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Part II: Prerogative Power and Prorogation – Suspension of Parliament Without Rhyme or Reason? symposium

THE PROROGATION CASE: RE-INVENTING THE CONSTITUTION OR RE-IMAGINING CONSTITUTIONAL SCHOLARSHIP?

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1 Introduction

In 2017, the UK Supreme Court ('the Supreme Court') decided what was, prematurely, referred to as the 'Constitutional Case of the Century': *Secretary of State for Exiting the European Union v R (Miller)* ('*Secretary of State for Exiting the EU v Miller*').[1] However, within three years, the Supreme Court decided *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* ('*Miller v The Prime Minister*'), which arguably has even greater constitutional importance.[2] Given the number of similarities between the cases, this is hardly surprising. They provide the only examples, to date, of the Supreme Court sitting with its maximum number of eleven Justices. Both arose in the context of Brexit, involved key constitutional questions as to the relative powers of the legislature, the executive, and the courts and received a huge amount of media attention. Unsurprisingly, they both generated a great deal of commentary prior to, during, and after the cases were heard.[3]

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1 [2017] UKSC 5, [2018] AC 61.

2 [2019] UKSC 41, [2020] AC 373.

3 See eg the coverage of *Miller v The Prime Minister* (n 2) on the following blogs: UK Constitutional Law Blog <https://ukconstitutionallaw.org/> accessed 9 May 2020; Judicial Power Project <https://judicialpowerproject.org.uk/> accessed 9 May 2020; UKSC Blog <http://ukscblog.com/> accessed 9 May 2020. See also Mark Elliott, '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 9 May 2020.

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At first, *Miller v The Prime Minister* may have appeared to be less dramatic than *Secretary of State for Exiting the EU v Miller*. Given the relative speed with which *Miller v The Prime Minister* went through the Divisional Court, the Outer and Inner House of the Court of Session, and, eventually, the Supreme Court, the media circus outside the Supreme Court was slightly more subdued than that of *Secretary of State for Exiting the EU v Miller*. However, there was still live coverage and commentary of the case on mainstream UK news channels. The consequences of the decision, however, were far more dramatic. *Secretary of State for Exiting the EU v Miller* concluded that the prerogative powers relating to foreign relations did not include a power to notify the European Council of the UK's intention to withdraw from the European Union Treaties, given that to do so would modify domestic law and frustrate the European Communities Act 1972. Whilst this did require the UK Parliament to enact legislation to empower the Prime Minister to notify the European Council,[4] contrary to some commentary at the time, this did not prevent the UK from leaving the European Union ('the EU') on 31 January 2020. *Miller v The Prime Minister* established common law limits on the prerogative power of prorogation, concluding that the extensive prorogation of Parliament in the run up to what could have been the UK's exit date from the EU was a serious limitation on parliamentary sovereignty and parliamentary accountability for which the Government had failed to provide any, let alone a reasonable, justification. The judgment reversed the prorogation of the UK Parliament. As far as the law was concerned, the prorogation was ultra vires and quashed. Parliament had never been prorogued. Consequently, Bills introduced during the 2017-19 session of Parliament that had not yet received royal assent had not lapsed. There was also confusion as to whether the royal assent for the Parliamentary Buildings (Restoration and Renewals) Bill 2019, which was included on the same piece of paper that had informed the UK Parliament that it was to be prorogued, had also lapsed.[5]

Furthermore, *Miller v The Prime Minister* will potentially have a greater impact on the UK constitution than *Secretary of State for Exiting the EU v Miller*. It further develops the control over prerogative powers established in *Secretary of State for Exiting the EU v Miller*. Both cases focused on determining the extent to which the common law can place limits on the extent of prerogative powers. *Secretary of State for Exiting the EU v Miller* established that prerogative powers cannot modify domestic law, including removing domestic rights, or frustrate legislation, either through frustrating specific legislative provisions or by rendering legislation devoid of its purpose. *Secretary of State for Exiting the EU v Miller* also drew on

[4] European Union (Notification of Withdrawal) Act 2017.

[5] This is discussed in more depth in section 2.1 below.

constitutional principles – in particular, that it would be 'inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone'.[6] *Miller v The Prime Minister* builds on both of these legal developments. It explains that background constitutional principles can be used to shape the legal limits the common law places on the scope of prerogative powers. In particular, it provides a more expansive analysis of parliamentary sovereignty and clearly recognises parliamentary accountability as a fundamental constitutional principle for the first time. Both are used to determine the specific scope of the prerogative power of prorogation.

Unsurprisingly, the case has already attracted an array of commentary. As my early contributions makes clear, I am in the camp of those supporting the decision of the Supreme Court.[7] In this chapter, I aim to explain further why this is the case. I will first analyse some of the main criticisms of the case. I do so not just to present my opinion on these criticisms, but also to illustrate two themes running through these criticisms: comity and deference. Arguments from comity argue that the Supreme Court in *Miller v The Prime Minister* failed to recognise that the court has no role as regards the prerogative power of prorogation other than to recognise it exists. This is because it is for either the Monarch or Parliament, or both, to regulate how this prerogative power is exercised. Arguments from deference recognise that courts can play a role in controlling the prerogative but that the Supreme Court transgressed the proper limits of its role, crossing the important divide between legal and political controls. The second substantive section will build on these criticisms, arguing that they reflect deeper tensions as to the definition of 'Parliament' and the relative power of the legislature and the executive. In particular, those who criticise the judgment place more emphasis on the power of the executive, whereas those who support the judgment argue that the legislature is more constitutionally important than the executive. I will refer to the former as a preference for a Whitehall vision of democracy, and the second as a preference for a Westminster vision of democracy. I will argue that the Supreme Court, rightly, adopts a Westminster vision of democracy. Finally, I will provide a further normative defence of the decision based on an analysis of inter-institutional interactions. The decision of the Supreme

6 *Secretary of State for Exiting the EU v Miller* (n 1) [81].

7 Alison Young, 'Prorogation, Politics and the Principle of Legality' (UK Constitutional Law Blog, 13 September 2019) <https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/> accessed 9 May 2020, Alison Young, 'Deftly Guarding the Constitution' (Judicial Power Project, 29 September 2019) <https://judicialpowerproject.org.uk/alison-young-deftly-guarding-the-constitution/> accessed 9 May 2020.

Court can be defended as a form of constitutional counterbalancing, the Supreme Court ensuring that the executive does not usurp power from the legislature in circumstances where the legislature is unable to ensure its powers are not usurped by the executive.

2 Clearing the Ground: Six Short Criticisms

I must first explain my reason for dealing with these six criticisms in a more concise manner than I will deal with other criticisms of the judgment. This is not a reflection on the quality of these criticisms. Rather, I recognise that these criticisms have been dealt with in depth elsewhere,[8] including in this volume.[9] To a large extent, I agree with the response to these criticisms and have less to add than I might otherwise have done.

The first two criticisms focus on the way in which the Supreme Court analysed the facts when it reached its conclusion, as well as criticising the Supreme Court's choice of a quashing order as the most appropriate remedy. I will argue that the Court's factual analysis is defensible and that the quashing order did not breach art 9 of the Bill of Rights 1688. The second pair of criticisms argue that the Supreme Court was the inappropriate body to control the prerogative power of prorogation. Rather, the Queen and/or Parliament alone should control this prerogative power. The final pair of criticisms focus on how the Supreme Court reached its conclusion. The judgment has been criticised for crossing the line between controls over the existence and the exercise of a prerogative power. Also, it is argued that, by relying on the principle of parliamentary authority, the Supreme Court enforced a convention, contravening the clear line between law and convention established in *Secretary for Exiting the EU v Miller*.

2.1 Factual Impact and Remedies

The Supreme Court's decision recognised that the legal limits of the prerogative power of prorogation depended upon whether the detrimental impact of prorogation on parliamentary sovereignty and parliamentary accountability was sufficiently serious to merit court control. The Court concluded that there was sufficient evidence. Parliament was to be prorogued for five out of the eight weeks in the run up to 31 October 2019, the date set, at that time, for the UK's exit from the EU. The Court

[8] Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' [2020] Public Law 248; Martin Loughlin, 'A Note on Craig on *Miller; Cherry*' [2020] Public Law 278; and Paul Craig, 'Response to Loughlin's Note on *Miller; Cherry*' [2020] Public Law 282.

[9] Paul Craig, 'Constitutionality, Convention and Prorogation' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 10: 2018-2019 Legal Year* (Appellate Press 2021).

recognised that Brexit was a fundamental change to the UK constitution; an issue on which Parliament deserved to have a voice. The Court recognised that, although the period over which Parliament would be prorogued also included periods in which Parliament would normally be in recess for party conferences, nevertheless prorogation had a larger impact on parliamentary sovereignty and parliamentary accountability than a recess. Parliament is still able to conduct its business whilst in recess, the House of Lords continues to sit, and Parliamentary Committees can still conduct their business. The same is not true when Parliament is prorogued, not to mention that this brings a parliamentary session to an end, meaning that Bills that have not progressed through Parliament also, normally, lapse.[10]

The Supreme Court's analysis of these facts has been criticised. Did the Court merely hypothesise about an impact that it was impossible to assess?[11] Moreover, did the Court fail to pay sufficient deference to the reasons provided by the Prime Minister for such a long prorogation?[12] Neither of these criticisms negates nor undermines the decision of the Supreme Court. First, it has to be recognised that no specific evidence was presented to the Court by the Government concerning the justification for the prorogation. Courts can only take account of the evidence presented to them; it would be wrong for courts to engage with speculation found elsewhere.

Furthermore, when dealing with cases that have large constitutional consequences, the courts should ensure that all possible future impacts are assessed in order to ensure that fundamental constitutional principles are not eroded. In *Secretary of State for Exiting the EU v Miller*, for example, one of the issues before the court was whether it would be the case that, in the period between notifying the EU of the UK's intention to leave the EU and the UK's exit from the EU, no legislation would be enacted to remove, or preserve, domestic rights derived from the EU. If so, then domestic law would have been modified by an act of the prerogative alone. Lord Carnwath's dissent was critical of the decision of the majority because it was acting on an assumption. Nobody knew whether legislation would be enacted prior to the UK's exit from the EU. In reaching its conclusion, the Supreme Court had essentially assumed that it would not be. Yet, there was

[10] *Miller v The Prime Minister* (n 2) [56]-[57].

[11] John Finnis, 'The Law of the Constitution before the Court: Supplementary Notes on The Unconstitutionality of the Supreme Court's prorogation judgment' (Policy Exchange, 2019) <https://policyexchange.org.uk/wp-content/uploads/The-Law-of-the-Constitution-before-the-Court.pdf> accessed 9 May 2020, 21-22.

[12] Martin Loughlin, 'The Case of Prorogation: The UK Constitutional Council's ruling on the 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 9 May 2020, 18-21.

no basis for adopting this assumption.[13]

However, I would argue that: when faced with a range of possible assumptions as to future action; in circumstances where waiting to see which of these possible future actions occurs would render a legal challenge devoid of its purpose; and where there are large constitutional consequences of one of these possible future actions; the courts should act on the assumption of the worst case scenario. In earlier work, I have called this the 'constitutional precautionary principle'.[14] In *Secretary of State for Exiting the EU v Miller*, this meant assuming that no legislation would be enacted to remove, modify, or preserve domestic law. In *Miller v The Prime Minister*, this meant recognising that proroguing Parliament would remove the ability of the legislature to hold the executive to account in the run up to Brexit, particularly given the tension between the wishes of the legislature and the executive concerning the possibility that the UK could leave the EU on 31 October 2019 with no deal.

In terms of the remedy, the Supreme Court effectively quashed the prorogation order. In doing so, the Court has been criticised for acting contrary to art 9 of the Bill of Rights 1689. Arguably, prorogation is a proceeding in Parliament in a similar manner to royal assent.[15] Both involve the Queen – part of the Queen-in-Parliament. So, if royal assent is a proceeding in Parliament, surely the same is true of prorogation?[16] However, the argument does not follow. I agree with Craig and Elliott that the act of the Monarch signing royal assent and the act of the Monarch proroguing Parliament are distinct. Royal assent is a proceeding in Parliament as it is needed in order to make an Act of Parliament. Prorogation is an Act of the Monarch, on the advice of her Ministers, which is then reported to Parliament.[17] The House of Commons and the House of Lords have no ability to challenge a prorogation when it is announced to them in Parliament.[18] But both need to give their consent to legislation

[13] *Secretary of State for Exiting the EU v Miller* (n 1) [81], [265]-[267].

[14] See Alison L Young, '*Miller* and the Future of Constitutional Adjudication' in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018), 277, 298-301.

[15] Finnis (n 11), 7-8.

[16] *Barclay v Secretary of State for Justice* [2014] UKSC 54, [2015] AC 276.

[17] See Craig, 'The Supreme Court, Prorogation and Constitutional Principle' (n 8); Mark Elliott, '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 9 May 2020.

[18] See Anne Twomey, 'Article 9 of the Bill of Rights 1688 and Its Application to Prorogation' (UK Constitutional Law Association Blog, 4 October 2019) <https://ukconstitutionallaw.org/2019/10/04/anne-twomey-article-9-of-the-bill-of-rights-1688-and-its-

(subject to the provisions of the Parliament Acts 1911-1949).

Loughlin takes this criticism further, arguing that, in quashing the prorogation of Parliament, the court also quashed royal assent of the Parliamentary Buildings (Restoration and Renewal) Bill 2019, contravening not only art 9 of the Bill of Rights 1689, but also the rule that courts do not question an Act of Parliament duly entered on to the parliamentary roll.[19] The royal assent for the Bill was contained on the same paper as the prorogation order. When describing the consequences of the quashing order, the Supreme Court stated that it was 'as if the Commissioners had walked into Parliament with a blank piece of paper.'[20] Consequently, quashing the prorogation also quashed royal assent.

However, this criticism confuses a metaphor with reality. As Yuan Yi Zhu and Craig note, the Supreme Court may have used the phrase 'a blank piece of paper' to describe the effects of a quashing order to the public, but this did not mean that it quashed both royal assent and the prorogation order. The two were clearly severable and the Court's judgment only applied to the prorogation order.[21] Whilst this may have caused confusion, with the Commissioners concluding that royal assent would have to be given again to the Parliamentary Buildings (Restoration and Renewal) Bill, this is best understood as the Commissioners erring on the side of caution in constitutionally novel circumstances. The Supreme Court's judgment did not require that royal assent be quashed.

Running through these criticisms are concerns as to the proper role of the courts, the executive, and the legislature. The Supreme Court is criticised not just because it may have got the facts wrong, but because the court should not be carrying out such an analysis precisely because it is not within its relative area of expertise, meaning it is more likely to make mistakes. If the Supreme Court issued the wrong remedy, it was because, in quashing the order to prorogue, it interfered with the powers of Parliament. These themes are developed further in the next set of criticisms.

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application-to-prorogation/> accessed 9 May 2020.

19 *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & Fin 810; *British Railways Board v Pickin* [1976] AC 765.

20 *Miller v The Prime Minister* (n 2) [69].

21 Yuan Yi Zhu, 'Putting Royal Assent in Doubt? One Implication of the Supreme Court's Prorogation Judgment' (Policy Exchange, 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/10/Putting-Royal-Assent-in-Doubt.pdf> accessed 9 May 2020; Craig (n 8).

2.2 Comity

The following arguments concern the justiciability of the prerogative power of prorogation, drawing on arguments of comity.[22] The courts should not control the prerogative power precisely because this is the role of Parliament, or the Monarch, or both to control prorogation. Respect for the relative roles of the institutions of the constitutions mean that the courts have no role to play.

First, it has been argued that the Monarch controls the prerogative power of prorogation, not the courts.[23] Prorogation is a personal prerogative of the Queen. There are conventions governing how the Monarch can exercise this power. Moreover, a reserve power may exist which enables the Queen to refuse to prorogue Parliament, even when advised by her Ministers to do so.[24] Finnis and Ekins argue that this may exist in exceptional circumstances. For example, this would arise were Ministers to advise the Monarch to prorogue Parliament in order to avoid a potential vote of no confidence in the Government,[25] or when it is clear that the Government has lost the confidence of the House of Commons.[26] Spadijer goes so far as to argue in favour of the Monarch as the 'guardian of the Constitution'; one that is able to operate subtly behind the scenes through using her conventional power to advise, encourage, and warn her Government, rather than using the blunt instrument of legality.[27] All three argue that, to fail to recognise this role of the Monarch is to effectively remove the Monarch from the UK constitution.

However, I would argue that it is far from clear that only the Queen, either in tandem with Parliament or acting on her own, has the power to control a potential abuse of prorogation. Although there are examples of the executive acting in this manner, they are drawn from other legal systems, most of which involve a Governor General as opposed to a Monarch. Governor Generals are appointed, they do not merely inherit their role.

[22] See Timothy Endicott, *Administrative Law* (4th edn, OUP 2018), ch 7.

[23] Finnis (n 11) 18-20; Richard Ekins, 'Parliamentary Sovereignty and the Politics of Prorogation' (Policy Exchange, 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of-Prorogation3.pdf> accessed 9 May 2020, 12; Steven Spadijer, 'Prorogation, Justiciability and the Reserve Powers' (UK Constitutional Law Blog, 20 September 2020) <https://ukconstitutionallaw.org/2019/09/20/steven-spadijer-prorogation-justiciability-and-the-reserve-powers/> accessed 9 May 2020.

[24] For a more detailed account of these reserve powers, see Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018); Anne Twomey, 'Prorogation, the Queen and the Courts – A View From Afar' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 10: 2018-2019 Legal Year* (Appellate Press 2021).

[25] Ekins (n 23) 12.

[26] Finnis (n 11) 18-20.

[27] Spadijer (n 23).

This appointment – depending on the manner of the appointment process – provides the Governor General with more legitimacy than the incumbent of an inherited position.[28] If the Governor General were to refuse to prorogue Parliament, even though this refusal contravened the will of the people, it is easier to hold the Governor General to account for her actions than it would be to hold the Monarch to account.

Second, whilst there are conventions governing how the Monarch exercises her prerogative powers, including the prerogative power of prorogation, there are also other conventions relevant to the assessment of the role of the Monarch. This includes the convention that the Monarch should remain politically neutral. If the Monarch were to intervene and refuse to prorogue Parliament, despite being advised by her Ministers to do so, she could undermine her political neutrality. Allowing the courts to provide a constitutional check on the use of the prerogative, through the development of the legal limits on the prerogative, provides a more legitimate form of a constitutional backstop, with the courts drawing on legal principles. In addition, the intervention of the courts does not prevent the Monarch from exercising her constitutional role. Instead, it ensures that the Monarch continues to maintain her legitimate role in the Constitution. The Queen is still in a position to advise, warn and encourage her Ministers; including about the wisdom of proroguing Parliament at any particular time. If her role is eroded, it would be if this opportunity were avoided, by announcing a future prorogation before providing the Monarch with the possibility of encouraging, warning or advising on this matter.

Third, it is important to recognise that the Monarch is part of the Crown. Yet, the Crown does not purely consist of the Monarch. The Crown refers also to Governmental Ministers, Ministers of the Crown exercising powers on behalf of the Monarch. Whilst there may be conventions governing how these powers are exercised, nevertheless, it is more legitimate for another body to check that the Crown acts legitimately than for one aspect of the Crown to check on another aspect of the Crown.

A second criticism is that only Parliament, either in tandem with the Monarch or by itself, is empowered to check on the use of the prerogative power of prorogation.[29] Most of these arguments focus on the extent to

[28] Finnis and Ekins refer to examples from Canada and Australia. The Canadian Governor General is appointed by the Queen on the advice of the Canadian Prime Minister, the convention being that such appointments are for five years and, until the most recent appointment, an emerging practice had arisen of using an appointments panel. Australia also appoints a Governor General, normally for a term of five years, on the advice of the Australian Prime Minister.

[29] See Timothy Endicott, 'Don't Panic' (UK Constitutional Law Blog, 13 September 2020 <https://ukconstitutionallaw.org/2019/09/13/timothy-endicott-dont-panic/>

which Parliament holds the Government to account through the convention that the Government only holds power to the extent that it enjoys the confidence of the House. As the Prime Minister issued the order to prorogue Parliament on 28 August 2019, the prorogation being scheduled to commence between 9 and 12 October 2019, Parliament had the opportunity to control the Government. The leader of the opposition had the opportunity to ask for a vote of no confidence in the Government, but chose not to. Consequently, Parliament must have decided that the prorogation was legitimate, for the court to reach the opposite conclusion would be for the court to usurp its role, trespassing on the powers of Parliament.[30]

Stephen Tierney's argument goes further, drawing on issues of justiciability which will be discussed in more depth below. He argues that there is a distinction between prerogative powers that have been subject to judicial review in the past – eg the prerogative power to regulate employment affairs at GCHQ – and the prerogative power of prorogation. The prerogatives that the courts have controlled in the past concerned individual rights. The prerogative power of prorogation concerns the relations between the branches of government – here between the executive and the legislature. Tierney argues that it is not for the courts to intervene when rights are not involved, it being instead the role of the legislature to check on the executive to ensure that prerogative powers are not abused, with one institution transgressing on the powers of another.[31]

I have two arguments to make in response. First, I accept the distinction drawn by Tierney exists. However, I would argue that this does not lead to the conclusion that the prerogative power of prorogation is non-justiciable and cannot be controlled by the courts at all. Rather, I would argue that this distinction explains why the prerogative of prorogation can be checked by the courts in terms of its legality, but that it is not the role of the court to go further and challenge the reasonableness of the choice made by the Prime Minister to advise the Monarch to prorogue Parliament. [32]

Second, I would argue that any assessment of whether Parliament had the opportunity to hold a vote of no confidence, and chose not to exercise this, has to take account of all of the facts. The 2017-19 parliamentary

accessed 9 May 2020; Stephen Tierney, 'Prorogation and the Courts: A Question of Sovereignty' (UK Constitutional Law Blog, 17 Sep 2020) <https://uk-constitutionallaw.org/2019/09/17/stephen-tierney-prorogation-and-the-courts-a-question-of-sovereignty/> accessed 9 May 2020,; Danny Nicol, 'The Supreme Court against the People' (UK Constitutional Law Blog, 25 September 2020) <https://ukconstitutionallaw.org/2019/09/25/danny-nicol-supreme-court-against-the-people/> accessed 9 May 2020.

[30] See Loughlin (n 12); Loughlin (n 8).

[31] Finnis makes a similar point in (n 11) 13-14.

[32] See also Craig (n 9) for a strong rejection of this distinction.

session was unique not just in terms of its length, but also in terms of the composition of Parliament. The Conservative Government started the session as a minority Government, shored up by a 'confidence and supply' agreement with the Democratic Unionist Party ('DUP'). As the session progressed, and the divisions across and within political parties over Brexit deepened, backbench MPs who voted against the Government had the whip removed, further reducing the potential number of votes the Government could count on to secure the enactment of its legislation. In addition, art 50 of the Treaty on European Union ('TEU') placed a further restriction on Parliament. It placed a time limit on the Brexit negotiation process that could not be unilaterally modified by the United Kingdom. There was not just the clock counting down to the prorogation of Parliament; there was also the clock counting down to Brexit.

In these circumstances, backbench and opposition MPs chose to work together to enact the European Union (Withdrawal) (No 2) Act 2019, designed to prevent the UK leaving the EU on 31 October 2019 with no deal, rather than initiating a vote of no confidence. This was a policy choice. Whilst the indicative votes in response to Governmental statements issued for the purposes of s 13 of the European Union (Withdrawal) Act 2018 may not have provided a consensus regarding the UK's future relationship with the European Union, they did demonstrate a consensus in the House of Commons that the UK should not leave the EU with no deal. The timing of the prorogation made leaving with no deal more likely. Are we to read these facts as Parliament not wishing to prevent the prorogation, when it could have done so, or as Parliament choosing to demonstrate its lack of confidence in a particular Governmental policy and acting to prevent it? It may not have been possible to do both. Moreover, the vote of no confidence may have also had the consequence of the UK's leaving the EU with no deal. Whilst the courts can be aware of these political choices, it is not their job to choose between them, which they may have indirectly done had they concluded that the courts could not intervene as Parliament could have held, but chose not to hold, a vote of no confidence in the Government. It is perfectly acceptable for courts to determine whether Ministers had a legal power to act, particularly when this not only ensures that the courts are not determining political choices but, moreover, refusing to control the prerogative power in this manner could also be interpreted as a political choice.

2.3 Institutional and Epistemic Deference

The final pair of criticisms concern issues of institutional or epistemic deference. Arguments based on comity assert that it is not the place of

the courts to regulate the prerogative power of prorogation at all. Courts should not intervene in order to respect the constitutional roles of the Monarch and Parliament. Arguments from institutional and epistemic deference differ from arguments of comity in two ways. First, deference does not apply on an all or nothing basis, it applies in degrees. Rather than arguing that the court should not intervene, arguments from deference would argue that the courts should check the actions of the executive, but do so less stringently than it may control other acts of the executive. Second, the justifications for institutional and epistemic deference differ from the justification for comity. Institutional deference recognises that a particular institution is better placed to determine a specific issue, normally because the institution has better access to certain information than other institutions. Epistemic deference recognises that institutions develop expertise in particular areas. Even if both the courts and the executive have access to the same facts, for example, the expertise of the courts or that of the executive may mean that they are better able to evaluate a particular set of facts.

Why is it the case that the Supreme Court was insufficiently deferential in *Miller v The Prime Minister*? First, it is argued that the Court transformed a constitutional convention into an enforceable legal principle. This is because the Court used the principle of parliamentary accountability when establishing the common law limits of the prerogative power of prorogation. Yet, parliamentary accountability is really a convention and not a legal principle. Finnis appears to argue, in addition, that, as there are conventions already governing how the prerogative power of prorogation should be exercised, there is no need for any further legal controls. However, as Craig rightly argues, Finnis's argument wrongly regards conventions as being capable of being a legal shield.[33] Loughlin provides a different justification, arguing that courts should not enforce parliamentary accountability as they do not possess the requisite knowledge of, and expertise in, politics to do so.[34]

However, as both Paul Craig[35] and Mark Elliott[36] conclude, the Supreme Court did not enforce a convention when it relied on parliamentary accountability to establish limits on the prerogative power of prorogation. Parliamentary accountability is best understood as a constitutional principle. It is more abstract than a convention or a legal doctrine. Moreover, it can provide both a good justification for adopting a constitutional convention or for developing a legal doctrine. The convention of Ministerial

[33] Craig (n 9).
[34] Loughlin (n 12) 16-18.
[35] Craig (n 9).
[36] Elliott (n 17).

responsibility, for example, is a means of upholding parliamentary accountability. The legal doctrine that prerogative powers cannot modify domestic law is an illustration of, and is arguably underpinned by, the principle of parliamentary accountability.[37]

Adam Perry is critical of this solution. He argues that, just because parliamentary accountability is a principle, that does not mean that it cannot also be a convention.[38] Whilst this is logically true, it does not prove that the Supreme Court thereby enforced a convention. To answer this, we need to investigate further how parliamentary accountability was used in *Miller v The Prime Minister*. The Supreme Court does not enforce parliamentary accountability *per se*. Rather, it uses the principle of parliamentary accountability, alongside parliamentary sovereignty, to determine the specific legal limits placed on the prerogative power of prorogation. The Court makes it clear that it regards parliamentary accountability as a 'fundamental principle of our constitutional law'.[39] After setting out this principle, alongside parliamentary sovereignty, the Supreme Court provides its specific account of the relevant limits on the prerogative power of prorogation:

> that 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 courts will intervene if the effect is sufficiently serious to justify such an exceptional course.[40]

Regardless of whether parliamentary accountability is both a principle and a convention, the Supreme Court was not enforcing parliamentary accountability *per se*. Rather, it was relying on the principle of parliamentary accountability to determine the specific legal limits of the prerogative power of prorogation, using the principle to develop a specific common law doctrine.

This insight also explains my response to Loughlin's criticism. If the courts were trying to enforce parliamentary accountability by acting in a similar

[37] *Case of Proclamations* (1610) 12 Co Rep 74; *Secretary of State for Exiting the EU v Miller* (n 1).
[38] Adam Perry, 'Enforcing Principles, Enforcing Conventions' (UK Constitutional Law Blog, 3 December 2019) <https://ukconstitutionallaw.org/2019/12/03/adam-perry-enforcing-principles-enforcing-conventions/> accessed 9 May 2020.
[39] *Miller v The Prime Minister* (n 2) [41] and [46].
[40] ibid [50].

manner to Parliament when enforcing the convention of Ministerial accountability, then I would agree that courts are not best-placed institutionally to perform this function. They do not possess the same information or expertise as Parliament. However, the courts are not enforcing this convention. Rather, they are performing a task that is within their expertise, drawing on case law to demonstrate the existence of the principle of parliamentary accountability in the UK constitution and using this to establish legal doctrine.

The second criticism which draws on institutional and epistemic deference argues that the Supreme Court mistakenly classified a control as to the exercise of a prerogative power as a control over the existence of a prerogative power. Since the *GCHQ* case,[41] courts have been able to review not just the existence, but also the exercise, of a prerogative power. However, courts may only review the exercise of justiciable prerogative powers. The Supreme Court focused on controlling the existence of the prerogative power of prorogation, examining its scope. By focusing on the existence and extent of the prerogative, there was no need for the Court to determine whether the prerogative power of prorogation was justiciable.[42] However, it is argued that, when determining the extent of prorogation, the Court, in reality, was examining how the prerogative power was exercised.

All of the criticisms of the Supreme Court argue that the distinction between existence and exercise is fluid. I agree that it can be difficult to draw a clear line between controls over the existence and the exercise of a prerogative power. This is nothing new. In *Burmah Oil v Lord Advocate*, for example, the House of Lords had to determine the scope of prerogative powers, examining specifically whether the Crown could, if compensation was paid, destroy property in order to stop it falling into enemy hands.[43] The House of Lords assessed the case as one purely concerning the scope of a prerogative power. But it could also have been defined differently – the scope of the prerogative being that of destroying property in times of emergency to prevent it falling into enemy hands, but this being subject to a condition of its exercise that compensation should be paid.

The distinction between existence and exercise may be vague; but this does not mean that it does not exist. Rather, it calls for a deeper examination of why we delineate between courts controlling the existence and the exercise of prerogative powers and whether the reasons for this distinction were undermined in *Miller v The Prime Minister.* Finnis argues that the line was

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

[42] See Jack Williams, 'Prerogative Powers After Miller: An Analysis in Four E's' in Elliott, Williams and Young (n 14), 39.

[43] [1965] AC 75.

crossed by relying on the reasoning in the *GCHQ* case.[44] He argues that Lord Diplock's account of the heads of review in the *GCHQ* case – illegality, procedural impropriety, and rationality (with a potential in the future for proportionality) – effectively define controls over the exercise, as opposed to the existence, of a prerogative power. I agree with Paul Craig's analysis that this is to misinterpret the *GCHQ* case.[45]

Loughlin makes a different point. First, he explains how the Supreme Court focuses on effects in its analysis; prorogation is unlawful if it 'has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature.'[46] Loughlin argues that this blurs the line between existence and exercise. Additionally, it requires the courts to evaluate conduct to determine whether prorogation is unlawful to determine whether the effect on Parliament's ability to carry out its functions was 'sufficiently serious' to trigger the intervention of the court.[47] Moreover, the court needs to assess whether there is a 'reasonable justification' for this effect. These evaluations are more similar to an assessment of reasonableness or rationality than they are to a determination of the scope of the prerogative power of prorogation.

I don't agree with Loughlin's criticism. However, to make this argument more fully, I need to revisit these criticisms in more depth below by drawing out two themes running through the criticisms that draw on arguments of deference. First, there is tension in the academic commentary as to the relative power of the legislature and the executive, both of which are components of the Queen-in-Parliament. Those critical of the judgment regard the executive as more important than the legislature. The executive's role is to govern. Whilst courts can play a role to protect individual rights from being restricted by the administration, they should not interfere with the ability of the executive to govern effectively. Those less critical of the judgment tend to share the Supreme Court's conclusion that the legislature is more important than the executive, recognising the role of the court to protect rights and to uphold the separation of powers between the legislature and the executive. I will argue that the latter is a better interpretation of the UK constitution in the 21st century.

Second, disagreements as to whether the prerogative power of prorogation is justiciable draw on arguments for legal and political controls. Those critical of the Court's judgment prefer political to legal controls. Those in support of the judgment prefer legal to political controls. However, I

[44] *GCHQ* (n 41).
[45] Craig (n 9).
[46] *Miller v The Prime Minister* (n 2) [50].
[47] ibid.

will argue that this analysis oversimplifies analyses of the UK constitution. It ignores the extent to which legal and political controls interact and can work together to provide a better set of controls designed to prevent abuses of governmental power. I will use these arguments to provide a distinct normative defence of the decision of the Supreme Court.

3 Parliament: Whitehall or Westminster?

Miller v The Prime Minister uses the constitutional principles of parliamentary sovereignty and parliamentary accountability. However, there is a lack of consensus as to the content of both principles, as well as of the use of parliamentary accountability as a legal principle. This, in turn, illustrates a tension between different conceptions of democracy. David Howarth refers to this as a tension between the Whitehall and the Westminster visions.[48] Drawing on the work of A H Birch, Howarth argues that the Whitehall vision places the balance of power in the hands of the executive, understood as the members of the Government in the House of Commons and the House of Lords.[49] The Westminster vision places the balance of power with the legislature, composed predominantly of opposition and backbench MPs, supplemented by the House of Lords, recognising the more limited power of the House of Lords which can normally delay but not veto legislation.[50] Under the Westminster vision, the House of Commons is the centre of political attention, holding the Government to account for its actions and possessing the ultimate power to remove confidence from the Government. Under the Whitehall vision, the Government is the centre of political attention. Its role is to govern the country, supported by its backbenchers, having the ability to push through its legislative agenda.

A preference for the Whitehall vision of the UK's parliamentary democracy runs through the work of Finnis, Loughlin and Ekins, all of whom criticise the Supreme Court's decision in *Miller v The Prime Minister*. Finnis, for example, draws attention to the role of the Crown as an integral component of the Queen-in-Parliament. By failing to account for the Crown as 'an integral part of Parliament',[51] the Supreme Court's judgment provided a:

[48] David Howarth, 'Westminster versus Whitehall: Two Incompatible Views of the Constitution' (UK Constitutional Law Blog, 10 April 2019) <https://ukconstitutionallaw.org/2019/04/10/david-howarth-westminster-versus-whitehall-two-incompatible-views-of-the-constitution/> accessed 9 May 2020.

[49] Anthony Harold Birch, *Representative and Responsible Government: An Essay on the British Constitution* (Allen and Unwin 1964).

[50] Parliaments Acts 1911-1949.

[51] John Finnis, 'The Unconstitutionality of the Supreme Court's prorogation judgment' (Policy Exchange, 2 October 2019) <http://judicialpowerproject.org.uk/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment-john-finnis/> accessed

> pinched, minimising description of what is in fact and in constitutional reality the high and burdensome responsibility of carrying on the government in 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.[52]

In a similar manner, Loughlin criticises the judgment as it 'removes the Crown from its status as a source of authority'.[53] For Loughlin:

> [s]ince 1688, the British constitution has evolved around the pivot of the Crown. The Crown-in-Council expresses governmental authority, the Crown-in-Council-in-Parliament signifies ultimate legislative authority, and judges acquire their commission from appointment by the Crown. Asserting its absolute independence after a decade of existence, the Supreme Court now conceives of Parliament primarily as the forum of (qualified?) democratic legitimacy and the Government as an entity that depends on Parliament for its legitimacy.[54]

Ekins provides a similar account of the UK constitution. For Ekins, '[t]he Crown summons Parliaments to help it govern',[55] and '[t]he government of the country is carried out in the name of the Queen by ministers who are responsible to the Houses of Parliament'.[56] Moreover, whilst:

> Parliamentary sovereignty is a fundamental legal rule about the legal standing of Acts of Parliament and about the plenary (unlimited) law-making authority of the Queen-in-Parliament […] it does not encompass the whole of the constitution; it does not entail that the House of Commons, which is part of the Queen-in-Parliament, should itself govern.[57]

All of these statements illustrate a preference for the Whitehall, over the Westminster, vision of democracy. They prioritise the role of the

9 May 2020 8.

[52] ibid 10.

[53] Loughlin (n 12) 6.

[54] ibid 7.

[55] Ekins (n 23) 7.

[56] ibid.

[57] ibid.

Crown and of the Government. Whilst Government may be accountable to Parliament, it is the Government that holds centre stage in the UK constitution.

In addition, the preference for the Whitehall vision is illustrated in Ekins's account of when, if at all, prorogation would be unconstitutional; if Ministers were to seek prorogation either to avoid a vote of no confidence, or where the Government was seeking to remain in office after confidence has been withdrawn, using prorogation to avoid a general election.[58] Similar limits are implied in the account of Finnis, who states that the Monarch should always prorogue Parliament when advised to do so by Ministers 'still enjoying the confidence of the elected house.'[59]

A Whitehall vision of representative democracy also underpins arguments from comity and institutional and epistemic deference, as well as criticisms of the manner in which the Supreme Court evaluated the facts. Critics of the Supreme Court's judgment in *Miller v The Prime Minister* argue that the Court failed to exercise comity and should have concluded that prorogation was non-justiciable. Arguments from institution and epistemic deference criticise *Miller v The Prime Minister* for transforming a convention into a legally enforceable principle and for, in reality, controlling the exercise as opposed to the existence and extent of a prerogative power. If the Crown, either through the Monarch or her duly appointed Governmental Ministers, is the focus of the Constitution, then it is unsurprising that only the Crown should be able to control prorogation. Also, a Whitehall vision recognises that the Government only holds the ability to govern to the extent that it enjoys the confidence of the House. This explains why it is for Parliament and not the courts to check the use of the prerogative power of prorogation. Second, a Whitehall vision of democracy would regard conventions as suited only to political and not legal enforcement, as well as regarding the Commons as having greater expertise as to when the Government is abusing its prerogative powers. Finally, if we adopt a Whitehall vision of democracy, Parliament could and should have used a vote of no confidence in the Government. The Government should be able to continue to govern until it loses the confidence of the House. For the Supreme Court to have interfered would have undermined this fundamental convention of the UK constitution.

The decision of the Supreme Court in *Miller v The Prime Minister*, however, supports a Westminster, as opposed to a Whitehall, vision of democracy.[60]

[58] ibid 9.

[59] Finnis (n 11) 19.

[60] See Jack Simson Caird, 'The Supreme Court and Parliament: The Constitutional Status of Checks and Balances' (UK Constitutional Law Blog, 27 September 2019)

This is illustrated, in particular, by the way in which the Supreme Court describes the scope of parliamentary sovereignty and in its account of the principle of parliamentary accountability. The Supreme Court asserts that 'the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law.'[61] Rather, the courts have also recognised parliamentary sovereignty in other ways. For example, the courts protected the sovereignty of Parliament from being eroded directly by concluding that prerogative powers cannot modify domestic law.[62] Courts have also ensured that prerogative powers do not erode the sovereignty of Parliament indirectly, either by by-passing statutory authority or through 'rendering a statute nugatory through recourse to the prerogative'.[63] To reinforce this point, the Supreme Court cites Lord Browne-Wilkinson, who stated in *Fire Brigades Union* that 'the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body'.[64]

Consequently, the Supreme Court concludes in *Miller v The Prime Minister* that the sovereignty of Parliament would 'be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased.'[65] In reaching this conclusion, the Supreme Court refers to the legislative authority of Parliament needing to be protected from acts of the executive. This reflects a Westminster vision of representative democracy. The legislature – constituted in the Commons by backbench and opposition MPs – are at the centre of government, not the executive. Under a Whitehall vision of representative democracy, the legislature would not need to be protected from acts of the executive in this manner. Rather, the legislature should either support the executive, or move a vote of no confidence.

The Supreme Court's conception of parliamentary accountability also supports a Westminster, as opposed to a Whitehall, vision of democracy. The Court describes this principle as follows:

<https://ukconstitutionallaw.org/2019/09/27/jack-simson-caird-the-supreme-court-and-parliament-the-constitutional-status-of-checks-and-balances/> accessed 9 May 2020.

61 *Miller v The Prime Minister* (n 2) [41].

62 *Case of Proclamations* (n 37).

63 *Miller v The Prime Minister* (n 2) [41]. See also *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513; *Secretary of State for Exiting the EU v Miller* (n 1).

64 *Fire Brigades Union* (n 63) 522, cited in *Miller v The Prime Minister* (n 2) [41].

65 *Miller v The Prime Minister* (n 2) [42].

> Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.[66]

This account emphasises the role of the legislature in the UK constitution. Backbench and opposition MPs hold the executive to account. In turn, this upholds representative democracy. The Government is accountable to Parliament and Parliament is accountable to the people. This check over the executive by the legislature is designed to prevent the arbitrary exercise of power. It places the legislature and not the executive at the centre of the constitution. The Supreme Court asserted that 'the longer that Parliaments stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.'[67] This statement fits with a Westminster, as opposed to a Whitehall, vision of representative democracy.

The choice between celebrating and criticising the decision of the Supreme Court in *Miller v The Prime Minister*, therefore, may depend, at least in part, upon whether one adopts a Whitehall or a Westminster interpretation of democracy. I would argue in favour of a Westminster version of democracy for three reasons. First, whilst it is the case that both understandings of democracy are logically possible, albeit not necessarily equally feasible interpretations of the UK constitution, at the time of *Miller v The Prime Minister*, the political reality was more accurately described as upholding a Westminster, as opposed to a Whitehall, interpretation of democracy.[68] This is evidenced by legislation – particularly the Fixed-Term Parliaments Act 2011 and s 13 of the European Union (Withdrawal) Act 2018 – as well as the use of Standing Orders, particularly to facilitate the enactment of the European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No. 2) Act 2019.

Prior to the Fixed-Term Parliaments Act 2011, general elections were held after the Monarch exercised her prerogative power to dissolve Parliament,

[66] ibid [46].
[67] ibid [48].
[68] I would also argue that this was more historically accurate more generally, although space precludes a detailed defence of this argument.

acting, by convention, on the advice of her Ministers to do so, with perhaps an additional reserve power to refuse to dissolve Parliament in exceptional circumstances.[69] This placed the balance of power in the hands of the executive. Subject to legislation providing for the maximum length of a parliamentary term,[70] a Prime Minister could choose the date of a general election that she believed to maximise her party's chances of re-election. In addition, given the convention that a Government losing a vote of no confidence would resign and ask for the dissolution of Parliament to trigger a general election, a Prime Minister could use a vote of no confidence to stymie a potential backbench rebellion. Whilst backbench MPs may have been willing to vote against a particular piece of legislation, or to back an opposition amendment to Governmental legislation, they may be less willing to do so if that were to potentially lead to a general election and the possibility that they would not be selected to stand as an MP for their constituency, or that the MP may lose his seat at the ensuing general election. Both of these powers strengthened the role of the executive against the legislature.

The Fixed-Term Parliaments Act 2011 fixes parliamentary terms at five years, setting the dates of future general elections. The Act provides two ways in which an early parliamentary general election may take place. First, two-thirds of the 650 members of the House of Commons may vote in favour of a motion for an early parliamentary general election.[71] Second, the House of Commons, by a simple majority, could vote in favour of motion of no confidence in the Government. Following this vote of no confidence, the House has 14 days in which to form a Government, and to vote in favour of a motion of confidence in that Government, or the House of Commons, dissolves and a general election takes place.[72] Consequently, the Act potentially transfers power from the executive to the legislature. A Prime Minister may not simply advise the Monarch to dissolve Parliament and hold a general election. Any general election requires a vote in favour from two-thirds of the House of Commons or runs the risk that the House of Commons could offer a vote of confidence in an alternative Government to the one seeking an early parliamentary general election, without a general election taking place.

The political reality may attest to the fact that it can sometimes be easy for the Prime Minister to obtain these votes, as was the case with the vote

[69] Twomey, *The Veiled Sceptre* (n 24); Twomey, 'Prorogation, the Queen and the Courts' (n 24).

[70] Prior to the Fixed-Term Parliaments Act 2011, the limit of five years was found in the Parliament Act 1911, s 7.

[71] Fixed Term Parliaments Act 2011, ss 2(1) and 2(2).

[72] ibid ss 2(3) to 2(5).

for an early parliamentary general election on 19 April 2017, where 522 MPs voted in favour and only 13 MPs voted against an early parliamentary general election.[73] This led some to suggest that, given the importance of a general election, the Fixed-Term Parliaments Act 2011 did nothing to alter the balance of power. However, the events of 2019 would suggest that political context is key. Boris Johnson tried, and failed, three times to obtain a vote in favour of an early parliamentary general election.[74] Whether one deplores the outcome of these votes and the consequence of the Act as creating a zombie Parliament, or applauds the Act for providing the legislature with the means to prevent the actions of a Government that did not have a working majority in the House, depends upon whether one prefers a Whitehall or a Westminster vision of democracy.

Section 13 of the European Union (Withdrawal) Act 2018 also provides support for the accuracy of a Westminster as opposed to a Whitehall vision of democracy. This provision provided the legal conditions for the ratification of the Withdrawal Agreement between the UK and the EU. It could not be ratified unless: a Minister of the Crown laid before Parliament a statement that agreement had been reached, as well as a copy of the Withdrawal Agreement and a copy of the framework for the future relationship between the UK and the EU;[75] there was a vote of the House of Commons in favour of adopting both the Withdrawal Agreement and the framework for a future relationship and a motion in the House of Lords to take note of this vote;[76] and an Act of Parliament was enacted to implement the Withdrawal Agreement.[77]

Treaties are normally ratified through their provisions being laid before Parliament, Parliament having the opportunity to vote against the ratification of the Treaty within 21 sitting days. If there is no such vote, then the Treaty is ratified. Moreover, this procedure can be avoided when it is urgent for the Treaty to be ratified without being laid before Parliament in this manner, with the ability of Parliament to vote against this ratification. The Government may still ratify a Treaty if Parliament has voted against this ratification, if a Minister of the Crown lays before Parliament a statement that the Treaty should nevertheless be ratified and provides the reasons for this ratification.[78] These normal provisions for the ratification of a Treaty clearly place the balance of power with the executive as opposed

[73] HC Deb 19 April 2017, vol 624, cols 708-12.
[74] HC Deb 4 September 2019, vol 664, cols 314-15; HC Deb 9 September 2019, vol 664, cols 637-39; HC Deb 28 October 2019, vol 667, cols 77-79.
[75] European Union (Withdrawal) Act 2018, s 13(1)(a).
[76] ibid s 13(1)(b) and 13(1)(c).
[77] ibid s 13(1)(d).
[78] Constitutional Reform and Governance Act 2010, ss 20 to 25.

to the legislature.

The 2018 Act, therefore, provides a shift in the balance of power from the executive to the legislature, providing the legislature with more of a say in the ratification of the Withdrawal Agreement than was the case for other Treaties. The House of Commons voted against the Withdrawal Agreement on three occasions: 15 January 2019; 12 March 2019; and 25 March 2019.[79] The first vote marked the largest Governmental defeat since the establishment of universal suffrage. Further provisions of s 13 reinforced this potential move away from a Whitehall to a Westminster vision of democracy. If the House of Commons did not vote in favour of the Withdrawal Agreement or the framework for a future relationship, the Government was required to make a statement to the House of Commons, followed by a motion in neutral term in response to this statement in the Commons and a motion in the House of Lords to take note of the statement.[80] Similar requirements were in place should the Minister make a statement that it would not be possible, in principle, for a Withdrawal Agreement to be made by 21 January 2019,[81] or if by the end of 21 January 2019 no agreement in principle had been reached.[82] These provisions led to a series of so-called 'meaningful votes'.[83] Again, this illustrates a relative transfer of power from the executive to the legislature.

Further evidence of this move from a predominantly Whitehall, to a predominantly Westminster, vision of democracy can be found in the way in which the Speaker interpreted and applied some of the Standing Orders governing the conduct of behaviour in the House of Commons. Standing Order No 14 provides support for a strong executive by prioritising the business of the Government.[84] These provisions make it very difficult for a Private Members' Bill to be enacted through Parliament, these Bills only have 'precedence over government business on thirteen Fridays in each session.'[85] Nevertheless, in the 2017-19 session, two Private Members Bills were enacted – the European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No. 2) Act 2019 – both of which instructed the Prime Minister at the time to do something she or he did not wish to do, seek an extension to the art 50 negotiation process and neither of which

[79] HC Deb 15 January 2019, vol 652, cols 1122-1125; HC Deb 12 March 2019, vol 656, cols 291-295; HC Deb 25 March 2019, vol 657, cols 60-145.

[80] European Union (Withdrawal) Act 2018, s 13(3)-(6).

[81] ibid s 13(7)-(9).

[82] ibid s 13(10)-(12).

[83] See, for example, votes on motions on 29 January 2019, 14 February 2019, 27 February 2019, 13 March 2019, 14 March 2019 and 1 April 2019.

[84] Standing Order No 14(1) provides that: 'Save as provided in this order, government business shall have precedence at every sitting.'

[85] Standing Order No 14(8).

had been allocated time through the usual process of a ballot for Private Members' Bills.

The enactment of both of these Private Members' Bills required a novel interpretation of the Standing Order rules, the most striking of which was the interpretation of Standing Order No 24 by the Speaker on 3 September 2019. Standing Order No 24 allows for a Member of the House to propose that the House 'should debate a specific and important matter that should have urgent consideration'. If the Speaker allows this motion, it is supported by sufficient Members of the House and the House votes in favour of this motion, then a 'debate shall be held on a motion that the House has considered the specified matter'. Prior to this date, it was understood that this Standing Order only provided for a neutral motion, which would not be capable of having substantive consequences. However, on 3 September 2019, the Speaker allowed this to be used to debate a motion to suspend Standing Order No 14, and, instead, propose a timetable for all of the stages of the European Union (Withdrawal) (No. 2) Bill 2019 to be rushed through Parliament on that day. This vote having succeeded, the Bill then proceeded through the Commons in one day, before being enacted quickly through the House of Lords after a failed attempt to prevent the modification of their Standing Orders to permit this. Once more, this illustrates a change in the relative balance of power between the executive and the legislature, from a Whitehall to a Westminster vision of democracy.

I would argue that the Supreme Court in *Miller v The Prime Minister* was right to recognise this potential move to the Westminster vision of democracy. If we are to expect the Supreme Court to be sensitive to political realities when deciding key constitutional issues, then we should expect the Court to take account of the political reality at the time, not that of the past or a potential future. In addition, I would argue that there are, further, normative reasons for the Supreme Court to have adopted a Westminster, as opposed to a Whitehall, vision of reality. First, the assumptions which support the justifications of a Whitehall vision of representative democracy have been eroded Second, a Westminster vision of democracy reflects the justification provided by the Supreme court for the principle of legality, a principle similar to that used by the Supreme Court in *Miller v The Prime Minister* when determining the common law limits on the prerogative power of prorogation.

Whitehall visions of democracy prioritise the executive, through recognising that the executive is drawn from the political party with the most seats in the Commons. The role of the electorate is minimal; to vote for a particular political party, having read the relevant manifestos setting out what that political party promises to deliver should it have the privilege of form-

ing a Government. Deliberation takes place within political parties, further enabling the electorate to participate in the formation of the policies of the political party to which they belong. Moreover, if there are two political parties, the political party with the most seats will also have a majority of the votes cast, and hence the backing of a majority of the public.

These assumptions were far from met in the 2017-19 parliamentary session. There are not just two major political parties and a Government can obtain a majority for their political party in the House of Commons without receiving a majority of votes cast. In 2017-19 the Conservative Party formed a minority Government, with a confidence and supply agreement from the DUP. As more Conservative Party backbenchers were prepared to vote against the Government, the party's majority was reduced as the whip was removed from some and others resigned their party membership and joined other political parties. The 2017-19 also saw a large number of Ministerial resignations over Brexit issues. Furthermore, most of the electorate are not members of political parties.[86] There also appears to be little evidence of deliberation within political parties as to the adoption of key policy issues. This can be illustrated by the volte-face in Governmental policy following the change of leadership of the Conservative Party – and hence the holder of the office of Prime Minister – from Theresa May to Boris Johnson. Whilst it may be claimed that 'getting Brexit done' is a means of ensuring the achievement of the outcome of the Brexit referendum of 2016, nevertheless the referendum did not provide a clear account of the direction of travel, particularly given reports from the Welsh and Scottish Governments in favour of a softer form of Brexit than that negotiated by Theresa May and, later, Boris Johnson.[87]

In addition, further normative support for the Westminster vision of democracy can be seen in the justification provided by Lord Hoffmann for the principle of legality:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights…The constraints upon its exercise by Parliament are

[86] See Ben Westerman, 'The Inner Workings of British Political Parties: The Interaction of Organisational Structures and their Impact on Political Behaviours' (The Constitutional Society, 2020) <https://consoc.org.uk/wp-content/uploads/2020/01/Westerman-The-Inner-Workings-of-British-Political-Parties.pdf> accessed 9 May 2020.

[87] Welsh Government and Plaid Cymru, 'Securing Wales' Future: Transition from the European Union to a New Relationship' (Welsh Government, 2017) <https://gov.wales/sites/default/files/2017-01/30683%20Securing%20Wales%C2%B9%20Future_ENGLISH_WEB.pdf> accessed 13 December 2020; Scottish Government, 'Scotland's Place in Europe' (Scottish Government, 20 December 2016) <https://www.gov.scot/publications/scotlands-place-europe/> accessed 9 May 2020.

> ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed by the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, through acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[88]

This justification is more viable under a Westminster, as opposed to a Whitehall, vision of democracy. It assumes a Parliament that is able to carry on a full democratic scrutiny, such that there is a general consensus in favour of restricting human rights. Under a Whitehall vision of democracy, all that would be needed is a strong wish of the executive to restrict these rights. In addition, the principle of legality has a stronger justification in a political system that facilitates deliberation, where there is an ability for Government, backbench and opposition MPs to provide information from a wide range of sources, balancing the need for human rights against the justification for their restriction.

The Supreme Court did not apply the principle of legality in *Miller v The Prime Minister* because it concerned the extent of a prerogative, not a statutory power, and the principle of legality is traditionally understood as a principle of statutory interpretation in addition to a constitutional principle. Nevertheless, when determining the extent to which the common law placed limits on the extent of the prerogative power of prorogation, the Supreme Court found it of 'some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle'.[89] This would imply that a justification similar to the principle of legality underpins the court's ability to determine the common law limits over prerogative powers. If anything, these prerogative powers may require a stricter application of common law limits. Whilst there has been democratic deliberation to set the limits of a

[88] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131.
[89] *Miller v The Prime Minister* (n 2) [49].

statutory power, no such democratic deliberation takes place to determine the limits of a prerogative power.[90]

This section is not intended to provide a complete defence of the Westminster over the Whitehall vision of democracy which would require a more detailed historical and normative analysis. Rather, it is intended to justify the Supreme Court's support of a Westminster interpretation of representative democracy in *Miller v The Prime Minister*. I have argued that this is a better reflection of the political circumstances at the time of the prorogation, as well as this being a better fit with the normative justification of the principle of legality and its analogous application to the scope of prerogative powers. Surely it is better for the Court to adopt a vision of representative democracy that better reflects the particular set of facts presented in the specific case before it than to adopt a vision that it thinks best reflects the constitution as a whole, or of the constitution in 1689, or another perceived important historical moment in the evolution of the UK constitution.

4 Justiciability: Legal or Political?

When I discussed arguments from instrumental and epistemic deference above, I argued that there was a need to go beyond debate as to whether the Supreme Court in *Miller v The Prime Minister* converted a convention into law, or whether the Court wrongly controlled the exercise of a non-justiciable prerogative power. Both of these questions raise deeper issues as to the proper role of the court – when is a prerogative power justiciable and what is the appropriate standard of review? The debate illustrates the tension between a preference for legal and political controls. Those criticising the judgment frequently advocate a preference for political controls, minimising the role of the courts. Those supportive of the judgment tend to prefer legal controls, recognising the importance of the courts in preventing the executive from abusing its powers.

This theme runs through the six criticisms I discussed at the beginning of this chapter. Those who criticise the judgment do so because of a preference for political controls, either specifically over the prerogative power of prorogation or more generally. If the court misunderstood the facts, this demonstrates its institutional inability, political institutions being more suited to carrying out these factual assessments. If the Supreme Court granted an inappropriate remedy, this was because it strayed from its legal sphere, as set out in the Bill of Rights 1689. If it is for the Monarch or Parliament, either separately or together, to control the prerogative power of prorogation, it is because their political control is to be preferred to the

[90] Craig (n 9).

legal control provided by Parliament. Similarly, if the prerogative power of prorogation is non-justiciable, it is because it should be controlled through political and not legal means; or because conventions are political and not legal; or because courts only control existence and not the exercise of prerogative powers to ensure that they do not interfere with better, political controls.

These arguments will not be revisited in this section, Rather, it will provide an alternative normative justification for the Supreme Court's decision. I will argue that merely examining whether legal or political controls are a better means of controlling the executive provides an incomplete account of the constitution. It is also important to recognise how political and legal controls interact. When analysed from this perspective, there is a further normative justification for the decision.

In previous work, I have argued that inter-institutional interactions can serve two purposes, constitutional counterbalancing and constitutional collaboration.[91] Constitutional collaboration aims to ensure the development of better standards of control over decisions of the executive by focusing on the relative institutional and constitutional characteristics of legal and political institutions. Institutional features refer to the composition and powers of different institutions. These considerations feature in an assessment of institutional and epistemic deference, focusing on the ability of institutions to obtain information and their relative expertise in assessing this information. The constitutional characteristics draw on features of institutions to determine the constitutional legitimacy of their actions. For example, it is more legitimate for democratically accountable bodies to balance competing interests than it is for non-democratically accountable bodies to perform this function. In contrast, it is more legitimate for courts, who benefit from judicial independence, to resolve disputes concerning legal rights that take place between individuals and the administration or between individuals and the executive. The independence of the judiciary ensures a lack of potential bias in such decisions that might occur were the executive to decide cases concerning the scope of its own powers.

Constitutional counter-balancing focuses on a different purpose of inter-institutional interactions. The UK does not have a codified constitution, with aspects of the UK constitution instead being regulated through legislation, the common law, conventions and rules of practice and procedure. We often focus on this feature when analysing the consequences of parliamentary sovereignty. If it is not possible for one Parliament to limit the law-making powers of its successors then, in turn, it is not possible to have a codified constitution which places legally enforceable limits on the law-

[91] Alison L Young, *Democratic Dialogue and the Constitution* (OUP 2017), ch 3.

making powers of a future Parliament. In addition, the lack of a codified constitution means that the separation of powers, whilst recognised as a constitutional principle, has not played a key role as an aspect of constitutional design in the UK. Rather, the relative roles of the legislature, the executive and the courts have evolved over time. Constitutional counterbalancing is one aspect of this evolution. It refers to interactions where one institution believes that another has transgressed its constitutional role, to the detriment of that institution. In these circumstances, it can be justified for that institution to push back against this transgression by the other institution. This can occur pre-emptively, in order to establish limits, in addition to being in response to an action from another institution.

Miller v The Prime Minister provides a further example of constitutional counterbalancing. This is an example of an institution acting to prevent the actions of another institution from eroding the powers not of itself, but of another governmental institution; in other words, the constitutional counterbalancing protects the powers of a third party. This is not novel. The *Fire Brigades Union* case may also best be explained in this manner.[92] The justification for providing a broad interpretation of a commencement provision also rests on ensuring the powers of the legislature are not usurped by the executive. Parliament had devised a compensation scheme set out in legislation that the Minister had the power to bring into force. To use the prerogative to bring in a less generous scheme frustrated the will of the legislature in a manner where it would have been difficult, if not impossible, for the legislature to have prevented the executive from acting in this manner. In *Miller v The Prime Minister*, the Supreme Court is exercising constitutional counterbalancing in order to protect the powers of the legislature from being illegitimately eroded by the executive. Here, as above, I understand the legislature to consist predominantly of backbench and opposition MPs, although I accept that the legislature also includes members of the House of Lords who are not members of the Government. The executive consists of governmental Ministers.

When, if at all, is it legitimate for the court to interfere to protect the rights of the legislature from erosion by the executive? There are four criteria. First, the encroachment of the executive over the powers of the legislature, or the potential erosion of the legislature's constitutional role must be manifestly serious in order to justify intervention by the court to protect the powers of the legislature. Second, the legislature must be unable to defend the erosion of its constitutional role by the executive. Third, the intrusion of the executive over the powers of the legislature must give rise

[92] *Fire Brigades Union* (n 63). See also Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] Public Law 599.

to serious legal, political, social or constitutional consequences. Fourth, the actions of the court to defend the legislature from intrusion by acts of the executive must not increase the powers of the court. Rather, they must be designed to ensure that the powers of the legislature are bolstered from erosion by acts of the executive.

All four of these criteria were satisfied in *Miller v The Prime Minister*. First, I agree with the assessment of the Supreme Court as to the serious nature of this particular prorogation. Parliament was prorogued for five out of the eight weeks of what was then the remaining time to the end of the art 50 negotiation period. As discussed above, the legislature had been given a role to play in the ratification of the Withdrawal Agreement through the provisions of s 13 of the European Union (Withdrawal) Act 2018. In addition, there was clear evidence that the legislature did not agree with the then policy choice of the Government to leave the EU on 31 October 2019, even if this meant leaving with no deal. The House of Commons had repeatedly voted against leaving the EU with no deal, in addition to enacting legislation to require the Prime Minister to seek an extension to the art 50 process in order to prevent the UK from leaving the EU with no deal.[93]

Second, the legislature was not in a position to defend its own constitutional powers from erosion by the executive. Whilst I accept that the Government did provide notice of its intention to prorogue Parliament, giving Parliament an ability to hold the Government to account for its actions, the only realistic means of doing so is to hold a vote of no confidence under the Fixed-Term Parliaments Act 2011, including the 14-day period in which a possible vote of confidence could be held in a Government prior to the calling of a general election. Given the short time in which Parliament would have been sitting between the announcement of the prorogation and the dates announced for the potential start of that prorogation, and the art 50 deadline that could not be unilaterally extended by either the UK legislature or the executive, the legislature had little realistic opportunity to defend its own constitutional position. Instead, the legislature had to choose between a vote of no confidence and the risk of a general election leading to the UK leaving the EU with no deal, or enacting legislation aiming to prevent the UK leaving the EU with no deal. It is not for the courts to indirectly evaluate the policy choice of the legislature to decide to prefer to act to preserve its intention that the UK should not leave the EU with no deal rather than to issue a vote of no confidence in the Government. Yet, if the Supreme Court had concluded that there were no limits on the extent of the prerogative power of prorogation, it may have indirectly influenced the legislature's choice.

[93] European Union (Withdrawal) Act 2019; European Union (Withdrawal) (No. 2) Act 2019.

Third, it is hard to dispute the serious legal, political, social and constitutional consequences of preventing the legislature from scrutinising the executive during the Brexit process. Regardless of one's views on Brexit, the UK's exit from the EU poses one of the largest legal and constitutional challenges of the 21st century. A failure to ensure that legislation and delegated legislation operate effectively to achieve Brexit could have large social repercussions. We have already witnessed large political consequences of the referendum outcome and the failure to achieve Brexit by the original deadline imposed by art 50 of the TEU. Brexit will also have constitutional consequences, not least as regards the restriction of the primacy of EU-derived law to legislation enacted prior to implementation period completion ('IP Completion') date,[94] in addition to the removal of the EU's Charter of Fundamental Rights and Freedoms that will no longer be recognised as a part of domestic law post IP Completion date.[95]

Fourth, the court only acted to preserve the powers of the legislature from erosion by the executive. The limits placed on prorogation by the common law are designed to protect the legislature, ensuring that parliamentary sovereignty and parliamentary accountability are not eroded. Moreover, the court recognises that any interference with parliamentary sovereignty or parliamentary accountability would have to be 'sufficiently serious to justify such an exceptional course'.[96] In doing so, the court is restricting its role to an intervention to protect the legislature, focusing on when the intrusion by the executive over the constitutional role of the legislature is sufficient serious to merit such a control.

The Supreme Court also ensured that the executive can provide a 'reasonable justification' for the intrusion over the powers of the legislature. As no reasons were provided, we are not in a position to know how stringently the court would have exercised this power of review. However, it is important to note that the Court referred to a 'reasonable' justification here. In *R (UNISON) v Lord Chancellor*, Lord Reed stated that, in circumstances where legislation specifically empowers the executive to act contrary to fundamental common law rights, the principle of legality dictates that 'the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve'.[97] Given the similarities between the common

[94] European Union (Withdrawal) Act 2018, s 5(1)-(3), as amended by the European Union (Withdrawal Agreement) Act 2020.

[95] European Union (Withdrawal) Act 2018, s 5(4). See also Catherine S Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 MLR 350.

[96] *Miller v The Prime Minister* (n 2) [50].

[97] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, [88], citing *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [21] (Lord Bingham).

law limits on prerogative powers and the principle of legality, the Supreme Court could have opted for this more stringent test through which to review the reasons provided by the executive for such a serious interference of parliamentary sovereignty and parliamentary accountability. The Supreme Court chose, instead, to adopt a test of reasonable justification in *Miller v The Prime Minister*.

In addition, the court is not adding to its powers. It drew on long-standing case law determining the ability of the court to place limits on the prerogative powers of the executive. It also drew on earlier case law providing examples of the common law developing principles to protect the wider interpretation of parliamentary sovereignty and of parliamentary accountability, drawing on earlier cases controlling prerogative powers. The Supreme Court may have developed principles of the common law, but it did so incrementally. In addition, it did not conclude that the prerogative power of prorogation was justiciable in terms of controls over the exercise of the Minister of his discretionary powers found in a particular prerogative power. It did not evaluate the rationality of the Prime Minister's advice to the Monarch to prorogue Parliament. It concluded, instead, that the prorogation was beyond the limits of the extent of this prerogative power by the common law, with the Prime Minister failing to provide a justification for his sufficiently serious erosion of the common law principles of parliamentary sovereignty and parliamentary accountability. The Supreme Court is doing no more than it has done in other cases where it has developed the common law to protect fundamental principles of the UK constitution. Consequently, I would argue that the decision of the Supreme Court in *Miller v The Prime Minister* was normatively justified.

5 Conclusion

It is impossible to conclude anything other than that *Miller v The Prime Minister* will be regarded as a key constitutional case. No doubt the controversy surrounding its justification will continue long into the future. I have argued in support of the Supreme Court's decision, recognising the importance of reading decisions in their context. The outcome of *Miller v The Prime Minister* has large political ramifications. But this does not mean that it was a political judgment, in the sense of being influenced predominantly by political as opposed to legal considerations. The Court's account of the principles of parliamentary sovereignty and parliamentary accountability demonstrate a preference for a Westminster as opposed to Whitehall interpretation of representative democracy. But this is understandable given the context of the decision. The Westminster interpretation of democracy is a better reflection of the political reality

at the time the judgment was made. Moreover, a Westminster view of representative democracy better fits the normative justification for the principle of legality which was instructive in helping the Supreme Court reach its judgment. I have also argued that *Miller v The Prime Minister* should not be criticised as the courts favouring legal constitutionalism at the cost of failing to understand the importance of the UK's political constitution. Rather, it is better understood as applying a legal standard of control that is justified in the particular political context. It provides an example of the courts legitimately using the law to prevent the executive from undermining the role of the legislature when the legislature was not realistically in a position to protect itself.

The specific context of *Miller v The Prime Minister* also explains how, despite its importance, it is unlikely that the precise set of circumstances at play in the case will appear again in the near future. This is not to downgrade its importance. It is part of a line of recent cases where the Supreme Court has drawn on constitutional principles to place legal limits on the power of the executive, protecting the constitution by upholding the separation of powers. This does not provide evidence of the Supreme Court muscling-in on the proper role of the legislature. Rather, it provides an example of the Supreme Court setting limits that are sensitive to existing parliamentary and other political controls, treading carefully to protect the UK constitution in times of extreme stress.