



R (Miller) v Prime Minister:
A self-contradictory judgment

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The [decision](#) of the UK Supreme Court in September this year to overturn the government's attempt to prorogue Parliament was intensely controversial. In the judgment of Professors [John Finnis](#) and [Martin Loughlin](#), the decision was a bad one. This paper will not attempt to remake the arguments already made, cogently and authoritatively, by such eminent critics of the Supreme Court's legal analysis. Instead it makes a simple, but often overlooked point: the judgment was indifferent to the will of Parliament. Either Parliament implicitly assented to being prorogued, in which case the court's ruling defied Parliament's sovereign will (while purporting to uphold it); or, alternatively, Parliament's will either way was inscrutable, in which case the court presumed to speak on Parliament's behalf. Whatever the merits of the court's decision otherwise, it is impossible to reconcile it with the principle of Parliamentary sovereignty as properly defined.

The supremacy of Parliament's will

In the words of [Sir William Blackstone](#) (following Lord Coke) Parliamentary privilege is the law and custom that 'whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.' The custom is a wide-ranging concept implemented by different parts of the law. Its statutory manifestation, Article 9 of the Bill of Rights 1689, is the more well known. It protects MPs' right to deliberate and legislate freely, without intervention by the courts or an oppressive Crown, by providing that 'the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.'

The common law protection of Parliament's privilege – Parliament's 'exclusive cognisance' or, alternatively, 'exclusive jurisdiction' – protects Parliament's sovereign control of its own affairs more broadly, and is not limited to MPs' freedom of speech. Lord Phillips provided an authoritative definition of exclusive cognisance in [R v Chaytor](#):

This phrase describes areas where the courts have ruled that any issues should be left to be resolved by Parliament rather than determined judicially. Exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament. The boundaries of exclusive cognisance result from accord between the two Houses and the courts as to what falls within the exclusive province of the former. Unlike the absolute privilege imposed by art 9, exclusive cognisance can be waived or relinquished by Parliament.

Although Parliament's inherent right to manage its own affairs derives from its historical origin as a high court in its own right, the doctrine has passed into the jurisdiction of the common law courts. It is therefore for judges to determine the content and scope of the doctrine, albeit in 'accord' with the Houses of Parliament.

An interesting academic debate might be had as to whether judges could go so far as to ‘unmake’ the doctrine of exclusive cognisance, in the same way that they could unmake the judge-made principles of the common law, given that judges did not ‘make’ the doctrine to begin with. The position of the Supreme Court in *Miller 2* makes this unnecessary however – the court purported to defend Parliament’s privileges, not to undo them or radically reform them.

The question, rather, is whether the judgment did what it purported to do, and defended Parliament’s sovereignty, or whether it self-defeatingly undermined it. To answer that, we must ask whether Parliament in 2019 assented to prorogation by ‘waiving or relinquishing’ its exclusive cognisance. If the answer is ‘yes’, then that waiver must itself have been an act of sovereign will that a court may not call into question.

Prorogations past

The Supreme Court rightly pointed out that prorogation is distinct from adjournment, whereby either House of Parliament may decide by resolution not to sit, for any length of time it sees fit. Such a decision is well within the scope of Parliament’s exclusive power to govern its own affairs. No court could claim jurisdiction to review its legality. Prorogation, on the other hand, is an interference by government in Parliament’s sovereign power to deliberate and legislate. By virtue of being an exercise of executive power, such a decision can fall to be reviewed by courts for its legality.

The Supreme Court seems to have held that because its judicial review jurisdiction was engaged, Parliament’s jurisdiction over its own prorogation was therefore switched off. The court at no point considered whether its jurisdiction might be limited by an obligation to respect Parliament’s jurisdiction, or how the two competing jurisdictions should be balanced. Nor indeed did the Supreme Court, unlike the Divisional Court below, turn its mind to the history of past prorogations. That was a regrettable oversight. The history shows a course of dealing between government and Parliament, in which the assent of Parliament to prorogation has been integral.

We may assume, therefore, that when Queen Victoria attended the prorogation ceremony in 1854, she understood and her subjects understood that she was taking part in a constitutionally legitimate procedure. Despite the absence of rules set down by a senior court for when prorogation is and is not valid, there were clearly some other criteria by which its validity could be measured. Prorogation has not been, throughout the centuries, a recurring arbitrary outburst, or some annual rerun of [Pride’s Purge](#).

For the Supreme Court, that measure of validity is the common law’s recognition of the Crown’s powers as valid in law. It quoted the resounding words of Lord Coke in the *Case of Proclamations*: ‘the King hath no prerogative, but that which the law of the land allows him.’ This is stirring stuff, but of questionable relevance to a

prerogative power that also engages the supreme power of Parliament. The reason prorogations past were valid was not because the courts recognised them as lawful. Courts have no power to determine what Parliament must put up with. Moreover a supreme parliament has no need of and derives no ultimate protection from a court's say-so, as it has a higher power still to affirm or abrogate any such ruling. Perhaps more obviously, there was until this year no common law authority setting out the lawful scope of the power to prorogue, nor was one even on the horizon.

The legitimate basis of prorogation – the higher principle that made it fit and valid rather than merely arbitrary – was not the common law but Parliament's sovereign discretion to relinquish to the government a degree of control over its own affairs, *subject to* Parliament's power at any time to limit or revoke that control by enacting legislation, or to withdraw confidence and refer the matter to the ultimate authority of the people.

The Supreme Court acknowledged the previous occasions on which Parliament has limited the power to prorogue, but derived from them a questionable conclusion:

[44] Statutory requirements as to sittings of Parliament have indeed been enacted from time to time, for example by the Statute of 1362 (36 Edward III c 10), the Triennial Acts of 1640 and 1664, the Bill of Rights 1688, the Scottish Claim of Right 1689, the Meeting of Parliament Act 1694, and most recently the Northern Ireland (Executive Formation etc) Act 2019, section 3. Their existence confirms the necessity of a legal limit on the power to prorogue, but they do not address the situation with which the present appeals are concerned.

The existence of those statutes – in addition to those statutes that specifically preserve or limit the power of prorogation (the Succession to the Crown Act 1707, the Meeting of Parliament Act 1797, the Prorogation Act 1867) – confirms no 'necessity'. They confirm, rather, that Parliament has from time to time exercised its sovereign *will* to put its own sitting under statutory control. As a sovereign body it knows no compelling necessity. Its unconstrained will is, subject to the proper processes of enactment, law. There is also a clear and important distinction between a limitation that Parliament *desires* and chooses, and a limitation that a court holds *must* be imposed. Not least because a judicial limitation that is not desired by Parliament would infringe, rather than affirm, its sovereignty.

Parliament's power of waiver

The power of Parliament to waive its exclusive cognisance – a power that distinguishes it from Article 9 privilege, which beyond wholesale repeal cannot be waived – can be exercised explicitly, by active grant of waiver, or implicitly, by refraining from legislating against what would otherwise be an infringement of its sovereignty.

The Houses of Parliament can explicitly waive exclusive cognisance by passing a motion that, for instance, allows an officer of the House to give evidence on its internal proceedings. As [Erskine May](#) notes, a motion granting a waiver is required even in cases where a witness relies on a statutory exemption from Article 9 privilege. While the statute in such cases grants in law a licence or an ability to do what would otherwise be unlawful, exercise of that ability is dependent still on Parliament's institutional will that it be exercised.

Another example of Parliament's explicit waiver of its exclusive cognisance is when, as noted by Lord Phillips in *Chaytor*, Parliament enacts in legislation rules or arrangements that were previously governed by its own law and custom. Even though in such cases Parliament is enshrining its will in law, it is also waiving exclusive cognisance, by allowing the courts, which must interpret and apply the legislation, to encroach on matters that were previously within its internal jurisdiction ([67] to [68]).

Aside from those aspects of it that are governed by statute, prorogation does not require and invariably does not enjoy the explicit assent of Parliament. There is a strong argument, however, that the 2019 prorogation enjoyed Parliament's *implicit* assent.

The first ground for Parliament's implicit assent is the most obvious one. Parliament had, and declined, the opportunity to oppose its own prorogation, either by withdrawing confidence in the government or by legislating to reverse it. The prorogation Order was made, and announced, on 28 August 2019. Subsequently, on 4 September, Parliament rejected a motion that there should be an early election under the Fixed Term Parliament Act 2011. Fewer than half of MPs voted to dissolve Parliament so that a new government might be formed. It is extraordinary that the Supreme Court failed to acknowledge the significance of a parliament dominant over the governing party – so dominant that it could dictate the conduct of treaty negotiations – *relinquishing* the opportunity to resist prorogation. All the more extraordinary as that very dominance had led to the prorogation in the first place – it was the elephant in the room.

Parliament's response to the prorogation was a paradigmatic example of where, in the words of Lord Sumption in the [Nicklinson](#) case, 'Parliamentary inaction amounts to a decision not to act.' This is second ground for arguing that Parliament implicitly assented to prorogation. The majority in *Nicklinson* decided that the Supreme Court should not take the opportunity to reform the law on assisted suicide on the ground that it was either a matter of public morality strictly for Parliament to decide, or a matter on which Parliament should first be given the opportunity to legislate. *Nicklinson* concerned the scope of the individual right to a private life – a classically judicial matter, despite the court's wise decision to defer in that instance to Parliament. If, per Lord Sumption, the courts must respect Parliament's decision not to act in a matter concerning the rights of individuals, then, *a fortiori*, it must respect Parliament's decision on a matter which touches upon its exclusive cognisance.

Indeed, but for Parliament's acquiescence to the Crown's power of prorogation, the matter of when Parliament sits indisputably *would* fall within exclusive cognisance.

It is a commonly agreed principle that the scope of certain constitutional powers is determined residually, according to what Parliament chooses not to do. As our supreme Parliament can always impose at will an indisputable limit on the powers of the courts or of the executive, or indeed on its own exclusive cognisance, it follows that the absence of statute law carves out complementary spaces in which state institutions have discretion to operate.

In [*Mereworth v Ministry of Justice*](#), the High Court held that exclusive cognisance is defined by its complementary relationship with statute law: 'where a matter falls within the internal affairs of Parliament, it is within the area of Parliament's exclusive cognisance except where legislation provides to the contrary' [10].

This principle is most often seen in relation to the law-making power of judges. Despite the general constitutional rule that the legislature makes law, which the courts then apply and interpret, law-making by judges is held not to usurp Parliament's exclusive legislative competence because it is always subject to Parliament's ultimate power to overrule the decisions of the courts or put any law on a statutory footing. As Lord Hope held in [*Re Spectrum Plus*](#):

it is for the House [*of Lords*], as the ultimate court, to define the limits of its own jurisdiction. It can take as its starting point the inherent power which it has under the common law to do whatever is necessary to serve the interests of justice. That power is, of course, subject as our constitution requires to the doctrine of parliamentary sovereignty. It must respect any limits on its jurisdiction that may have been imposed by Parliament, so long as these are compatible with our treaty obligations under Community law and with the rights that are defined by s 1(1) of the Human Rights Act 1998 as the convention rights.

Lord Bingham in *A v Secretary of State for the Home Department* defended the democratic legitimacy of judicial law-making specifically on the basis that the Human Rights Act 1998 has given the courts a 'wholly democratic mandate' to review the compatibility of both government acts and legislation made by Parliament. In the same judgment, however, he also held that:

the greater the legal [*versus the political*] content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.

The saving power of Parliament's ultimate and supreme jurisdiction has been articulated even more forcibly extrajudicially. Lady Hale's predecessor as President of the Supreme Court, Lord Neuberger, concluded [his farewell speech](#) with these words:

An additional safeguard against judicial law making which is subsequently thought to be wrong exists in the fact that, where the law has been developed by a judge through a decision which is thought to be inappropriate, Parliament can always reverse the decision by legislation.

Lady Hale, in her [response to Lord Sumption's Reith Lectures](#), has made a similar argument:

The courts have to operate the Human Rights Act – they are only doing what Parliament has told them to do. This inevitably involves making these sorts of judgments in real cases involving real people. The courts would not be doing right by those people if they failed to adjudicate upon their cases. We all find this uncomfortable in some contexts ... and a proper degree of restraint when dealing with government policy decisions is indeed appropriate. But if Parliament does not like what the courts have decided, in this or any other context, it can always overturn it.

There is, I suggest, no principled reason why the latitude that the common law courts give to themselves in relation to Parliament should not also apply to the executive in proroguing Parliament. Parliament can always revoke the power to prorogue. It is subject to statutory limitations, and whatever other limits Parliament sees fit to impose. When, as in 2019, Parliament sees fit to impose no restriction, then the prorogation falls within the legitimate boundary set by Parliament.

The fatal self-contradiction

One could counter-argue that Parliamentary oversight is far too broad a test for what makes an act constitutionally valid. The rule of the common law is not, after all, 'as long as Parliament doesn't say "no", judges can do as they like.' There are other, internal criteria for what makes court's decision valid – procedural fairness, consistency with the law as declared previously by higher courts, respect for fundamental principles of the common law, etc.

The Supreme Court set itself the task of devising such granular criteria for the lawfulness of a prorogation order. It sought criteria which 1) did not derive simply from Parliament's implicit assent or will, but 2) which uphold Parliament's sovereignty.

The task was a hopeless one that could only end in self-contradiction. Upholding Parliament's sovereignty entails upholding its will – sovereignty just is the power of unconstrained will. However in the absence of a legal statement of Parliament's will, in the form of a statute, the court could not know whether the application of its new criteria for judging the prorogation might lead to a decision contrary to Parliament's

political will regarding the prorogation. No court possesses the institutional competence to discern that political will, or even to determine Parliament's will at all in the absence of a statute. Even if Parliament's will coincided with the court's judgment, and it too opposed prorogation, the court would not then be upholding or giving effect to Parliament's settled will. It would instead be presuming to speak Parliament's will on its behalf, when true sovereignty demands that no subordinate may speak with the voice of its sovereign master.

All of the court's moves to find a legal criterion for judging prorogation other than the will of Parliament led it to diminish Parliamentary sovereignty rather than, as it purported, to uphold it.

Parliament's ability vs. Parliament's will

The first move, at paragraphs 40 to 41, was to conflate Parliament's legislative supremacy over all other law-making bodies with its sovereignty as an institution governed by its own rules. This is not immediately relevant. The prorogation did nothing to affect the status of statute law. The justices conceded that Parliamentary sovereignty as legally understood is 'not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law.' However rather than turning to consider Parliament's right to manage its own proceedings – as the matter demanded – the court instead considered a line of cases in which the courts upheld statute law against attempts to frustrate it by use of the royal prerogative. The principle derived by the court, at paragraph 42, was that prorogation frustrates not Parliament's management of its own affairs but its 'legislative authority':

The sovereignty of Parliament would, however, 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. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.

This does not seem to be correct. The premise of Parliamentary sovereignty, and with it the foundation of our constitution, is not the *ability* or *capacity* of Parliament to wield its legislative authority, but its *will* to do so. Parliament could of course be prevented from exercising its legislative authority by its own will not to legislate, or even not to sit at all. An indefinite or very long adjournment by the House of Commons would have the same effect of undermining constitutional fundamentals that the court attributed to the 2019 prorogation. In the case of an adjournment, however, barring the enforcement of certain limited statutory powers of the Crown to the recall an adjourned Parliament, the courts would unquestionably have no power to enforce

constitutional fundamentals by compelling Parliament to convene, no matter how deleterious the effect.

Parliament's *ability* to wield legislative authority cannot be the fundamental principle the Supreme Court claimed, because a truly fundamental principle would not vary contingently on the procedural question of whether Parliament was prorogued or adjourned. Fundamental principles are not switched on and off so easily. The truly fundamental legal principle of the British constitution, which governs both prorogation and adjournment, is Parliament's freedom to do what it wants – to wield its legislative authority however it wishes or, if it so desires, not to wield it at all or even to cede it – subject only to the people.

It follows that if Parliament's ability to fulfil its constitutional role of scrutinising the government and making law is conditional on the yet more fundamental question of what Parliament wants, then the constitutional validity of any prorogation must also turn on the same question. At the very least, a court should take it into account. Yet the Supreme Court did not.

The legal inscrutability of Parliament's political will

The Supreme Court, at [33], made the reasonable point that, were Parliament to be prorogued with immediate effect, its wishes either way would be irrelevant as the very act of prorogation deprives it of the ability to express or effect its wishes. Let us set aside the obvious objection that this is an irrelevant hypothetical scenario – this was not a prorogation with immediate effect, it was an act that Parliament foresaw and subsequently chose not to resist. Nevertheless, even in the court's hypothetical scenario, Parliament's will either way remains an inscrutable counter-factual. It might, given the opportunity, have assented, or it might have resisted. We could not know – and given that the will of Parliament, as expressed exclusively by Parliament, is the supreme determining power in our constitution, it is extraordinary that a court should presume to second-guess it. If the court guesses wrong, then it will contradict rather than uphold Parliament's sovereign will.

The justices then attempted, at paragraph 56, to second-guess why Parliament may have wished to remain sitting. The attempt illustrates the wholly unsuitable terrain into which the court unwisely decided to venture. MPs may indeed have decided that 'parliamentary scrutiny of government activity in the run-up to exit day was more important.' Equally, however, one can posit reasons why MPs may in fact have welcomed prorogation. Most obviously, any prorogation is carried out on the advice of the Prime Minister – that is to say, the leader of the largest party in the House of Commons. It is almost certain that any political advantage he or she seeks through prorogation will be one sought also by a significant proportion of the MPs belonging to that party. Nor is it clear that opposition MPs will always have reason to oppose prorogation. Opposition parties in 2019 may have decided that assenting to prorogation would do more political damage to the government's credibility than their

MPs could inflict in Commons debates. A decision that many might think would have been a wise one.

These speculations, as those entertained by the Supreme Court, are legally fruitless. No court possesses the institutional competence to decide them either way. Beyond interpreting its will as enacted in legislation, courts cannot determine what the will of Parliament is. It is an intensely political matter. Fundamental to sovereignty is its solitude – no one may gainsay the sovereign, but nor may anyone presume to speak up for it or appoint himself as its spokesman. A sovereign must speak for itself alone. Even if MPs had passed a motion clearly expressing that they did not assent to prorogation, a court would struggle to have cognisance of it without breaching Article 9 of the Bill of Rights. Adversarial court proceedings would almost certainly involve the motion being impeached or questioned.

The 'rights' of Parliament

The preferable approach, one might think, would have been for the Supreme Court to accept that, as it was not competent to decide either way on the fundamental constitutional question before it, it should have refrained from deciding. Instead the justices leapfrogged the primary matter, in both logical and constitutional terms, of what Parliament willed – a dead end for the court – and seized on Parliament's constitutional powers and purported 'rights', which by contrast could in theory be subject to a legal decision. The emphasis on the 'ability' of Parliament to carry out its functions (paragraphs 45, 51, 56) rather than its will, flows from this questionable move. The corollary is made clear at paragraph 57:

that Parliament, and in particular the House of Commons as the democratically elected representatives of the people, has a right to have a voice in how that change comes about is indisputable.

A Parliament truly acknowledged as sovereign has no need of a 'right'. Its will suffices. Nor can Parliament be supreme if we define its privileges as rights. Doing so presupposes a yet higher body with power to grant (or withhold) those rights, and to circumscribe their meaning and extent. Such a notion is very clearly inconsistent with the principle of Parliamentary sovereignty that the judgment purports to uphold and defend.

Conclusion

Governments in the past wielded the power to prorogue according to the terms of a long-standing, consensual course of dealing between the executive and the legislature. The power has always been subject to Parliament's supreme power to restrict it, which from time to time it has done. As such, the scope of the prerogative power of prorogation was measured by the extent to which Parliament had signalled its will,

both implicitly and explicitly, to acquiesce to it. If Parliament chooses to acquiesce to a prerogative power over functions and abilities that otherwise would be within its exclusive cognisance, then that too is an unimpeachable decision of Parliament.

The judgment of the Supreme Court attempted to impose a new measure, based on the usual measure of the lawfulness of government decisions – 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.’ The court was unable to reconcile its new test with the primacy of Parliamentary intent. Instead of umpiring between government and Parliament, it appointed itself as the government’s constitutional antagonist. The effect was to supplant Parliament as exclusive and supreme decision-maker regarding its own privileges.

A better way out would have been for the court to hold that, in extreme circumstances where Parliament had been prorogued indefinitely or for a long time, the principle of responsible government, and the public interest in democratic accountability, would outweigh even the obligation to refrain from matters governed by Parliament’s supreme intent. It is likely, of course, that a Prime Minister so out of control as to attempt to govern without Parliament would pay little or no attention to an adverse court ruling. In those circumstances the court could only proffer the comforting fiction, amid the wreckage, that the constitution still existed.

Nevertheless, such an approach would have saved the court from hopeless self-contradiction. The difficulty with that approach, which may explain why the court did not take it, is that it would have blocked any attempt to void the prorogation, as it clearly did not constitute an extreme circumstance outweighing the fundamental principle of the British constitution. The infelicities of the judgment become explicable if one assumes the justices’ started out from the premise that, because the prorogation was (in the eyes of many, possibly their own too) politically abhorrent, the law would be perceived as perverse if the judges couldn’t find some way, by hook or by crook, of recognising its abhorrence in law too.

The outcome is a sorry mess. In the name of parliamentary sovereignty, a solitary concerned citizen can now persuade a court to overturn a prorogation, regardless of whether Parliament might in fact assent to it. The judgment of Lord Doherty at first instance in the Scottish courts is unanswerable:

Parliament is the master of its own proceedings, rules and privileges and has exclusive control over its own affairs. The separation of powers entails that the courts will not interfere. It is for Parliament to decide when it will sit and it routinely does so. It is not for the courts to devise further restraints on prorogation which go beyond the limits which Parliament has chosen to provide. Parliament can sit before and after the prorogation.

It is regrettable, and somewhat alarming, that the highest UK court fell so far short of such clear, considered wisdom.

It should be noted, finally, that the Supreme Court's judgment, while questionable, is not wholly anomalous. The assertion by the claimants in both *Miller* cases that they sought to uphold Parliament's sovereignty was, given their strong pro-EU stance, unusual. The supremacy of EU law is the greatest challenge to Parliamentary sovereignty in the history of our modern constitutional settlement. If it is in fact the case that the claimants' embrace of Parliamentary sovereignty was indeed opportunistic and merely tactical, then a judgment that paid lip service to Parliamentary sovereignty while, in effect, undermining it, did not defeat their purpose. Indeed, it may have been welcome. If the 2019 general election does deliver a pro-Brexit majority, then Mrs Miller and Ms Cherry, aided by Lord Pannick, may have won doubly. They defeated the government in court and, for the battles to come, strengthened the power of the courts over a Parliament that no may longer share their overriding preoccupation.

This is not to say, at all, that the justices of the Supreme Court were motivated by the same Europhile preoccupation as may have motivated the claimants. It may be the case, however, that the court had its own motivation as a belligerent, rather than arbiter, within the competition for constitutional power. This motivation might explain the strange self-contradiction in *Miller 2*. From this perspective, restricting the executive's power over Parliament by, in effect, diminishing the power of Parliament itself makes perfect sense, for that diminution conversely increased the court's own power. Although no British court would ever be so crude as to say it in terms, the corollary of the judgment is that encroaching on Parliament's privileges is a bad thing when the government does it, and a fine thing when the courts do it. This is either because increasing the power of judges is a desirable end in itself, or because the purported motivating spirit of British constitutional law is in all cases the systematic and continuous diminution of the power of the executive – or both. In any case, this judgment has made amply clear that, under the present law and as currently constituted, the Supreme Court is unfit to act as a constitutional court.