The Law of the Constitution before the Court

Supplementary Notes on *The unconstitutionality of the Supreme Court's prorogation judgment*

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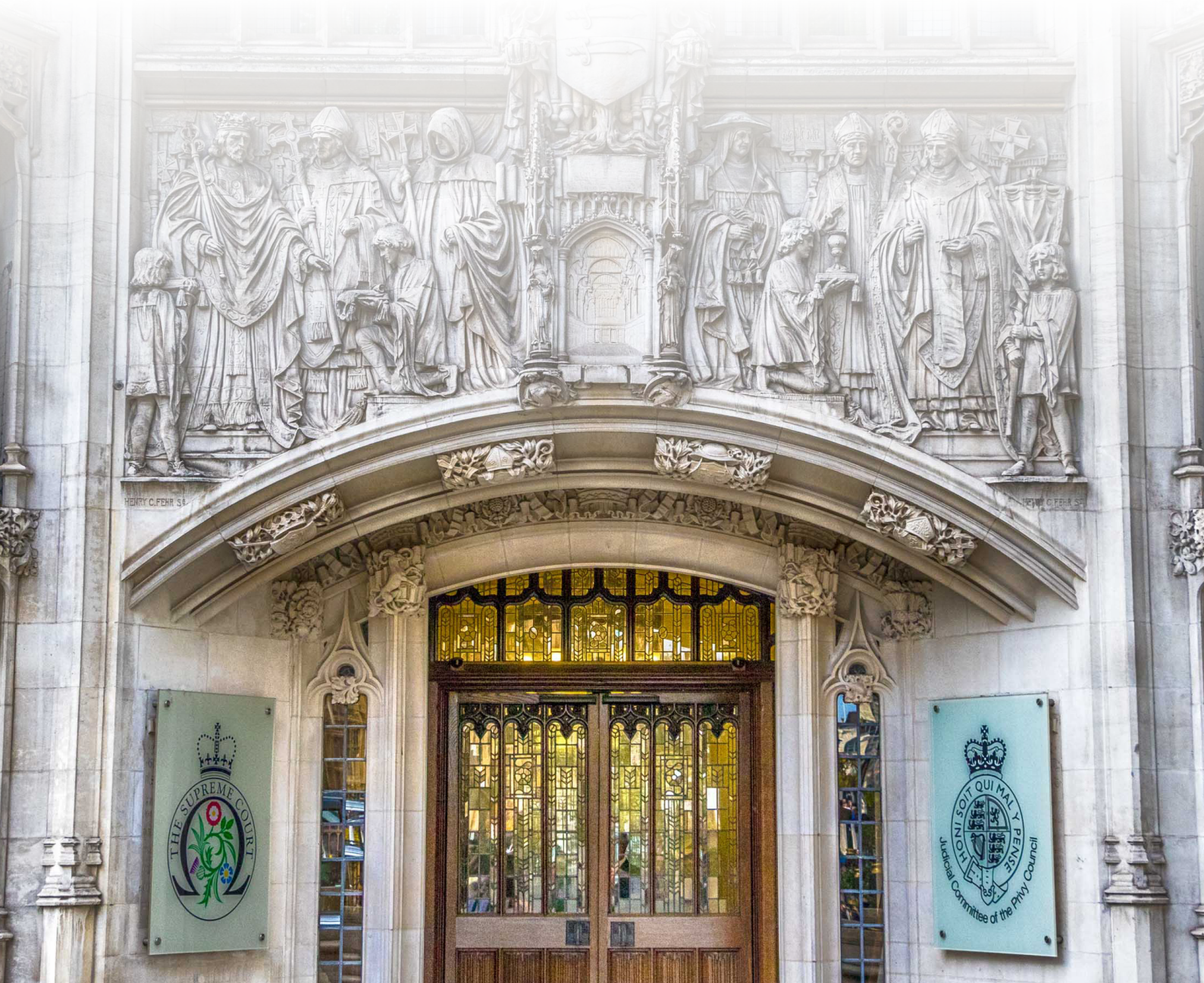
Foreword by Lord Faulks QC



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Professor John Finnis FBA, QC (Hon) is Professor Emeritus of Law & Legal Philosophy in the University of Oxford and Biolchini Family Professor of Law at the University of Notre Dame. Between 1972 and 1989 he was Rhodes Reader in the Laws of the British Commonwealth and the United States in the University of Oxford. In 2011, Oxford University Press published five volumes of his collected essay and a second edition of his magnum opus *Natural Law and Natural Rights*, and in 2013 a major Festschrift in his honour. Finnis was appointed Queen's Counsel (honoris causa) in 2017.

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The Brexit conversation may have moved onto the next stage. But the fallout from the Supreme Court's recent judgment in *Cherry/Miller* (No 2) (not to mention *Miller* (No 1) in January 2017) has left our constitution in a state of disarray. Distinguished legal commentators have taken different views about the Supreme Court's decision to quash the September 2019 prorogation. Policy Exchange's Judicial Power Project has been in the vanguard of the debate. In this modestly described 'supplementary note', Professor John Finnis has produced what to my mind is the final word on the subject.

Why does it all matter? After all, when the Supreme Court ruled that the purported prorogation was unlawful, Parliament returned for a short period during which not very much, if anything, was achieved. And then we had a general election.

But the result of *Miller* (No 2) is that principled limits on the justiciability of the prerogative power to prorogue, including limits firmly imposed by Article 9 of the Bill of Rights 1689, have been set aside. In other words, judges can now decide whether they are satisfied with the reasons (if any) the Government provides for its decision to prorogue Parliament. For many lawyers and commentators, this is an assertion of judicial power that cannot be justified by constitutional law or principle. That was also the view of the distinguished judges of the Divisional Court whose judgement was reversed by the Supreme Court without engagement with their reasoning. The decision to prorogue Parliament, however questionable it might have been, was the exercise of a clear prerogative power, the merits of which are the stuff of politics not law.

So the novelty of the Supreme Court's judgment should not be overlooked. In this masterful paper, which complements and completes his earlier critique, Professor Finnis explains with care just how far the Supreme Court's judgment distorts the law of our constitution. One implication of his analysis is that the Attorney General had good reason to maintain, in the face of heated criticism in the House of Commons and elsewhere, that his advice that prorogation was lawful had been correct.

In the common law, how a judgment is received by lawyers often determines its relevance to the future of the law. This is doubly so in relation to a judgment which is hailed by many as an historic vindication of parliamentary democracy against a rapacious, unbound executive and decried by others as an improper extension of judicial power into the heart of politics. Professor Finnis makes clear just how badly the Supreme

Court mishandled the law of our constitution which it was duty-bound to apply and thus the damage it has done to the integrity of the UK's political constitution. Unless his analysis can be answered, which I very much doubt, lawyers and judges should look back on *Miller (No 2)* as an historic mistake, a needless constitutional panic.

Unless and until the judgment is reversed by the Supreme Court or Parliament, it exposes decisions about prorogation – and by analogy decisions to seek a dissolution of Parliament or to form a government – to challenge in the courts. This may be good news for lawyers, and for those who want a second bite at the political cherry, but it constitutes a significant, unjustified constitutional shift.

What can the Government do? It can hope that the decision will simply be a one-off and that later courts will decline to follow the judgment further. That might prove to be wishful thinking. Or it can invite Parliament to legislate to settle authoritatively the non-justiciability of the prerogative power to prorogue Parliament and perhaps also to impose further limits on the scope of that power. While they are at it, Parliament might want to legislate to protect other, related prerogative powers.

Legislation of this kind may be the only way to limit the courts' incursion into political territory. Repeal of the Fixed-term Parliaments Act 2011 (a manifesto commitment) may provide an opportunity to act or the Government may choose to wait until it has the views of the Commission on the Constitution, Rights & Democracy, the remit of which appears certain to include an examination of the relationship between the legislature, the executive and the courts. For members of the commission, as for parliamentarians in both Houses, Professor Finnis's incisive analysis of the Supreme Court's missteps in *Miller (No 2)* should be required reading. I commend it to you.

Preface

Despite numerous long and widely detested prorogations both before and after the Civil War (not least in the years running up to the Glorious Revolution) the constitutional settlement of 1689, while abolishing many real or asserted prerogatives of Parliament, retained the royal prerogatives of dissolving and proroguing Parliament and giving or withholding assent to Bills. These powers of the monarch, exercisable on the advice of ministers holding office with the "confidence" of the elected House, are foundational elements in the balance and inter-dependency between legislature and executive which distinguish "Westminster" constitutions – dozens of them throughout the world – from constitutions modelled on a stricter separation of powers. For well over 300 years it has been peacefully accepted, as part of the common law governing our courts, that the exercise of these prerogatives could never be made the subject of litigation, and that the political-constitutional conventions governing their exercise, though well-known to the judges, could not be enforced, even in a "declaratory" way, by the courts.

The rationale for this rule of our constitutional law, stating this non-justiciability of the conventions, was not that prerogatives cannot be defined by the Courts: it was settled long before the Civil War that they can. Nor was it that *no* prerogative power can be judicially reviewed, as if only statute-based powers can be reviewed. It was that these conventions relate to the operations of the highest organs of the state in their interactions – not with individuals whose rights are directly at stake – but with each other and with foreign states, and are intrinsically political in the judgments those organs must make, in those interactions, for what they consider to be the common good of the realm. Such judgments, during their making and carrying out, are unfit for litigation, and for adjudication according to law. Of course, if some statute has been enacted to regulate the exercise of one or other of these prerogatives, it must be complied with and failure to do so can be adjudicated upon, in application of the statute. But the common-law standards for rationality and fairness in administration of legal powers, the standards that are enforced as standards of legality by judicial review, do not apply to these essentially high-political exercises of the prerogatives left in place by the Parliaments of the Restoration and then again of the Glorious Revolution settlement, so far as they have been left in place by all subsequent Parliaments.

This stable framework has been suddenly shaken to its foundations by the unanimous Judgment of the United Kingdom Supreme Court which is the subject of the Comment that the present Supplementary Notes amplify, and reinforce against commentators who have attempted, surprisingly, to deny or obscure the Judgment's novelty and radical or even revolutionary character and the constitutional *unsettlement* that it represents.

The Comment and these Supplementary Notes are not focussed on the question whether the constitutional-legal order created by the Judgment is an improvement. But they argue that the Judgment is not only constructed

in way that is legally flawed both in argumentation and conclusions, but also represents a very large political misjudgment and a substantial injustice to the persons responsible for advising and authorising the prorogation in August 2019. And these flaws in the Judgment confirm the wisdom of the constitutional statecraft of 1689 and of all subsequent generations (including judges down to 2019) in keeping these essentially political matters out of court, in the interests of good government, and of public confidence in the Rule of Law without fear, favour or political passion, as is essential to the defence of individuals and their legal rights.

A. Constitutional law made prorogation and its conventions and principles non-justiciable

"The unconstitutionality of the Supreme Court's prorogation judgment" was published by Policy Exchange's Judicial Power Project three or four days after the judgment given by the UK Supreme Court on 24 September 2019 in *Miller/Cherry* [2019] UKSC 41. It ("the Comment") argues that the Judgment was contrary to the well-established legal rule that prorogation by the sovereign (or her representative in a Commonwealth state within her dominions) is non-justiciable. That rule of law was so well established in the minds of constitutional lawyers, judges and politicians that, over many centuries up to 2019, it had never even been challenged in court anywhere in the wide world of Westminster-type constitutions. And it was so well understood that when it was first challenged – in *Cherry* and *Miller No.* 2 – all four judges who first considered the matter upheld the rule without difficulty, in judgments not discussed, even implicitly or obliquely, in the Judgment. On this aspect of the case, the Comment is summarised in its para. 20:

> 20. That paragraph [Judgment [50]] completes the Court's basic work of law-making, transforming a constitutional convention into justiciable law, and doing so, in substance, by fiat. To repeat: the operative parts of that judicial law-making are carried through **without even adverting to the long-established, long-respected and constitutionally successful distinction between *law* (therefore justiciable) and *convention* (therefore non-justiciable), or to the deep-going reasons for having the distinction (remembered and upheld as recently as *Miller No. 1*)**.

The *reasons* for the distinction between law and non-justiciable conventions, and for the non-justiciability both of a formally correct, statute-compliant prorogation and of the conventions applicable to it, are of course discussable. So too are the reasons for changing the law so as to make the prorogation conventions or their underlying politico-constitutional principle(s) justiciable. The Comment gives some of the reasons for the law as it existed on 23 September 2019, and against the new law introduced

by the Judgment. That debate, a discussion about constitutional policy, principle and reform, rightly continues.

B. "There is no authority …"

Meanwhile, however, the facts about the law as it stood until the Judgment have, surprisingly, been contested. On 8 October, Professor Paul Craig gave oral evidence to the Commons Select Committee on Public Administration and Constitutional Affairs, in their inquiry into Prorogation and implications of the Supreme Court judgment, HC 2666. He said (Q. 19):

> *…if you believe that Prorogation is indeed wholly non-justiciable, what it means going forward—and* ***certainly not going backward****—is that Parliament remains sovereign and has no boundaries, procedural or substantive, to its omnipotence; however, it sits at the grace and favour of the Executive, and that grace and favour and that Executive discretionary power is wholly uncontrollable outside the walls of Westminster. That would be* ***a new constitutional proposition. There is no authority*** *that Parliament's sovereignty has been bounded in that way. There is* ***no case****. There is* ***no text.*** *There is* ***no article or essay in the voluminous literature on sovereignty that attests to limits of that kind.***

In November, Paul Craig published a full exposition of the views he had expressed to the Select Committee; his SSRN paper will be published in the journal Public Law in April 2020. The paper contests a number of the arguments in the Comment and in other published critiques of the Judgment. On the question of the existence or non-existence of settled law, he writes on p. 7, against e.g. Richard Ekins and Martin Loughlin:

> *The very idea that Parliament can be swept aside because its view does not cohere with the executive is to stand principle on its head. This is not constitutional orthodoxy and we are constitutionally impoverished if we regard this as the new constitutional norm.*

(By "constitutional norm", Craig here means legal rule, for neither Ekins nor Loughlin suggested that that there are not strong constitutional conventions restricting the authority of "the executive" to "sweep Parliament aside"; they contested only the existence of a justiciable rule or norm.). On pp. 27-28, Craig makes his central statement of the law; the first paragraph includes (beginning "Parliament remains omnipotent…") an orthodox statement of the law, and the second claims – like his oral evidence quoted above – that this position has never been stated in any judicial decision or textbook or article:

> *…in terms of constitutional principle, the contention that the prerogative power concerning prorogation is wholly non-justiciable, irrespective of the purpose or effect or which it was used, is not sustainable. If we accept such an argument*

> *then we recast the boundaries of parliamentary sovereignty as traditionally conceived. Parliament remains omnipotent, in the sense that there are no bounds to its legislative authority, but the executive can determine when Parliament exercises that legislative authority. It can choose to prorogue Parliament whenever it so wishes, including in order to prevent Parliament exercising its voice, through legislation or otherwise, merely because the executive believes that what Parliament might do is undesirable. The executive's decision in this respect is legally unchallengeable, irrespective of the ground on which the prorogation decision is based.*
>
> ***If this represents the law then every judicial decision, textbook and article on constitutional law has missed this crucial qualification to the sovereignty of Parliament.*** *The reality is that* ***there is no authority*** *for such a qualification to parliamentary sovereignty.*

This is the reverse of the truth.

C. The historical evidence: denied but undeniable

"There is no text… every textbook…"? Well, the leading textbook on our constitutional law, Dicey's *An Introduction to the Law of the Constitution* – first published 1885, 8th and last edition by the author 1915, 10th edition 1939, in use as textbook through the 1950s, the 60's, and the 70's, reprinted as a textbook in 1985, and as *The Oxford Dicey* in 2013, paperback 2018 – states, expounds, explains and celebrates Parliament's legal sovereignty in a way often treated as authoritative by courts of the highest modern authority. It also celebrates "the rule of law", meaning that rules of law are justiciable, that is, directly enforceable – even against ministers of the Crown – in the ordinary courts. And it gives an account of the distinction between rules of law and constitutional conventions, an account expressly relied upon in the Canadian Supreme Court judgments about constitutional conventions that were relied upon by the UK Supreme Court, unanimously, in *Miller No. 1*.[1]

Famously, and more than once, Dicey selects prorogation as his paradigm hypothetical example of a power whose exercise (if compliant with any statute regulating the preconditions for its exercise) is wholly *non-justiciable*, and is regulated only by *constitutional convention(s)*. That is, he takes up the Queen's *legal* power by sufficiently articulated formalities to prorogue Parliament, and to do so even on the advice of ministers who have lost the confidence of the Commons. He underlines that, even when such constitutional convention(s), and the underlying principle of responsible government, are being defied by the ministers responsible for it, prorogation done by their advice can begin and continue *for months or years* without *ipso facto* violating any rule of law, and without violating the sovereignty of the Parliament of which the Queen is an essential component, and all this *without any possibility of intervention by the courts* until such time as, sooner or later, some violation of law occurs in the course of this

1. [2017] UKSC 5 at [141]-[146]

hypothetical effort to govern without the aid of parliamentary legislation – say, some attempt to draw or pay money out of the Consolidated Fund, or to levy some tax or charge, without authorisation of Parliament (i.e. of statute).

Dicey gives this prorogation example twice. In the first and all subsequent editions of the book's last chapter, on the nature and the modes of enforceability of non-justiciable conventions, he writes:

> *No rule is better established than that Parliament must assemble at least once a year. This maxim…is certainly not derived from the common law, and is not based on any statutory enactment. Now* ***suppose that Parliament were prorogued once and again*** *[sic]* ***for more than year,*** *so that for two years no Parliament sat at Westminster.* ***Here we have*** *a distinct breach of our constitutional practice or understanding, but we have* ***no violation of law****. (1st ed. p.371, 3rd ed. p.369, 8th ed. p.442)*

And the rule violated by such prorogations is "not a law and will not be enforced by the Courts" (1st ed. p. 374, … 8th ed. p. 444).

Then, in the 3rd edition, 1889, he added to his first chapter's exposition of the nature of constitutional law (ten pages before his exposition of "the principle of Parliamentary sovereignty") a footnote which is found in all subsequent editions, and which cross-refers to the passages just quoted, and reinforces them:

> *Ministers who, after Supplies were voted and the Mutiny Act passed, should* ***prorogue the House and keep office for months after the Government had ceased to retain the confidence of the Commons,*** *might or might not incur grave unpopularity, but* ***would not necessarily commit a breach of law.*** *(3rd ed. pp. 26-7; 8th ed. p. 26).*

That is to say, this unconstitutional prorogation would be neither justiciable nor a breach of law, *unless and until* (say) the statutory authority for the withdrawal of public funds needed to be renewed, or in some other way the non-sitting of the Houses came to violate a statute.

So, though Craig can properly (if very disputably) argue that the legal regime put in place by the Judgment is better than the legal regime that, without acknowledging, it sets aside, he could not properly make the claims he made about the law as it existed up to that replacement.

Scholars, including Craig, have long questioned some of Dicey's reasonings while accepting – as Craig's illuminating 1990 Law Quarterly Review article did – that questioning Dicey's political premises may leave substantially intact his conclusions about "both constitutional and administrative law".[2] Dicey's imperfect recognition or anticipation of the development if not the advent of judicial review of *administrative* action do not negate his testimony to the *constitutional* law of non-justiciability of conventions governing the highest organs of government in those organs' relations between themselves.

2. Paul Craig, "Dicey: unitary, self-correcting democracy, and public law" (1990) 106 LQR 105-43 at 106.

The uncontestability of Dicey's paradigm of non-justiciability, prorogation, is certainly the reason why, even in the most politically controversial of prorogations in the most sophisticated and litigious of jurisdictions – such as those in Canada in 2008 and 2009 (see sec. **G**) – no one went to court to have a prorogation judicially reviewed or set aside. It is surely the reason for the Attorney General's advice that the 2019 prorogation would be lawful, however contestable in terms of constitutional convention. And it is the reason why the first four judges who considered that prorogation confidently held it to be non-justiciable.

So far as I know, there is no authority, no case law, no textbook, that has contested Dicey's paradigm (highly visible to all students of Westminster-style constitutions): *prorogation is non-justiciable even if long extended and/or improperly motivated*, yet is regulated by conventions of responsible government – conventions (maxims of constitutional propriety) in the light of which anyone who advises and procures such prorogation with be held to account, sooner or later, in Parliament ("parliamentary accountability") and by the electorate. And the historic basis for this paradigm is illuminated by facts about the Bill of Rights 1689.

D. Prorogation was always known as "proceedings in Parliament"

For at two other critical points, Paul Craig has held out an imaginary normative order in place of the historical constitutional realities.

Both points concern what came first in the Comment: the Judgment's holding, as an indispensable precondition for its disposition of the litigation, that the prorogation of 9/10 September 2019 was not a proceeding in Parliament (all such proceedings being rendered immune from impeachment by any court by art. 9 of the Bill of Rights 1689).

(1) In defending this holding, Craig approvingly reports the Judgment's appeal to the statement in *Erskine May* that "that 'the primary meaning of proceeding, as a technical parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, taken by the House in its collective capacity'." Craig never even alludes to the Comment's first counter-argument (para. 3), which pointed out that the Judgment's position has the absurd consequence that there would be no "proceeding in Parliament" even if Her Majesty, an essential element in our supreme legislature ("the Queen in Parliament"), were to decide upon and carry out the prorogation in person, on advice given in the precincts of Parliament by the Prime Minister. Craig equally ignores Erskine May's own treatment of that scenario:

> *The Queen… can only* ***take part in its proceedings*** *by means which are acknowledged to be consistent with the Parliamentary prerogatives of the Crown, and the entire freedom of the debates and proceedings of Parliament. She … may not be* ***concerned in any of its proceedings, except when she***

> ***comes in state for the exercise of her prerogatives.*** … (*Thomas Erskine May, A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 9th *ed. 1883 p. 503; on p. 504 those prerogatives are identified as the opening of Parliament,* ***its prorogation,*** *and giving the royal assent to bills.*)

It would be absurd if what the great Clerk of the Parliaments himself explicitly identified as a proceeding in Parliament when done by the Queen in person were not also a proceeding in Parliament when done by members of the House of Lords commissioned by her to perform the equivalent actions while sitting in the House of Lords and addressing the members of both Houses assembled for the purpose of the proceeding.[3]

And the question all along is not what is the "primary" meaning of "proceedings in Parliament", but what is included within its original public meaning. As Erskine May's statements show, the phrase plainly included (and includes)[4] the collective act of announcing, receiving and complying with the initiative of one of Parliament's elements – the Queen in person or as represented by others members of Parliament – in discontinuing its current session for an announced period, short or long: prorogation.

E. The Bill of Rights deliberately left prorogation legally unregulated

(2) Craig has another strategy for bolstering the Judgment's weak and lopsided argument that such proceedings in Parliament are not "proceedings in Parliament" within the meaning of art. 9 of the Act of 1689: he urges us to imagine that a member of the 1689 Parliament was asked whether prorogation is a proceeding in Parliament protected from judicial review ("impeachment") by art. 9:

> *imagine that immediately after [the Bill of Rights'] enactment it is argued that Article 9 will protect the executive from external scrutiny whenever it prorogues Parliament for whatsoever reasons it wishes, because this action must be regarded as a proceeding in Parliament.*
>
> *The likely reaction … would not be parliamentary equanimity.* ***Parliament had just rid itself of the Stuarts, and thought that it had constrained the future exercise of prerogative power. It is then told that a provision that is clearly designed to protect the body politic of Parliament as a whole,*** *and the individual constituent members thereof when they exercise their speech rights, can be used to protect from external scrutiny unconstrained exercise of a monarchical/executive power to prorogue Parliament. It is told that legislation designed to curb prerogative power has served to instantiate and protect it via Article 9. The very idea of parliamentary sovereignty as it emerged from the Glorious Revolution is thereby radically curtailed at the outset.*

And that consequence, Craig invites us to conclude, would be too ironic

3. The prohibition on impeaching that collective act done in compliance with the order of one of Parliament's defining elements in no way entails that statutory instruments are protected from legal challenge because they have been laid before before the Houses and approved in negative or affirmative form. The challenge in such a case is not to what occurred in the Houses, nor is it a challenge to an act done by one of the defining elements of Parliament; it is simply to what was done in the instrument by the minister(s) responsible for making the instrument. The nullification of the instrument has no effect on the records of the proceedings in the House, still less on the continuance or discontinuance of the Parliament or of its sessions. Still less does treating prorogation as a proceeding in Parliament entail, or even suggest, that "any executive decision announced in Parliament [is protected] from judicial review", as Anne Twomey, "Brexit, the Prerogative, the Courts and article 9 of the Bill of Rights," (December 2019) http://ssrn.com/abstract=3503178 argues at p. 9.

4. The Clerks of the Journals of the two Houses, describing for the Hansard Society what was done in response to the Supreme Court's orders of annulment, unselfconsciously and unpolemically refer to "the prorogation proceedings" and other proceedings such as suspension which do not fall within the narrow idea of collective decision: https://www.hansardsociety.org.uk/blog/as-if-the-commissioners-had-walked-into-parliament-with-a-blank-sheet-of

to be acceptable to a member of Parliament in 1689.

To consider the substance of Craig's argument, it is best to set aside its final sentence, about "the very idea of parliamentary sovereignty". During the centuries from 1689 down to the last year or so, constitutional literacy treated as the subject/bearer of "parliamentary *sovereignty*" not the Houses of Parliament or either of them, nor conversely "our sovereign lady the Queen", but – like Dicey at the outset of his celebrated treatment of sovereignty and again when treating the nature of conventions – the Queen in Parliament.[5] So, all these years, the very idea that prorogation by the Queen might "curtail parliamentary sovereignty" was simply out of the question, to be regarded as a corruption of thought and language.

As to the substance of Craig's historical thought-experiment: it overlooks the most salient fact. The Parliament that had "constrained the future exercise of prerogative power" deliberately chose *not* to constrain *that* prerogative power which is the subject of the present discussion. The preambular Declaration in the Bill of Rights identified the kinds of prerogative acts that it intended to outlaw, and then the statute outlaws them one by one: suspending of or dispensation from Acts of Parliament, levying of money or raising of a standing army or of ecclesiastical courts, and so forth. The silence about prorogation is highly meaningful.

For James II had made vigorous use of the powers of dissolution and prorogation. He used dissolutions to make Parliaments relatively infrequent. And he used prorogations – some of them lasting years[6] – for more specific purposes, purposes considered by the Commons to be highly improper (such as for protecting persons considered to be religious agents of a foreign potentate, and for terminating the imprisonment of persons being detained on the orders of the Commons). Yet *these* two prerogatives go unmentioned in the Bill of Rights, which is content to provide with deliberately unenforceable vagueness that "Parliaments ought to be held frequently".

The prerogatives thus left intact were precisely those that – unlike suspending and dispensing and the others complained of and dealt with – relate to the very workings, especially the interactive workings, of the *three* elements of "the King/Queen in Parliament". It is these that, as Dicey said (8th ed pp. 3 and 423) and the Comment repeats in other words (paras. 9, 16, 18, 29, 30), are left to be the main subject-matters of non-justiciable convention in the constitutional order being engineered in 1689.

F. *GCHQ* acknowledged that historic settlement

What about the "external constraint" Craig asked us to imagine being exercisable in and after 1689, a court exercising jurisdiction to review prerogative acts relating to the various elements of the Queen in Parliament? No one considered it possible in 1689, nor indeed at any time until nearly three centuries had elapsed. When review of prerogative acts was declared

5. Dicey, *Law of the Constitution* (8th ed) p. 37: "Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the 'King in Parliament,' and constitute Parliament." Again, on p. 423-4: "the conventions of the constitution, looked at as a whole, are customs, or understandings, as to the mode in which the several members of the sovereign legislative body, which, as it will be remembered, is the 'King in Parliament' [fn. See p. 37 ante], should each exercise their discretionary authority, whether it be termed the prerogative of the Crown or the privileges of Parliament."

6. For instance: 9 June to 13 October 1675; 22 November 1675 to February 1677; November 1685 to July 1687 (at which date Parliament was *dissolved* with intent that it not be summoned until October 1688 – and in the event it never was).

possible in principle in the GCHQ case (1984, following *ex p. Lain*, 1967), the judges responsible for the development acknowledged that *constitutional* prerogatives which relate *not to individual rights*[7] but to the interactions of the supreme organs of the state, or to distribution of functions between those organs, remain immune from judicial review – an acknowledgement not made in the principled, synthesised way just articulated, but clearly enough and consistently both with the general strategy of the Bill of Rights and with art. 9. (Some gaps and vulnerabilities in the *GCHQ* ruling and dicta are mentioned in secs. **H** and **I** below.)

So in the perspective of authentic history, the upshot of Craig's thought-experiment about the intentions of those enacting the Bill of Rights can only be the opposite of what he asserts; there would indeed have been acceptance with "parliamentary equanimity" that art. 9's protection from the scrutiny of the courts extends not only to the freedom of speech and debate but also to all proceedings in Parliament such as prorogation and assent.

G. Prorogation: non-justiciable even where "outside" the legislature

And all those historical choices made in 1689, choices to omit as well as to include, are part of the unexpressed background to the **rule that prorogation is non-justiciable**, the rule that was affirmed with such clarity and insistence by Dicey, and peacefully accepted by everyone involved in Westminster constitutions until 2019.

For that rule does not depend upon art. 9, which is neither a primary nor an essential source for it but rather a supplementary bulwark for the non-justiciability rule wherever prorogation is carried out as a manifest part of the proceedings of and (with)in the Houses. In other versions of "Westminster-style" constitutions, versions where prorogation can be completed outside the Houses by the Head of State, or the Governor-General or other representative of the Head of State, the rule of non-justiciability rests exclusively and sufficiently on prorogation's inherent character as an action taken by an element in the complex body bearing legislative powers, the element that the historic settlement of 1689 deliberately left with a judicially unreviewable discretionary power – a settlement ratified by constitutional doctrine peacefully accepted for more than three centuries since then. That inherent character, in our law as distinct from our conventions, is summed up in even recent editions of *Erskine May*: "The prorogation of Parliament is a prerogative act of the Crown. Just as Parliament can commence its proceedings only at the time appointed by the Queen, so it *cannot continue them any longer than she pleases*"[8].

That explains why the many efforts to nullify the intensely controversial, politically motivated prorogations in Canada in 2008 and 2009 did not include any application to the courts, even though in September 2008, when a dissolution of Parliament arguably contravened

7. This precondition is the primary theme of Lord Diplock's judgment in *GCHQ* and is repeated briefly in the evidently mutually coordinated judgment of Lord Roskill: see the quotation in sec. H below.

8. For example, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th ed., 2011), p. 144; online ed. Part I chap. 8 para. 8.5.

a fixed-term Parliament statute, there was a court challenge to the exercise of the Governor-General's discretion to dissolve Parliament (on the advice of the Prime Minister), a discretion conferred by the Constitution but modelled on the prerogative discretion of the Crown in the United Kingdom. (The challenge was rejected by the Federal Court at first instance and on appeal because the statute, while specifying 4-year terms, explicitly preserved the Governor-General's *discretion* to dissolve, and any convention about the exercise of that discretion was of course non-justiciable).[9] To repeat: this is the legacy, not of art. 9 by itself or predominantly, but of the whole set of inclusions and deliberate omissions in the Bill of Rights itself, as maturely understood in 1689 down to 2019.

It is a legal legacy, an established and settled rule of law. That rule of non-justiciability, while it embraces (i) conventions (e.g. about prorogation), is a law, a legal rule, not a convention. It embraces also (ii) the power of prorogation itself, which it establishes as justiciable only for compliance with statutory limits (if any). And it embraces (iii) the principle of accountability (historically known as the principle of responsibility of ministers to the elected house – "responsible government"), a principle which the same legal rule declares non-justiciable in its application to the exercise of the power of prorogation. This rule of law is what, in all its three aspects, was set aside by the Supreme Court in *Miller/Cherry*, without being confronted and examined in the Judgment.

H. Mangling and defying *GCHQ*

It was legal rules such as this one that Lord Roskill for most or all of the Law Lords in the *GCHQ* case was referring to – exemplifying it by dissolution and treaty-making – when he said that the justiciability of prerogative powers is subject to "excluded categories". But the gaps in his exposition of the relevant constitutional legal rules, and of their historical and constitutional grounding, left the exclusion vulnerable to the evasive circumvention that it met in the Judgment. It is worthwhile watching this evasion in slow motion. In the paragraph before identifying non-justiciable prerogatives, Lord Roskill said the following (the short final sentence is included here for discussion in the next section):

> *If the executive instead of acting under a statutory power acts under a prerogative power and* ***in particular a prerogative power delegated*** *to the respondent [Minister for the Civil Service] under article 4 of the Order in Council of 1982,* ***so as to affect the rights of the citizen****, I am unable to see, subject to what I shall say later [scil. about the excluded categories of non -justiciable prerogatives], that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge* ***to the manner of its exercise*** *which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the*

9. *Conacher v Canada* 2009 FC 920, https://www.canlii.org/en/ca/fct/doc/2009/2009fc920/2009fc920.html; 2010 FCA 131 <http://canlii.ca/t/29z9r>. The same doctrine of constitutional law holds good, without question, for Australia. In India, giving one of the many partly overlapping, partly differing judgments in the Supreme Court's innovative constitutional decision to curb, on federalism grounds, the constitutional power of the President to take over the government of a state, K. Ramaswamy J. declared:

   prorogation of Parliament or dissolution of Parliament done under Article 85 is *not liable to judicial review. The accountability is of the Prime Minister to the people*, though the President acts in his discretionary power, with the aid and advice of the Prime Minister.

   (*Bommai v Union of India*, AIR 1994 SC 1918 at [144]).

archaism of past centuries.

Such a challenge to a power's "manner of exercise", said Lord Roskill, could be on any of the three bases identified in Lord Diplock's companion judgment: "illegality, irrationality or procedural impropriety."

In the *Miller/Cherry* Judgment, the whole doctrine set out in *GCHQ* is radically distorted. Having abbreviated Lord Roskill's phrase "manner of exercise" to "exercise", the Judgment asserts that the highly intrusive judicial review it is carrying out is not about (manner of) exercise but about "limits", and so cannot fall within *GCHQ*'s exclusions (excluded categories).[10] But these "limits" are defined in the Judgment [50] entirely by considerations which *all the Law Lords in GCHQ would unhesitatingly have said constitute an examination of the manner of exercise* of the power. For the definition of "limits" involves the Supreme Court in examining whether the exercise in question had the effect of "frustrating" Parliamentary supervision, and if so whether there was any "reasonable justification" for doing so, and if thus lacking in justification whether it was sufficiently "serious" in its frustrating effect to warrant judicial nullification. So the Judgment's argument that its review did not touch an "excluded category" – because that category excluded only review of (*manner of*) *exercise* and this was a review not of (manner of) exercise but of limits – was nothing but a fallacy of equivocation, using the term "exercise" (shorthand for *GCHQ*'s "manner of exercise" and for its own [52] "mode of exercise") in a way quite foreign to its use and meaning in *GCHQ*.

To restate the distortion in slower motion: the Judgment, citing and purporting to apply *GCHQ*, says [36] and repeats [37] that there are three topics of review and that only the third of them can be non-justiciable: (i) existence of power, (ii) legal *limits* of power, and (iii) *exercise* of power; and it proceeds to nullify the prorogation by type (ii) review. But *GCHQ* explicitly treats review for "illegality" (legal *limits*) as one kind of review of *exercise*. So in the *GCHQ* perspective, there are two categories, not three: there is no review of "limits" except as a review either of existence or of exercise; powers that belong in the excluded categories are non-justiciable as to exercise; and review of the *Miller/Cherry* type — finding a prorogation too long, too unexplained, too damaging to accountability, etc – is obviously, and indubitably, about exercise not existence.

The analysis in the preceding two paragraphs provides a historical doctrinal supplement to the Comment's criticism in paras. 21 and 22 of the "card-shuffle" in the Judgment's key paragraphs, [50] and [52].

I. And writing the Queen out of the constitution

Now consider the last sentence of the passage from Lord Roskill quoted in the preceding section: "To talk of that act as the act of the sovereign savours of the archaism of past centuries." That imputation of "archaism"

10. Judgment [32] – critical to the whole decision – rules that the case can be decided without settling the argument about whether prorogation falls, like dissolution, within the excluded categories because–

> *It is …important to understand that this argument only arises if the issue in these proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits, rather than as one concerning the lawful limits of the power and whether they have been exceeded. As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law.*

made good sense in relation to "prerogative acts" of the kind at stake in *GCHQ* (where the Minister's powers over employees were conferred by an Order in Council), and in relation to its trail-blazing predecessor *ex parte Lain* (where the Criminal Injuries Compensation Board exercised powers and granted benefits to individuals, under the Order in Council creating it), and to the successor case *ex parte Bentley* (1993), removing pardon from Lord Roskill's list of excluded categories (because pardon involves individual rights in all but a formalistic sense and can be infected with errors of law or process), and again in relation to *Miller No. 1* (where the Prime Minister proposed to send an art. 50 notification in exercise of the prerogative of conducting relations or affairs with foreign entities and without involvement of the Queen). But Lord Roskill's sentence makes less sense – has less truth – in relation to an action such as the making, by Her Majesty in Council assembled at her residence in Balmoral, of the Order in Council for prorogation. As the Judgment relates [15]:

> *We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it.*

Despite all this not knowing, the Judgment did "draw conclusions" about "what the Queen was told". Indeed, it proceeded to rule that what *the Queen did* in "acting on the advice of the Prime Minister" *was a nullity* precisely because of that advice to her, the advice which –

> *led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect… It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect. [69]*

The passage just quoted is devised so as to write the Queen out of the picture. Her powers disappear from view and in their place there appears the "power" of the Prime Minister to advise her. But the law conferred no power on the Prime Minister or anyone else to give that advice to the Queen. On the occasion of the making of the Order in Council, *the only legal power was hers*, which by strict convention – well known to constitutional law and doctrine *as a convention* – could be exercised only on the advice of one or more of her ministers responsible to Parliament, in this case primarily the Prime Minister, albeit at a distance.

If we parrotted Lord Roskill and said that what was going on in Balmoral was nothing but "the archaism of past centuries," we would be saying that, even as a matter of the law the courts are to uphold, the Queen has no real place in our legal constitution. But to say that is to abandon the distinction between law and convention, and to treat convention as

superseding the law in the very domain for which the distinction between law and convention was developed: high policy *in the sense of the political interactions and interrelations of the supreme organs of the state*. There was no doctrinal case for doing so, and no constitutional need (see further sec. **O** below) to change the doctrine so as to achieve that effect.

J. The five constitutional features of the power to prorogue

Consider the surprisingly worded intervention, during the argument of counsel for the Prime Minister, by Lord Kerr (whose questions tended to indicate presciently the contours of the eventual Judgment). In relation precisely to prorogation, he asked whether the Queen "had any prerogative power…", and repeated the inquiry by asking whether "*from a legal perspective*…there is any prerogative power vested in the Queen". Counsel replied that it is a matter of uncertainty, on which he and the Government took no position.

The question and, by its omissions, the answer revealed once again the weak grip on constitutional fundamentals that was displayed by a majority of Law Lords in *Quark Fishing* [2005] UKHL 57 holding that, when the Queen exercised a power under the constitution of a dependent territory to give directions "through a Secretary of State [one of her UK ministers]", she was "in constitutional theory" – that is, as a matter of constitutional *law* to be applied by the courts – acting as Queen of the dependent territory *and not* as Queen of the United Kingdom, because the Secretary of State was her mere mouthpiece. That had to be repudiated by the (overlapping) majority of the Law Lords in *Bancoult No 2* [2008] HL 61, because the constitutional formula "through a [United Kingdom] Secretary of State", means and entails precisely that she is acting as Queen *of the United Kingdom and* its dependent territories, *on the advice and responsibility* of the UK Secretary of State. Lord Kerr's mistake in *Miller/Cherry* was a mirror image of the *Quark* mistake. The legally correct answer to his question, however gently counsel would perhaps have had to put it, involves five propositions. The power of prorogation is, "from a legal perspective", nothing but a power of the Queen herself which, precisely as hers–

(**i**) could (as Dicey both says and takes for granted in the pages mentioned in sec. **C** above) no more be impugned in court than her act of appointing a Prime Minister or, *at least* before the Fixed-term Parliaments Act 2011 (FtPA), dissolving Parliament; but

(**ii**) "from the perspective of" the constitutional conventions of responsible (accountable) government, the power must never be exercised except on the advice and/or signature of a minister or ministers responsible to Parliament; and

(**iii**) she could not, save perhaps in the most exceptional circumstances, refuse to exercise it when advised to prorogue by ministers still enjoying the confidence of the elected House;

(**iv**) ministers are legally as well as conventionally responsible for their advice if it is contrary to *law* and

(**v**) they are politically responsible to the elected House and to the electorate for all aspects and effects of their advice as it bears on the making of decisions (including decisions not to act).

What Lord Kerr appears to have had in mind should, with respect, have been framed as a question about point (**iii**): Does the Queen, as a matter of *convention*, have a "reserve power" of rejecting ministerial advice to prorogue? And to that question, counsel's actual answer was proper so far as it went: the existence of such a reserve entitlement or liberty in relation to prorogation as distinct from dissolution remains a matter of dispute amongst constitutional scholars, a matter about which he had no instructions and in all the circumstances did not need to say anything other than that counsel for the applicants erred in assuming that the power of prorogation must differ radically, in relation to this "reserved personal conventional power," from the power of dissolution before the FtPA.

The five-part answer just set out has been established and unchallenged constitutional doctrine for at least two centuries. There was no need for counsel to shrink as he did from stating it, or for the Court either to misunderstand it or to reject it.

K. Prorogation 2019: no "extreme" (or any) effect on "fundamentals of our democracy"

The Court's rejection of the settled and never controverted doctrine of constitutional law (including the law about the non-legal character of conventions of responsibility/accountability) had two expressed motivations. One was its fear [42]-[43] of hypothetical circumstances in which a rogue prorogation might go uncorrected for a long time – circumstances which our doctrine, as Dicey exemplifies, has long treated with open-eyed acceptance as a tolerable side-effect of embracing democratic accountability and rejecting judicial meddling in the high politics of the supreme organs of the state.

The Court's other motivation was its judgment that the prorogation authorised by the Queen on the Prime Minister's (unknown) advice on 28 August 2019 had "such an extreme effect upon the fundamentals of our democracy" [58].

The Comment replies to the former fear in paras. 15-17, and about the latter political judgment said, in para 23, that it was one "wide open to reasonable doubt". Here the Comment spoke too gently. In truth, though the September 2019 prorogation was apparently[11] designed to seem so unconventional[12] as to send – not least to EU negotiators – a political message of swashbuckling resolution to "get Brexit done" and to cause enough opposition in Parliament and the media to raise the chances of inducing the Commons to authorise a general election, that prorogation's pre-announcement, timing and length were all calibrated in so restrained

11. Beyond the public record, the author has no access to the thinking of any of those who counselled or procured the prorogation. The Prime Minister's first statement to the House of Commons, on the last day before the summer recess, 25 July 2019, makes clear a public order of priorities: restoration of faith in democracy by making good on Parliament's repeated promises of Brexit by refusing to seek any extension beyond the treaty-agreed exit date, 31 October; *persuading the EU to abandon its refusal to renegotiate the Withdrawal Agreement*, especially the Irish backstop; preparing for the eventuality of exit without agreement on 31 October; laying out a programme of policies quite obviously aimed at winning an election in the near future should that prove the only way of breaking the Brexit-preventing parliamentary deadlock. There seems no evidence of a different, non-public order of priorities. And events between 25 July and the calling (after multiple refusals by the House) of that foreshadowed election, by special Act of Parliament, on 31 October (after introduction of the Bill in the Commons on 29 October), can reasonably be said to have unfolded broadly in line with a political strategy of applying maximum rhetorical-political pressure, scrupulously within the law, on all relevant actors: EU governments and officials, pro-Brexit and anti-Brexit members of the Conservative party and of all other parties in Parliament – with a view to *achieving at the earliest date legally possible* what Parliament by the Referendum Act of 2015 had promised the electorate.

12. That does not mean or entail that it violated constitutional convention. Whether conduct X counts as violation of convention A may partly depend on whether or not X is a response to conduct Y which is a violation of – or at least unconventional relative to – a related convention B. Here the relevant conventions are interlocking: (i) the prerogative should not be deployed on executive advice so as to prevent the elected House from withdrawing its confidence in ministers in response to their conduct of public business; (ii) while it has the confidence of the Commons, the executive should be able to determine what matters of legislative business affecting the public finances or prerogatives shall be conducted in the Commons; (iii) a majority of the Commons that is unwilling to allow the executive such control of legislative business should transfer its support to a new executive or make possible a general election to put the key disputes to the electorate with a view to settling, *via* the Commons, who shall form the executive. Here conventions (ii) and (iii) were being or likely to be violated, and the prorogation was in any case not in violation of convention (i). The Judgment speaks as if the "principle of accountability" were much wider than convention (i) and as if the demands ancillary to convention (i) were unaffected by non-compliance with conventions (ii) and (iii).

and gentlemanly[13] a fashion, leaving so much room for Parliamentary counter-action both to the prorogation and to the Government's Brexit policies, that – quite independently of its nullification by the Supreme Court – it had no effect at all on the fundamentals of our democracy. It is not unreasonable to think that the Court's opinion – this prorogation had an extreme (or *a fortiori* "such an extreme") effect on those fundamentals – was, or verged upon, an instance of *Wednesbury* unreasonableness, "irrationality".

Equally questionable is the other key component in the Judgment, the proposition that no reasons at all were given for selecting the appointed period of prorogation. Even the Judgment's meagre summary of the reasons articulated for the Prime Minister's attention in the Da Costa memorandum discloses that there were real reasons, and the Divisional Court's more adequate summation [10]-[14] of the memorandum discloses others. That, too, is not said with sufficient force in the Comment.

L. Its reasons and purposes: not properly demanded by litigants or courts

As the Divisional Court judgment puts on record –

> *19. The central contention of the claimant set out in her witness statement is that "the purpose of the prorogation is to prevent or frustrate Parliament from holding the Government to account and, in particular, from passing legislation that would require the Prime Minister to take steps to avoid the UK leaving the EU without an agreement… under Article 50(3)… ".*

That contention was always implausible: the timing selected by the Prime Minister and given effect by Her Majesty in Council ensured that Parliament, so far from being frustrated, would be able itself to frustrate the alleged purpose, if it had ever existed, by passing legislation of the kind desired by the claimant. In fact, precisely such legislation was passed and came into effect even before the Divisional Court gave judgment. The Judgment of the Supreme Court sets aside improper purpose as unnecessary to decide, and rests its orders on the *effect* of the prorogation on the holding of ministers to account in Parliament. But that effect was in truth so slight – and would have been so short-lived and slight even if Parliament had not been recalled by direction of the Supreme Court – that Paul Craig's defence of the Judgment spends more time on purpose (motive) than on effect.

When he finally confronts the objection that the effect on Parliament fell far, far short of the grave effects required by the Judgment's effects-criterion for its "limits" test in [50], Craig offers three responses: (i) How could the Court know in advance that the effects would be negligible? Anyway, (ii) there was or may have been or might have been a big effect on scrutiny of subordinate legislation (statutory instruments) needed to make UK law "fit for purpose" for exit day (though the Benn Act,

13. The claim made both before and after the Judgment that the prorogation was "constitutional hardball" was dependent upon multiple false premises embedded in misleading formulations:

(i) *"as a constitution reliant on understandings and non-legal rules"*; in truth, the constitution relies on justiciable rules of statute and common law, but its workings for the common good are also strongly affected by understandings and non-legal i.e. conventional rules;

(ii) the prorogation authorised by the Queen in Council on 28 August 2019 *"is almost universally recognised as a device to prevent Parliament interfering in the Brexit process. The Executive plans to shut Parliament to stop Parliament making decisions about the policy direction of the state"*; but in truth, by allowing Parliament to sit from 3 September to 9 September (if not 12 September) and to resume on 14 October, the prorogation guaranteed that Parliament would have no fewer than 14 days and as many as 18 sitting days prior to 31 October (Parliament's selected (Br)exit day) to discuss and legislate against Brexit including 5 days before and nearly two weeks after the prorogation; the Government's voluntary discontinuance of the filibuster in the Lords at 1.30 am on 5 September is supplementary confirmation of the calibrated and gentlemanly nature of the prorogation. At no time were terms such as "*prevent*" or (the Judgment's) "*frustrate*" acceptable descriptions of what was intended or done;

(iii)*"its motivation is a constitutional outrage. It turns the UK's constitution on its head: our unelected Executive's legitimacy depends on the support of the elected Parliament."* In truth, the length and timing of the prorogation, not to mention its pre-announcement 12 days before the earliest date it could be effected, allowed "*the elected [part of the] Parliament*" ample opportunity not only to legislate against a Brexit it did not desire but also to withdraw its "*support for the executive*", secure the appointment of a new executive, and – prior to 31 October and to any general election precipitated by its ouster of the Johnson government – enact the Treaty agreed by the May government with the EU, revoke the UK's art. 50 notice, and/or make provision for a new referendum;

(iv)*"the Supreme Court intervened to protect Parliament from a Prime Minister who is contemptuous of its constitutional position and willing to use any means to undermine its capacity to hold the Government to account;"* in truth, neither of these claims about the Prime Minister and his Government could rationally be defended; besides the facts recalled earlier in this footnote, consider what the Judgment itself records [17], that according to the memo of 15 August on which the Prime Minister acted, Parliament would, under the period of prorogation proposed (and adopted), "have the opportunity to debate the Government's overall approach to Brexit in the run up to the EU Council and then vote on it once the outcome of the Council was known. … Parliament would sit for three weeks before exit and… a maximum of seven days were lost apart from the time usually set aside for the conference recess."

enacted during the days deliberately left between the announcement and the coming into effect of the prorogation, already ensured that exit day would very probably be postponed for months after the prorogation). And anyway, (iii) the Government should have offered the judges *reasons* for "five weeks" – liberal democracy demands that judges be given reasons, and *none were provided*!

None of these responses succeeds in pointing to an effect of the kind needed to make the prorogation fail the para [50] effects-criterion. Particularly out of place is the third. For even on the new view, grave effects on accountability were a *precondition for any obligation to supply reasons to the courts*, and omission (real or alleged) to tender such reasons cannot substitute for the absence of any *specified* bad effects, let alone for the absence of grave or "extreme" bad effects. And the new view is revolutionary: the demand that reasons be tendered to the courts for a chosen period of prorogation, that is, reasons satisfactory to the judges, was – like it or not – something never before heard-of in the world of real Westminster liberal democracies. The *effect* of any such demand on the dynamics of complex political disputes and on the conduct of government in such a context is inherently likely to be political and significant: some are indicated in Comment paras. 11 and 12. Meanwhile, failure to supply reasons satisfactory to the courts is not an effect, and on the Judgment's own view, a prorogation is not justiciable – and the court has no jurisdiction to demand reasons – unless it exceeds "legal limits" by having a sufficiently serious effect.[14] The extreme weakness of the first two of Craig's three responses shines a light on this large hole in the fabric of the Judgment.

And if accountability to the "sovereign Parliament" is gravely damaged by being postponed for a couple of weeks, how much more justiciable must every dissolution have been, before 2011, terminating that "sovereign" by "executive" will and dismissing all its elected members.

M. Lord Sumption: "What's revolutionary about the Supreme Court decision…"

Lord Sumption, on the Supreme Court in *Miller No. 1* but now retired from it, appeared before the Select Committee immediately after Paul Craig on 9 October. The support he expressed for Professor Craig's evidence had no explicit limits. But his basic judgment that the Judgment's reasoning is "radical" is incompatible with Craig's basic position. So too were other public pronouncements by Lord Sumption, in which he described the Judgment's decision as "revolutionary".[15] That opinion has the veracity missing from Craig's repeated claims to the effect that the Judgment "represented the constitutional status quo". And it is in line with earlier statements by Lord Sumption about the prorogation and the litigation.[16]

Nevertheless, by contrast with views he expressed before the Judgment, Lord Sumption's evidence to the Select Committee *welcomed* the revolutionary decision:

14. Anne Twomey, n. 3 above, p. 5 contends that the Judgment –

    managed to avoid addressing the … justiciability of prerogative powers that fall into the area of high politics. It instead resorted to a very long-standing proposition, that the courts may determine the existence and scope of prerogative powers.

    Not so. The Judgment treats what was indisputably a formally valid prorogation, compliant with all statutory limitations and previously articulated common law requirements, as justiciable for the purposes of litigiously assessing the political question or questions (see Lord Sumption's dictum in the next footnote) whether its effect in "frustrating" (a loaded term for delaying) accountability to Parliament was in all the political circumstances "without reasonable justification" and serious enough in this "effect" to merit quashing. There can be no adjudication on a matter without assuming the justiciability of that matter.

15. Jonathan Sumption, *The Times* 25 September 2019: *"What's revolutionary about the Supreme Court's decision is that it makes the courts the ultimate arbiters of what political reasons for doing this are good enough."*

16. On 10 September, the day before the Divisional Court judgment:

    Sumption said about Gina Miller's litigation: *"I have my own view, which is that the courts are not entitled to interfere in what is essentially a political issue and not a legal one… The Supreme Court would really have to turn itself into an arbiter of the political and not just the legal aspects of our constitution."*

    https://www.prospectmagazine.co.uk/politics/jonathan-sumption-boris-johnson-is-putting-forward-ideas-which-are-essentially-those-of-a-fanatic On 16 September he said on Newsnight: "if they are wise" the Supreme Court will "take the same view as the Divisional Court."

> *Q. 49… The decision undoubtedly was that it was unlawful, and that was a decision that was radical in its reasoning but very conservative in its result.*[17] *I agree with what Professor Craig has told you earlier today that this did not simply come out of a clear blue sky. The exercise of the royal prerogative by Ministers has been reviewable for 25 years since 1984, the decision in the GCHQ case. The law has always been careful that there are very few, if any, unlimited powers. The classic statement is that of Lord Diplock in a slightly earlier case, where he said that Ministers are responsible to the courts for the legality of their decisions and to Parliament alone for their policies and the efficiency with which they carry them out. The courts have never accepted at any time that Ministers can be responsible to absolutely nobody for what they do, and the problem about this Prorogation was that it created a period of five weeks when there would have been effective responsibility for [to] nobody, and retrospective political sanctions of the kind suggested as appropriate by Professor Ekins would in all probability have come too late.*

Those "political sanctions…suggested as appropriate by Professor Ekins" were, of course, the variegated sanctions, or constitutional checks and balances, described by Dicey and accepted without controversy as having been constitutionally in place – and appropriate and sufficient – for hundreds of years: a statutory background requiring elections at defined intervals, total statutory control of taxation and expenditure, statutory recall of prorogued Parliaments in emergency, and then conventional requirements of maintaining the confidence of the elected House on pain of dismissal and replacement, and/or prospective defeat in subsequent parliamentary elections. The notion, constantly repeated by the Judgment and its defenders, that ministers are not responsible or accountable to Parliament during the time that Parliament is not in session *has no basis*: none in law, none in convention, and none in common-sense and the expectations of the electorate.

As for the idea that in this case the sanctions "would in all probability have [but for the nullification of the prorogation] come too late", it is yet another manifestation (see Comment para. 27) of unwillingness to accept that the allegedly "constitutional" changes involved in Brexit had by September 2019 been given full democratic and constitutional approval, first by the 2016 statutory referendum and then by the 2017 statutory authorisation of the art. 50 notification, and then again by the repeal of the European Communities Act 1972 in the European Union (Withdrawal) Act 2018, which remitted the effective date of that repeal to subsequent executive negotiations (which might be benefited by prorogation) and to decisions to be taken under parliamentary oversight not substantially affected by the prorogation. On the principle of the majority decision in *Fire Brigades Union*, the "constitutional" decisions had already been made by Parliament. Lord Sumption's "too late", presumably meaning "too late to prevent a no-deal Brexit", either confuses the economic-political

17. Compare this with his statement on BBC's *Today* programme at 7.15 am on 25 September 2019: the Justices had, he said, decided "to invent a brand-new rule… a brand-new constitutional rule"; for "when you do something sufficiently shocking, as this government has done, you must expect people to *change the ground rules*".

consequences of "no-deal" with the constitutional significance of Brexit itself (see Comment para. 27 on the Judgment's similar confusion), or quietly discloses the lingering hope of many that, by way of a sequence of puttings-off both of no-deal exit and of approval of the offered deals, the basic decision to leave the EU might eventually come to be regarded as a still open question, and be somehow reversed.

N. Parliamentary accountability is in fact a principled convention

Lord Sumption's evidence added:

> *Q. 63. … [Professor Ekins] says that, yes, Parliament is sovereign and that is a proposition of law. There is no source of law higher than parliamentary legislation. However, accountability, he would say, is not a proposition of law; it is a mere political fact. Professor Craig had some very critical words to say about that theory and I agree with all of them. It seems to me that parliamentary accountability is the whole basis on which the courts draw lines as to what decisions they may interfere with and which decisions they cannot. It is also an essential underpinning of the separation of powers because it enables the courts to distinguish between those matters in respect of which Ministers are responsible to the courts and those in which they are responsible to Parliament. Parliamentary accountability is a very familiar concept in law and it is simply nonsense to say that it has no existence except as a political fact.*

In truth, however, the written evidence of Richard Ekins (from the gist of which his oral evidence did not depart) said this:

> *15. The Supreme Court's reliance on the* ***principle*** *of parliamentary accountability is no better. The* ***principle*** *underpins a range of conventions and practices which make up our political constitution, in which the Government is formed by and accountable to the Houses of Parliament, especially the Commons. The principle is sometimes noted by courts but it is not a legal principle and cannot justify novel judicial intervention. On the contrary,* ***the principle is a reason*** *for courts to avoid intervention, precisely* ***because the proper control*** *on the abuse of some powers (like prorogation)* ***is political*** *rather than legal. The Supreme Court turns the principle on its head by invoking it as a ground for judicial intervention.*[18]

As the discussion of Dicey in the present Supplementary Note has indicated, the classic constitutional law and doctrine, settled in essence in 1689 and embedded in political and judicial practice for more than three centuries, is a set of rules and principles that function not as mere facts (political or otherwise) but as *normative reasons* for action.

Some of those reasons are justiciable legal rules. Some of them are non-justiciable conventions giving specific practical shape to the normative principles of responsible ("accountable") government or governance. The courts, in dealing with justiciable issues, may appropriately take into

18. The passage continues: "The judgment, written by Lady Hale and Lord Reed, flouts Lord Reed's warning, in the first *Miller* judgment, that the 'the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary'. Lord Reed was right then."

account the existence and operation of the non-justiciable principles, conventions and practices of ministerial accountability to Parliament ("parliamentary accountability").

As Professor Ekins's written evidence said: prior to the Judgment, the judicial use made of the principles, conventions and practices of accountability has been as a negative reason, a reason for *avoiding*, abstaining from, judicial intervention and enforcement measures. That use, cryptically recorded in Judgment [47], cannot warrantably serve to justify the Judgment's novel positive intervention to *enforce a convention* of temporally and politically restrained prorogation (and/or to enforce that convention's underlying principle of accountability to Parliament). Lord Sumption's redescription of the Ekins non-legal (non-justiciable) principles as mere political facts simply mischaracterizes the Ekins argument, and leaves its basic point quite unanswered: judicial recognition of conventions and/or their principles as ground(s) for judicial abstention has, in the Judgment, been flipped or inverted – by logical fallacy – into a judicial ground for intervention in the political process, intervention of a revolutionary kind.

O. Sheer political misjudgment, or creative constitutional development?

In judging that the prorogation could and should be judicially annulled because of its "extreme effect on the fundamentals of our parliamentary democracy", the Judgment succumbed to the political panic against which Timothy Endicott warned early in the litigation, in his essay "Don't Panic".[19] The Divisional Court did not. The Supreme Court did. On its first foray as a player of highest-level politics precisely as such, the Supreme Court misjudged a storm in a teacup, a noisy wind-machine of political staging, and cried wolf, with rhetoric fit to describe a closure of Parliament by the military. The Judgment had no detectable good effects in the political domain; Parliament did nothing significant, for good or ill, in the period of its recall. In the domain of litigation and adjudication, on the other hand, the Judgment's revolutionary character is likely to prove messily unsettling across a wide domain, and thus in need of measures of pre-emptive correction which, as the Judgment shows, can only come from the Parliament.

The Judgment's supporters, on the other hand, regard it as a constitutional development as benign in its purpose – and likely to be as beneficial in its constitutional effects – as landmark instances of constitutional leaps forward, like the *Case of Proclamations* and *Prohibitions del Roy* were in their day and like *GCHQ* has been in our era – to take the instances deployed by Timothy Endicott in his exemplary discussion (in the wake of *Miller No. 1*) of constitutional creativity.[20] Should the Judgment perhaps be seen in that light – as the exercise, like Lord Coke and Lord Denning (bringing in his train Lords Diplock and Roskill and all), of a constituent, constitution-

19. https://ukconstitutionallaw.org/2019/09/13/timothy-endicott-dont-panic/

20. Timothy Endicott, "Lord Reed's Dissent in Gina Miller's Case and the Principles of our Constitution", The UK Supreme Court Yearbook 8 (2017) 259–81 at 267–81. He contrasts these with stick-in-the-mud, legally correct but constitutionally retrograde decisions such as *Darnel's Case*.

making power?[21] And should we not expect the new constitution to be as serviceable and beneficial as those introduced by, say, the three judicial exercises of similarly constituent power just mentioned?

The answer suggested by the Comment and this Supplementary Note is in line with Endicott's conclusion about *Miller No. 1*: This exercise of judicial constitutional creativity is not an authentic constitutional development because there was *no need for it*. There was *no need* – no constitutional need[22] – for the *Miller No. 1* majority's judicially created and novel restriction on treaty-making power, because Parliament had the matter comprehensively in hand in 2016-17 and, more generally, has the executive sufficiently in hand, as a matter of course.[23] In 2019, in the circumstances of the prorogation impeached in *Miller/Cherry*, the political-constitutional controls operated so powerfully that, despite elements of novelty which aroused the most passionate opposition inside and outside Parliament ("coup", "fanatics"[24], and much more), the prorogation was rigorously calibrated to allow for controls entirely sufficient to prevent irreversible consequences. To have thought that its authors were disrespectful of constitutional restraints, either in their thinking or in its real-world effects, was already to make a misjudgment of the kind that is predicted by the worldly wisdom underlying the political judgments that yielded a serviceable, all-weather separation of powers and a constrained but constitutionally definite doctrine of non-justiciability of the conventions of responsible government. To use such a misjudgment as the key premise for a never frankly described choice to change the constitution, in a manner described by the Court's truthful friends as revolutionary, was to undermine the Rule of Law which it is for judges, above all, to uphold as a fundamental of our democracy.

21. Ibid., 274.

22. Ibid. 280.

23. Ibid., 276, where Endicott says:

> *…I think it all depends on the nightmare scenario argument. That is what it takes –the need to stand against arbitrary exercise of power by the executive in the constitutionally significant matter of triggering art 50… If there was a need to prevent arbitrary use of the treaty power to do something that would have major constitutional consequences, then the majority decision was a legitimate exercise of the judges' constituent power.*
>
> Then at p. 277 Endicott quotes what he calls "Lord Reed's complete answer to the nightmare scenario argument":
>
> *[…] controls over the exercise of ministerial powers under the British constitution are not solely, or even primarily, of a legal character… For a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary.*
>
> *… there has never, at any point, been any prospect at all that any Prime Minister would wake up one morning and trigger art 50 … arbitrarily, without the House of Commons behind her. It is possible to imagine a Prime Minister doing that! But it is only possible if we imagine the Prime Minister not being subject to the constitutional pressure and the constitutional controls under which every British Prime Minister works. …*
>
> On pp. 278-9 Endicott elaborates on all the parliamentary controls in fact exercised over the decision, prospective and then actual, to trigger art. 50, showing the redundancy of the courts' invention of a legal restriction on the prerogative power to do so. (That it was sheer invention he shows on pp. 259-97, largely in the wake of Lord Reed's dissent.)

24. Lord Sumption's term on 19 September, as *Prospect*, n. 16 above, records:

> *Boris Johnson "is putting forward ideas which are essentially those of a fanatic," Sumption said, requiring surprisingly little encouragement. "Whether he is a fanatic himself is a matter on which there has been much speculation. I have no more knowledge of that than the rest of the public. But he has certainly got plenty of fanatics around him. We are getting statements from Downing Street like 'We intend to sabotage this extension,' and such like. If Al Capone had been in the habit of issuing press statements, they would have looked something like that."*

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