Miller/Cherry and the Justiciability of Prerogative Powers

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Introduction

On the 24th of September 2019, a landmark judgment was handed down by the Supreme Court of the United Kingdom.[1] Decided by a unanimous verdict of 11 justices, it was held that Prime Minister's advice that led to Order in Council issuing prorogation was 'unlawful, void and of no legal effect.' The judgment was heralded as 'revolutionary' by former Supreme Court justice, Lord Sumption.[2] Others were critical of the court's judgment, on the basis that the Supreme Court having entered upon political arena.[3] Others viewed this decision as a matter that was within the Court's jurisdiction, in a manner consistent with the case law.[4] This paper supports the latter position, arguing that the outcome of the *Miller/Cherry* case ultimately represents a gradual development of legal precedent, which is well grounded in precedent and principle.[5] In this article, I argue that this judgment clarified the justiciability of political prerogative powers, on the basis of a nuanced application of the principles of Parliamentary sovereignty, Parliamentary accountability, and the rule of law.

Section one of this paper looks at the justiciability of prerogative powers. Section two focuses on the *Miller/Cherry* judgment and analyses of the core rationale of the court. Section three evaluates this decision, identifying some of its potential effects. This paper uses a working definition of justiciability which draws on Barendt's overview of the concept.[6] Barendt relates

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[1] *R (On the Application of Miller) v Prime Minister; Cherry and Others v Advocate General* [2019] UKSC 41, [2019] 4 All ER 299. Hereafter '*Miller/Cherry*'.

[2] Lord Sumption, 'Supreme Court Ruling is the natural result of Boris Johnson's Constitutional Vandalism', *Times* (The Times 2019) <www.thetimes.co.uk/article/supreme-court-ruling-is-the-natural-result-of-boris-johnson-s-constitutional-vandalism-kshrnrt55#> accessed 9 October 2019.

[3] Stephen Tierney discusses how the decision potentially opens up further aspects of our 'political constitution' to judicial challenge. See: Stephen Tierney, 'Guest Comment: Has 'Far More Assertive' Supreme Court Over-Reached in Miller 2?' (*Legal Business*, 2019) <www.legalbusiness.co.uk/blogs/guest-comment-has-far-more-assertive-supreme-court-over-reached-in-miller-2/> accessed 17 November 2019.

[4] Mark Elliot discusses how, despite politically controversial circumstances, the decision was based on long standing constitutional principles. Mark Elliot 'The Supreme Court's Judgment in Cherry/Miller (No 2): A New Approach to Constitutional Adjudication?' (*Public Law for Everyone*, 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 17 November 2019.

[5] *Miller/Cherry* (n 1).

[6] Eric Barendt, *An Introduction to Constitutional Law* (Oxford University Press 1998) 143-145.

the idea of justiciability to the concept of political questions within US administrative law.[7] Going on to explain that the difference between justiciable and non-justiciable issues, Barendt states that this 'arguably explain[s] why the United Kingdom Courts are reluctant to intervene in some cases, despite their general jurisdiction to review unlawful administrative action'.[8] By this, he means that the concept of justiciability is useful for understanding why the courts will examine some executive decisions, but not others. Principally, the reasons for determining that a matter is non-justiciable are, much like in the US example, the idea that the matter is a political question and therefore that it is not a decision that it would be proper for the courts to make.[9] A key reason for finding that a matter is a political question could, for example, be that there are no legal standards against which the exercise, existence, or extent of an executive power can be judged.[10] The relevance of this to my thesis is that the use of the prerogative power of prorogation in the current circumstances—with a looming Brexit deadline— is a highly political issue and therefore, the identification of appropriate legal standards was central to finding the matter justiciable.

The Justiciability of Prerogative Powers in the Common Law

Prerogative powers are powers which continue to be vested in the Crown. They are a remnant of the divine right of kings, recognised by Blackstone in the eighteenth century as being 'that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his Royal dignity … it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others'.[11] However, as Wade recognised, most contemporary authority sees as a prerogative power 'any and every sort of government action which is not statutory'.[12] Among those prerogative powers which remain in the hands of the Crown is the power to prorogue Parliament.[13] The cardinal convention necessitates that the exercise of these powers only occurs upon the advice of the Prime Minister, or members of the Cabinet.[14] It is this advice by the Prime Minister

[7] ibid 144.
[8] ibid.
[9] For an exploration of the Political Question doctrine: Nat Stern, 'Don't Answer That: Revisiting the Political Question Doctrine in State Courts' (2018) 21 University of Pennsylvania Journal of Constitutional Law 153.
[10] As discussed in section 2, finding proper legal standards against which to judge the exercise of the prerogative power to prorogue parliament was central to the decision in *Miller/Cherry.*
[11] William Blackstone, *Commentaries on the Laws of England (* 1765–69) I (Oxford University Press 2016) 155.
[12] HWR Wade, *Constitutional Fundamentals* (London, Stevens & Sons 1980) 49.
[13] While the power to dissolve parliament was placed on a statutory footing by the Fixed Term Parliaments Act 2011, Section 6 (1) of this act explicitly states that the Queens power to prorogue parliament is unaffected. Fixed Term Parliaments Act 2011 s 6(1).
[14] This position is supported by the Cabinet Manual. UK Cabinet Office, The Cabinet Manual (Cabinet Office, 2011) 16.

(which led to the Order in Council upon which prorogation was issued) that was considered by the Supreme Court considered in *Miller/Cherry* No 2 .[15]

In general, the exercise of prerogative powers is governed by constitutional conventions.[16] Conventions are non-legal rules of conduct that have developed over time as the result of historical practice. At times, conventions have been referred to as a form of constitutional morality.[17] For example, the Cardinal convention dictates that the monarch acts on the advice of their ministers.[18] Conventions, therefore, can be understood as normative rules intended to govern the conduct of actors within the UK constitution. Though they are intended to be binding on one's own conscience, they are not regarded as being enforceable by the courts.[19] However, the courts have, from time to time, acknowledged their existence and scope.[20]

Traditionally, while judicial review of the existence and extent of Prerogative powers has been possible, review of how an existing power has been exercised has not.[21] Or at least, it could not be said with any confidence that such a review was open to the courts. As Barendt recognises, 'until recently [1985] the courts automatically abstained from reviewing the exercise of prerogative powers… in the domestic field'.[22] Thus, when discussing the issue of justiciability, I argue that there are two lines of analysis which must be considered. The first relates to the existence and extent of a given Prerogative Power. The idea that the courts possess a power to review the existence and scope of the Prerogative Powers can be dated back to the *Case of Proclamations.*[23] In the *Case of Proclamations,* the Court held that 'the King Hath no Prerogative, but that which the law of the land allows him'.[24] In so doing, they effectively determined that the Crown possessed only those Prerogative Powers which the courts recognised, rather than a more general legal power.[25] This position has been affirmed numerous times in subsequent case law.[26] The second refers to whether the exercise of that

[15] It should be noted that a small number of powers remain the personal prerogative of the monarch.
[16] John Stanton and Craig Prescott, *Public Law* (Oxford University Press 2018) 205-206.
[17] Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984) 11–12.
[18] This convention was recognised by the Supreme Court in their statement that 'Her Majesty was acting on the advice of her Prime Minister… we do not know what the Queen was told and cannot draw any conclusions about it'. See: *Miller/Cherry* (n 1) [15].
[19] As Marshall states, conventions are 'the beliefs that the major participants in the political process as a matter of fact have about what is required of them.' See Geoffrey Marshall (n 17) 11-12.
[20] See for Example: *Attorney-General v Jonathan Cape* [1976] QB 752, 762-764.
[21] John Stanton and Craig Prescott (n 16) 213.
[22] Barendt (n 6) 144.
[23] *Case of Proclamations* (1611) 12 Co Rep 74.
[24] ibid 76.
[25] It should be noted that this proposition also entails that it is not possible for new prerogative powers to be created. In *British Broadcasting Corporation v Johns*, Lord Diplock explicitly stated that 'it is 350 years and a civil war too late for the Queens courts to broaden the prerogative.' See: *British Broadcasting Corporation v Johns* [1965] CH 32 (CA) 79.
[26] *Entick v Carrington* [1765] EWHC J98 (KB*); British Broadcasting Corporation* (n 25).

power, within its legal limits, is open to challenge. The paper reflects this division between existence—and extent—and exercise. Firstly, the section discusses the caselaw as it relates to existence and extent, before going on to discuss the caselaw relating to exercise. Though this makes for an account which is not entirely chronological, it allows the paper to clearly demonstrate the two different approaches courts should adopt to the justiciability of prerogative powers.

The reason for this differing treatment of reviews of Prerogative Power can be attributed to the Bill of Rights and the principle of the rule of law.[27] Article 1 of the Bill of Rights states, 'the pretended power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyment is illegall'.[28] Article 2 goes on to state that 'the pretended power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall'.[29] In this sense, the Bill of Rights can be seen as declaring pre-existing limitations upon Prerogative Powers, given that it merely enumerates principles drawn from the *Case of Proclamations* some 77 years prior.[30] The Bill of Rights followed on from the Glorious Revolution which, in simplistic terms, represented a transfer of power away from the monarch to parliament. This is further strengthened by the terms of article 9 which provides that 'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[31] The result of this section further underlies that the exercise of legal power in regard to existence and extent can be challenged in circumstances where it clashes with a statute. Finally, the concept of the Rule of Law is the idea that society is governed by law.[32] According to Tom Bingham, the essence of the Rule of Law is that no entity—including the Monarch—is above the law.[33] Thus, if society is to be governed by law, it is crucial that a valid legal source can be cited for all exercises of executive power. On the other hand, review of the exercise of Prerogative Powers has often been seen as being concerned with the merits of a particular policy and

[27] There is a great deal of debate over how the Rule of Law is to be interpreted. This paper uses the term to refer to the eight criteria identified by Lord Bigham in his extra-judicial work. Though there is wealth of debate, these criteria appear, in my view, most likely to resemble the mindset of the judiciary. By selecting a conception based on this basis, the paper is able to focus on addressing the issue of Justiciability in the detail which it deserves. See Tom Bingham, 'The Rule of Law' (2007) 66 Cambridge Law Journal 67.

[28] Bill of Rights 1689, article 1.

[29] ibid, art 2.

[30] *Case of Proclamations* (n 23) 76.

[31] Bill of Rights 1689, art 9.

[32] This dates back to Aristotle. Aristotle, *Politics and the Athenian Constitution,* Book III, S 1287 (John Warrington ed) 97, cited in Tom Bingham, *The Rule of Law* (Allen Lane 2010) 3.

[33] Tom Bingham, 'The Rule of Law' (n 27) 69.

therefore to be a matter outside the proper constitutional role of the courts, due to its political nature.[34]

Subsequent to the Bill of Rights, the courts have made further decisions concerning the justiciability of questions relating to the existence and extent of Prerogative Powers. In *De Keyser's Royal Hotel* it was held that a prerogative power would become unavailable when it overlaps with statute law.[35] This decision was justified on the basis of Parliamentary sovereignty, in so far as it would undermine the supremacy of Parliament if the executive were empowered to act in a manner contrary to statute through the use of prerogative powers.[36] This principle has subsequently been expanded in the in the *Fire Brigades Union* case where it was held that even a statutory scheme which was yet to be brought into force would place the prerogative into abeyance.[37] It was also this principle which was in issue in *R (Miller) v Secretary of State for Exiting the European Union* where the government proposed to use the prerogative power on treaty making to trigger article 50 and begin the process of leaving the European Union.[38] Here, the Supreme Court held by a majority of 8-3, that prerogative powers could not be used because to frustrate the purpose and operation of an Act of Parliament: the European Communities Act 1972.[39]

Each of the cases explored in the previous paragraph relates only to the review of the existence and extent of prerogative powers, because in each case the court focused on the impact of statutes on the remaining scope of a Prerogative Power, rather than looking at whether a given use of that prerogative power—within its legal limits—was legitimate. However, their focus on impact does not mean that the courts have recognised an unlimited right to review the extent of Prerogative Powers. For example, in *Shergill v Khaira*, a joint judgment of Lord Neuberger, Lord Sumption, and Lord Hodge held that a matter could be held to be non-justiciable because of a 'lack of judicial or manageable standards'.[40] This case highlights one

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[34] Lord Keith stated in Gibson 'The making of decisions upon what must essentially be a political matter is no part of the function of the court, and it is highly undesirable that it should be. The function of the Court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons, or in certain instances, to the state. See *Gibson v Lord Advocate* [1975] SC 136 (CS), 144.

[35] *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] UKHL 1, [1920] AC 508, 526-528. Hereafter '*De Keyser'*.

[36] It should be noted that the limitation can also be justified on the grounds that as statutes are required to receive Royal Assent, the crown has effectively always consented to a limitation on their prerogative powers brought about by a statutory change.

[37] *R v Secretary of State for the Home Department ex p Fire Brigades Union and Others* [1995] 2 W.L.R 464 (HL) 516-523. Hereafter '*Fire Brigades Union'*.

[38] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 158.

[39] The majority stated that, 'The majority cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of its content or preventing its effectual operation. See: ibid [51].

[40] *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359 [40].

of the reasons why the prorogation of Parliament could have been being determined as non-justiciable, in accordance with the judgment of the Divisional Court.[41] Prior to *Miller/Cherry*, this was ambiguous due to a lack of precedential authority on the courts to treat questions of the existence and extent of prerogative powers differently from questions regarding their exercise. This lack of clarity was clearly underlying the judgment of the Divisional Court who accepted limitations on justiciability, such as those arising from *Shergill*—namely being political and lacking standards—without considering whether these limitations applied to all attempts to bring a judicial review regarding prerogative powers, or only to those attempts concerned with the exercise of prerogative powers.[42] The Supreme Court made clear that these limitations, while they remain valid, apply only to cases concerning the exercise of prerogative powers.[43]

The courts have been reluctant to find the exercise of prerogative powers a justiciable matter.[44] It was not until the obiter comments of Lord Denning in *Laker Airways Ltd v Department of Trade and Industry*, that potentially reviewing the exercise of prerogative powers gained judicial recognition.[45] On that occasion, the majority of the Court of Appeal declined to adopt what was at the time a radical stance, instead finding that prerogative powers could not be used to withdraw consent previously given under a statutory scheme.[46] However, Denning's position[47]—or at least a more conservative version of it—did come to be adopted by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*[48], hereafter '*GCHQ*'.

The *GCHQ* case is known for setting out the grounds upon which prerogative may justiciable through judicial review. Lord Diplock also listed the three commonly recognised heads of judicial review.[49] Through this judgment Lord Roskill offered an indication of which powers under the prerogative would be justiciable and which would not. He stated that,

> I do not think that the right of challenge [to an exercise of prerogative power] can be unqualified. It must, I think depend upon the subject matter of the prerogative power which is exercised. Many examples were given… of prerogative powers which as a present advised I do not think could properly be made into the subject of judicial review. Prerogative powers such as those

[41] *R (on the Application of Miller) v Prime Minister [2019]* EWHC 2381, [2019] WLUK 81 [37]-[42]; [47]-[57].
[42] *Shergill v Khaira* (n 40) [40].
[43] *Miller/Cherry* (No 2) (n 1) [36].
[44] John Stanton and Craig Prescott (n 16) 213.
[45] *Laker Airways Ltd v Department of Trade and Industry* [1977] 2 All ER 182 (CA) [192]- [193].
[46] ibid.
[47] It should be noted that Denning has been a frequent pursuer of reform and that some of his ideas have been radical departures from general principles of UK law.
[48] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), [410]-[418].
[49] ibid [410]-[412].

> relating to the making of treaties, the defence of the realm… the dissolution of parliament and the appointment of ministers as well as others… because of their nature and subject matter as such are not to be amenable to the judicial process.[50]

In the case itself, the decision of the minister was held to be justified on the grounds of national security with Lord Diplock stating that, national security 'is par-excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problem which it involves'.[51] However, the judgment of *GCHQ*, established the exercise of prerogative powers as a justiciable matter, dependent on the nature of the power in question.

In general, the powers which have been held to be reviewable are those which are closest in nature to a statutory power. For example, in *Everett* it was held that a decision to refuse a passport was amenable to judicial review.[52] In the same case, it was held that one of the categories of prerogative power which were excluded from being justiciable was that concerning 'high policy'.[53] As this example shows, it is those decisions which are primarily administrative and general—in the same way as a power which may be delegated by statute—that have come to be seen as justiciable matters. As a counter point the court in *Abassi v Foreign Secretary* held that the Foreign Office had discretion with regards to the protection offered to British Citizens. While they did find that it might be possible to review exercises of discretion in some circumstances, the court also reiterated that 'foreign policy' issues are not justiciable.[54] This suggests that where the power is more political in nature, such as where its exercise is likely to reflect government policy or where there are not relevant legal standards against which the judges could review the decision, the matter is likely to be considered non-justiciable.

The final case to consider, in order to contextualise the legal position prior to the judgment in *Miller/Cherry*[55] is *Bancoult*.[56] The first important factor which relates *Bancoult* and *Miller/Cherry* is that *Bancoult* was the first case to find that an Order in Council, made pursuant to a Royal Prerogative power, is a justiciable matter.[57] Given that the mechanism through which Parliament was prorogued was an Order in Council, this factor is very important to the

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[50] ibid [418].
[51] ibid [412].
[52] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811, [817]-[820].
[53] ibid [820].
[54] *Abassi v Foreign Secretary* [2002] EWCA Civ 1598, [2002] 11 WLUK 114 [106]. Hereafter '*Abassi'*.
[55] *Miller/Cherry* (n 1).
[56] *Secretary of State for Foreign and Commonwealth Affairs v R (On the Application of Bancoult) (No 2)* [2007] EWCA CIV 495, [2008] QB 365. Hereafter '*Bancoult'*.
[57] A form of Primary Legislation passed by the Queen and the Privy Council.

finding that *Miller/Cherry* itself concerned a justiciable matter. Secondly, *Bancoult* is significant for Lord Justice Sedley's view that

> It can be observed without disrespect, particularly since Lord Roskill was careful to express himself tentatively, that a number of his examples could today be regarded as questionable. The grant of honours for reward, the waging of war of manifest aggression or a refusal to dissolve parliament at all might well call in question an immunity based purely on subject matter.[58]

Thus, the court in *Bancoult* held that alongside the consideration of subject matter, the decision over whether a given prerogative power is justiciable could also take account of the circumstances surrounding its and the subject matter of the power in question. The ability to consider circumstances is relevant to a review because it allows consideration of the prerogative power in context. For example, in *Miller/Cherry* the looming Brexit deadline and the need for Parliament to scrutinise the executive at such a time was taken to be a relevant aspect of the circumstances.[59] As I will explore in the next section, this finding set the stage for the judgment regarding the justiciability of the advice upon which prorogation was issued parliament in *Miller/Cherry*.[60]

Miller/Cherry in Focus

This section will explore the judgment in *Miller/Cherry* examining how it has expanded the scope of justiciability within UK administrative law. The discussion begins by exploring the classification of *Miller/Cherry* in regard to whether it is a question of existence and extent or exercise. The section will then discuss the legal standards which the court employed in order to assess the extent of the prerogative power.

The case *Bancoult* permitted the Court to consider both the subject matter and circumstances of the exercise of a prerogative power when deciding whether the matter is justiciable.[61] In general, where that subject matter is political as in *Abassi*,[62] or where there are not legal standards against which the exercise of that power can be judged, as the Divisional Court found in *Miller (No 2)*[63](this being one half of the conjoined *Miller/Cherry* appeal considered by the Supreme Court), the matter will be determined to be non-justiciable. Alongside this, it can be said with strong authority dating back to the *Case of Proclamations*, that questions over

[58] *Bancoult* (n 56) [46].
[59] *Miller/Cherry* (n 1) [60].
[60] ibid.
[61] *Bancoult* (n 56) [46].
[62] *Abassi* (n 54) [106].
[63] *R (on the Application of Miller) v Prime Minister* (n 41) [37]-[42], [47]-[57].

the existence and extent of a given prerogative power will be regarded as being justiciable.[64] However, it was unclear prior to the Supreme Court's judgment whether there were any limitations to the justiciability of issues concerning the existence and extent of Prerogative Powers. For example, it was not previously clear whether *Shergill v Khaira* would apply to a review of the existence or extent of a Prerogative Power in a given scenario where matters were determined to be too political or where there was a 'lack of judicial or manageable standards'.[65]

As previously noted, there are two lines of thought when considering whether or not a given prerogative power is justiciable. The first concerns the existence and extent of that power and the second concerns its exercise. In *Miller/Cherry*, the Supreme Court determined that the question was of the first kind, relating to the extent of the prerogative power.[66] The judgment lays out that the proper concern of the court was with determining the boundary between the prerogative power and the constitutional principles of Parliamentary sovereignty and Parliamentary Accountability.[67] Through this decision, the Supreme Court embraced a wide view of justiciability which recognises few limitations where a judicial review concerns the existence or extent of a prerogative power.[68]

The Divisional Court had previously found that the issues raised in *Miller/Cherry* were not justiciable.[69] They found this on the basis that '[t]he Prime Minister's decision that Parliament should be prorogued… [was] political… and there are no legal standards against which to judge their legitimacy'.[70] As this shows, their decision focused on the political nature of the decision to prorogue Parliament and on this basis found that it would be improper for the courts to intervene. However, in their treatment of the prerogative, the Divisional Court mixed analysis of the existence and extent with the exercise of prerogative powers. In doing this, they ignored the fact that the limitations on the justiciability explored above apply only to those cases dealing with the exercise, rather than the extent of prerogative powers. A fact that the Supreme Court duly recognised.[71]

In their decision, the Supreme Court focused on the fact that 'almost all decisions made by the executive have a political hue to them'.[72] The court went on state that this has not prevented the courts from exercising a 'supervisory jurisdiction over the decisions of the executive'.[73]

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[64] *Case of Proclamations* (n 23) 76.
[65] [2014] UKSC 33, [2015] AC 359 [40].
[66] *Miller/Cherry* (n 1) [52].
[67] ibid [38]-[51].
[68] ibid [36].
[69] *R (on the Application of Miller) v Prime Minister* (n40) [37]-[42], [47]-[57].
[70] *Miller/Cherry* (n 1) [51].
[71] ibid [36].
[72] ibid [31].
[73] ibid.

They justified this by drawing on the *Case of Proclamations*.[74] Specifically citing the courts conclusion that 'the King Hath no Prerogative, but that which the law of the land allows him'.[75] As this suggests, the view of the Supreme Court is that all questions regarding the existence and extent of a given prerogative power will be justiciable, irrespective of whether they have a political character.[76]

The Supreme Court further noted that the argument that the Prime Minister was properly politically accountable to Parliament for his exercise of the prerogative was ill-formed, given that, 'the effect of prorogation is to prevent the operation of ministerial accountability'.[77] In this sense, the judgment effectively acknowledges that, in most cases, the matter would properly be considered one to be addressed by political forces. However, given the nature of the executive action, the court appears to have felt bound to intervene in order to ensure the preservation of our constitutional order. While the court's intervention could be seen as being purely a reflection of the complexities of Brexit, this seems unlikely given that the court went on to pinpoint that far from a usurpation of the political role this was the proper constitutional function of the courts.[78] This reasoning suggests that the courts themselves see this intervention as being consistent with their historical role, rather than as being a necessary intervention in the context of Brexit.

Having established that the political aspects surrounding the decision to prorogue Parliament did not render the matter non-justiciable, the courts then set about finding legal standards against which the extent of the prerogative power could be judged. The judgment in *Miller/Cherry* does this by situating the sovereignty of Parliament as the general principle of our constitution and establishing the impact of prorogation on this sovereignty as being the appropriate standard, this can be seen in the statement that:

> 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.[79]

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[74] *Case of Proclamations* (n 23).
[75] *Miller/Cherry* (n 1) [32] citing *Case of Proclamations* (1611) 12 CO Rep 74, 76.
[76] A point which is clearly pinpointed within the judgment of the Supreme Court. See *Miller/Cherry* (n 1) [36].
[77] ibid [33].
[78] ibid [34].
[79] *Miller/Cherry* (n 1) [42].

What the judgment is effectively recognising here is that if the extent of the prerogative power to prorogue were determined to be without limit, this would undermine the key constitutional principle of Parliamentary sovereignty. The use of Parliamentary sovereignty as a legal standard against which to judge the existence and extent of a prerogative power has strong precedent running from *De Keyser*,[80] to the *Fire Brigades Union*[81] case and even underlying the judgment in the first *Miller* case.[82] Therefore, the court drew on the well-established constitutional principle of Parliamentary sovereignty in order to establish a legal limit on the extent of the prerogative power to prorogue Parliament. Given that Parliamentary sovereignty is itself a creature of the common law, this is a proper legal standard which enables the judiciary to determine the limits of the power without encroaching on political terrain.[83] Thus, the Supreme Court avoided the conclusion that the only standards against which the Prime Minister's advice can be judged are political by focusing on 'the fundamental principles of our constitutional law'.[84] As they note:

> Courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.[85]

Their approach to the issue of justiciability, far from representing encroachment in politics, is the proper role of a Court. Such a role is allowed because the courts adopting this role is a necessary feature within a society governed by the rule of law. In line with Tom Bingham's eight principles,[86] 'questions of legal right…should ordinarily be resolved by application of law and not the exercise of discretion'.[87] Therefore, when courts to determine whether or not a given prerogative power exists, and what the extent of that prerogative power is, they are always acting pursuant to the rule of law.

Interestingly, the Court draws the principle of Parliamentary sovereignty[88] more broadly than the traditional conception of Parliament, as a body capable of unmaking any law.[89] They

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[80] *De Keyser* (n 35) [526]-[528].
[81] *Fire Brigades Union* (n 37) 516-523.
[82] *R (Miller) v Secretary of State for Exiting the European Union* (n 38) [43]-[48], [57]-[59], [60]-[67].
[83] *Miller/Cherry* (n 1) [30].
[84] ibid [38].
[85] ibid [39].
[86] See generally: Tom Bingham, 'The Rule of Law' (n 27).
[87] ibid 72.
[88] The Principle of Parliamentary Sovereignty proposed in *Miller/Cherry* will not be tackled in full due the extensive nature of the topic. Indeed, it could easily form the basis of an article in its own right.
[89] ibid [41]. Example of this can be taken from the first *Miller* case. See: *R (Miller) v Secretary of State for Exiting the European Union* (n 38) [43].

instead reconfigure Parliamentary sovereignty to be a general principle of the UK constitution. Effectively, they construe Parliamentary sovereignty into a principle which also entails Parliament possessing a right to sit, going on to argue that this right cannot be curtailed without lawful justification.[90] Through this subtle reinterpretation, the courts are able to tether the decision in *Miller/Cherry* to the *De Keyser* line of precedent, while also providing a novel response to the issue of lacking legal standards. This new approach was necessary because there was not adequate information for the judges to make a decision on grounds such as propriety of purpose. Further, employing such grounds would come closer to looking at the merits of the advice to prorogue, and thus would be more political in nature than the analysis the court undertook, which focused only on the impact of prorogation on core constitutional principles, such as Parliamentary sovereignty.

Debating which conception of Parliamentary sovereignty was adopted in *Miller/Cherry* will not be undertaken in this paper due to the scale of analysis this would require. However, the court in *Miller/Cherry* endorses a view of sovereignty which entitles parliament to sit unimpeded by the executive in its legislative functions. As Aileen McHarg notes, this novel interpretation of the principle draws the net of Parliamentary sovereignty more broadly than it has traditionally been conceived.[91] Parliamentary sovereignty is, in effect, converted from a reflection of the legislative power of parliament, to a general principle entailing that parliament has a right to sit.

The courts also employed another—less well recognised—constitutional principle, that of Parliamentary accountability.[92] Aileen McHarg further draws attention to the novelty of considering Parliamentary accountability as a principle of the constitution, rather than simply a convention.[93] The court's interpretation of this principle was the idea that

> 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 subject to consideration by the representatives of the electorate.[94]

In principle then, Parliamentary accountability is a recognition that democracy and the Parliamentary system are themselves the features which provide legitimacy for exercises of

[90] *Miller/Cherry* (n 1) [42]-[44].
[91] Aileen McHarg, 'The Supreme Court Ruling: The Defence of Parliamentary Democracy - UK In A Changing Europe' (*UK in a Changing Europe*, 2019) <https://ukandeu.ac.uk/the-supreme-court-ruling-the-defence-of-parliamentary-democracy/#> accessed 1 December 2019.
[92] *Miller/Cherry* (n 1) [46].
[93] Alieen McHarg, 'The Supreme Court Ruling: The Defence of Parliamentary Democracy' (n 91).
[94] *Miller/Cherry* (n 1) [46].

executive power. Therefore, the argument must follow, that the extent of the prerogative powers such as prorogation should be interpreted in light of the principle that the executive is properly accountable to Parliament for the use of its powers. Where these powers undermine the accountability of the executive to Parliament, the judiciary should be able to step in and confine the extent of the power to be compatible with the principle of Parliamentary accountability. Evidence of the principle of Parliamentary accountability being a principle of the UK constitution is far less easily attainable than evidence of Parliamentary sovereignty; indeed, its status as a general principle of the UK constitution is hugely debatable. However, the principle is mentioned in the first *Miller* case[95] and, as the Supreme Court recognised, it has been noted in other judgments.[96] In addition, the use of constitutional principles to review executive action has a clear precedent in the *Unison* case.[97] Although *Unison* relates to the use of a statutory power, the Supreme Court in *Miller/Cherry* were in clear in stating that it had influenced their approach.[98]

Through placing an emphasis on these principles, the Supreme Court was able to distinguish the justiciability of existence and extent from the more strictly guarded justiciability of exercise. They were able to refute the claim that the decision to prorogue was political, by drawing attention to the fact that all exercises of executive power will ultimately have a political hue to them. They were also able to draw on core principles of the UK constitution—such as Parliamentary sovereignty—in order to create standards against which the extent of the prerogative power could be reviewed.[99]

Paul Yowell has argued that the judgment of the Supreme Court had collapsed the questions of extent and exercise into one another.[100] This argument is made on the basis that is impossible to determine whether Parliamentary sovereignty and scrutiny functions have been curtailed without reasonable justification 'without reviewing political questions of high policy involved in the exercise of the power'.[101] However, according to this paper's analysis, this interpretation appears to be mistaken for two reasons. Firstly, the judgment of the Supreme Court indicates that Parliamentary sovereignty and scrutiny limit the extent or reach of the power to prorogue. That is to say, the Court could limit the circumstances in which the power may be invoked. Thus, the issue of reasonable justification relates to whether or not this power

[95] *R (Miller) v Secretary of State for Exiting the European Union* (n 38) [249].
[96] See for example: *Bobb v Manning* [2006] UKPC 22, [2006] 4 WLUK 415 [13].
[97] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903 [65].
[98] ibid [49], [69].
[99] It should be noted that in doing this they drew on and were informed by the approach taken to reviewing a statutory power In Unison. See: *R (On the Application of Unison) v Lord Chancellor* (n 97) [65].
[100] Paul Yowell, 'Miller (No 2) And Political Questions - Judicial Power Project' (*Judicial Power Project*, 2019) <http://judicialpowerproject.org.uk/paul-yowell-miller-no-2-and-political-questions/> accessed 30 November 2019.
[101] ibid.

is available in the first place, rather than with reference to a given exercise of the power. In this way, the 'high policy' remains an exception to justiciable prerogative powers, because the court is only considering the scope of the power in relation to principle and justification, not its usage. Secondly, as Paul Craig notes, prior to the Supreme Court judgment, the ceremony of proroguing Parliament usually does not entail 'high policy'. Indeed, proroguing Parliament is often mundane and procedural.[102] In other words, it is fundamentally administrative rather than political in nature—and generally the only political questions revolve around the date on which prorogation will take place, which outside of the Brexit context is rarely a controversial question.[103]

Evaluation

The judgment in *Miller/Cherry* may be seen as largely consistent with the historical development of the UK constitution due to its logical codification of principles previously recognised in case law. However, the judgment also has several salient features which suggest the case may come to hold an important place in the development of UK public law. Firstly, the judgment codifies the situation in respect of the justiciability of royal prerogative powers, marking out that—where appropriate legal standards can be drawn from constitutional principles—questions regarding the existence or extent of prerogative powers will be justiciable before the courts even while questions regarding their exercise continue to face constraints with regard to justiciability. Significantly, the case clarifies that when a legal issue regarding prerogative powers arises, there are two lines of analysis which can be adopted. The first focuses on the existence and extent of the prerogative power and will generally be justiciable where standards can be found. The second concerns the exercise of the prerogative. Therefore, when considering judicial review of prerogative powers, the courts need to clearly articulate which line of analysis the question of justiciability falls under.

Secondly, the judgment clarifies that just because a matter has a political context or flavour does not preclude matter from being justiciable. This clarification is significant particularly because most exercises of prerogative powers have political undertones due to them being carried out at the behest of a political party that will seek to act in its own interests according to its own policy goals. Hence, the judgment clarifies that a given Prerogative Power being related to politics will not prevent it being reviewed in the courts.

[102] Paul Craig, 'Prorogation: Three Assumptions' (*UK Constitutional Law Association*, 2019) <https://ukconstitutionallaw.org/2019/09/10/paul-craig-prorogation-three-assumptions/> accessed 30 November 2019.
[103] ibid.

Miller/Cherry also marks an increasing willingness, on the part of the courts, to intervene in order to protect Parliament from the Executive.[104] Despite Parliament's Legislative supremacy, the executive has a number of powers capable of stifling Parliamentary mechanisms.[105] This development is similar to that made in respect of statutory powers in *Unison*.[106] The Court's new willingness to intervene is demonstrated by the novel formulation of Parliamentary sovereignty laid down in *Miller/Cherry*.[107] While previous authority such as *De Keyser* sets down that prerogative powers must be consistent with statute law, the decision in *Miller/Cherry* goes far further effectively articulating a position in which Parliamentary Sovereignty entails a right for Parliament to sit. This envisioning of Parliamentary sovereignty could, in the future, be adopted as a legal standard by which to question a number of further executive powers of both a statutory and prerogative nature. Sadly, further consideration of this new interpretation of Parliamentary sovereignty is beyond the scope of this paper.

The decision in *Miller/Cherry* may also be considered to demonstrate the court's desire to establish the core principles of the UK constitution—such as Parliamentary sovereignty, the rule of law, and the separation of powers—as fundamentals with which the exercise of executive powers must be consistent. The court's employment of constitutional principles, such as Parliamentary sovereignty and Parliamentary accountability, acting as a counterbalance against which the extent of a prerogative power can be judged must be seen as a new step for the courts. It is a step which provides them with much greater resilience to protect the UK's constitution from acts of the executive and in this way, it is a move which further cements the centrality of democracy within the UK's constitutional set-up.

However, perhaps the most central aspect of the judgment is the clarification that Parliamentary accountability is a legally binding, and judicially enforceable, principle of the constitution, rather than being a constitutional convention. This clarification allows potential for future executive actions—or powers—to be assessed based on their compatibility with the concept of Parliamentary accountability. For example, future actions taken under prerogative power to declare war may come to be restrained through the principle that the executive should be properly accountable to Parliament in its undertakings. Presently, the duty to call a parliamentary vote on a decision to declare war is seen as convention and thus not a matter on which the courts could decide.[108] However, the scope of this prerogative power could easily

[104] Jonathan Sumption has pinpointed how their experience with EU and Human Rights Law may have made courts feel more able and willing to intervene. See: Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019) 1-21.
[105] Such as their ability to use Prerogative Powers without Parliamentary consent and their control of the House of Commons timetable.
[106] *Unison* (n 97) [65].
[107] *Miller/Cherry* (n 1) [41]-[48].
[108] Sebastian Payne, 'War Powers the War Prerogative and Constitutional Change' (2018) 153 The RUSI Journal 28.

be confined if Parliamentary accountability comes to be employed as judicially enforceable constitutional principle on a more general basis.

Conclusion

This paper has argued that the decision in *Miller/Cherry* marks the gradual development of UK jurisprudence regarding the justiciability of prerogative powers. While the decision was the source of intense political controversy, its legal impact is far less stark. As I argue, this decision strengthens and clarifies, rather than alters the UK's constitution. While some may argue the court have shown a fresh willingness to intervene, in what may have been previously considered a political situation, the Supreme Court's intervention was justified on accepted common law grounds. Therefore, I suggest that the courts have ensured the proper functioning of democratic accountability within the United Kingdom. The courts stepped in and formulated legal standards against which they can judge the extent of prerogative powers and in so doing ensured that the centrality of Parliament within the UK's political structure was not undermined. As Russell stated, this decision protects the core principles of our constitutional order.[109] It has done so by drawing on the well-established principle of Parliamentary sovereignty and developing the principle of Parliamentary accountability. While the decision regarding justiciability has certainly proved controversial, it ultimately represents a gradual development of legal precedent, which is well grounded in precedent and principle.

[109] Meg Russell, 'Judiciary and Human Rights – The Constitution Unit Blog' (*The Constitution Unit Blog*, 2019) <https://constitution-unit.com/category/judiciary-and-human-rights/> accessed 14 October 2019.