreme Court’s judgment. None are addressed by Professor Craig in his critique of the critiques. These omissions suggest that his lengthy defence of the judgment fails to provide a sound foundation for assessing its constitutional significance.

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