



BRIEFING PAPER

Number 9006, 24 September 2020

The Prorogation Dispute of 2019: one year on

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Summary

On 28 August 2019 an Order in Council was made providing that Parliament should be prorogued from some point between 9 and 12 September until 14 October 2019.

Why this was controversial?

This would have been the UK's longest period of prorogation in modern times. It would have prevented Parliament from debating motions and legislation and from carrying out a range of other scrutiny activities normally carried out e.g. through select committees.

Why did the Government prorogue Parliament?

The Government argued that the 2017-19 session was already the longest session of the UK Parliament's history and that it was entitled to use the Royal Prerogative in this way. It explained that it intended to bring forward a Queen's Speech to refresh its legislative agenda, following the change of Prime Minister in July 2019.

Why did this end up in the courts?

The decision to prorogue Parliament was challenged in both the Scottish and the English courts. In both [Cherry](#) and [Miller II](#) it was argued that this prorogation of Parliament was unlawful. The Inner House of the Court of Session found both that the prorogation was justiciable and that it was an unlawful exercise of the prerogative: the power had been exercised for the improper purpose of "stymying Parliament". By contrast the Divisional Court in England concluded that the matter was not a "justiciable" one and that the exercise of the power to prorogue Parliament was not susceptible to legal standards.

Supreme Court ruling

The UK Supreme Court heard appeals from both jurisdictions. [It ruled unanimously](#) that the prerogative power of prorogation was justiciable. However, in finding the prorogation was unlawful, it set out the legal test in different terms than those of the Scottish court.

The Supreme Court maintained that this long prorogation significantly interfered with the constitutional principles of parliamentary sovereignty and parliamentary accountability. Such an interference required a "reasonable justification". On the facts the Court concluded the Government had not offered any justification for the prorogation's length, let alone a "reasonable" one, and accordingly the decision to prorogue was unlawful.

Consequences of the judgment

The immediate consequence of the Supreme Court judgment was that the 2017-19 session was treated by the Parliamentary authorities as though it had never been ended in the first place. [Parliament resumed sitting the following day](#). The session was eventually ended with a much shorter period of prorogation, from 8 October to 14 October 2019.

Beyond the events of 2019, *Miller III/Cherry* has a continuing significance. It establishes explicit legal limits on the prerogative power to prorogue, and makes it less likely that long periods of prorogation will be adopted in future. It has also revived debates about whether prorogation (like dissolution) should be put on a statutory footing, and if so what the constitutional rules for it ought to be.

The Supreme Court case also has implications beyond prorogation. It affects broader debates about prerogative powers in the UK constitution, and the interaction between different constitutional principles (especially those affecting the role of Parliament).

1. Political context of the dispute

Summary

Prorogation brings a Parliamentary session to an end. Normally prorogation is no more than a week and does not significantly disrupt Parliament's ability to scrutinise the Government of the day.

From the outset the first session of the 2017 Parliament was expected to last around two years. The 2019 prorogation dispute was not about whether Parliament could or should be prorogued *at all*. Rather it was a dispute about *when* and *for how long* any prorogation could or should take place.

A majority of MPs were opposed to the UK leaving the EU without a deal, though it was the legal default position under EU law's [Article 50](#) process. Those MPs sought to exert pressure on the Government to delay or prevent a "no-deal" exit. The most explicit Parliamentary pressure was the [EU \(Withdrawal\) \(No. 5\) Bill](#). It was approved against the Government's wishes. The resulting Act forced the Government to seek to extend Article 50 beyond the European Parliamentary elections.

A long or timely prorogation was mooted as a counter-measure against similar such Parliamentary manoeuvres. If Parliament could not sit, it also could not legislate on seeking further extensions of Article 50. A 'strategic' prorogation was a prominent talking point during the Conservative leadership contest in June 2019. Although other candidates ruled out such a prorogation, [Dominic Raab notably insisted it should not be ruled out](#), if it was needed to ensure the UK left the EU on 31 October 2019.

Anticipating the risk of a long prorogation after the summer recess, MPs amended a Government Bill going through Parliament. The [Northern Ireland \(Executive Formation etc\) Act 2019](#) imposed certain reporting requirements on the Government. These effectively meant Parliament had to sit:

- shortly before the anticipated (but as of yet unapproved) conference recess;
- after the party conferences but before the October European Council summit; and
- after the European Council summit but before 31 October 2019.

1.1 Prorogation generally

In the vast majority of cases prorogation is, politically, an uncontroversial and insignificant aspect of the UK's constitution. It is the means by which a Parliamentary session is ended otherwise than by dissolution. It typically, though not always, happens once a year and enables the Government to refresh its legislative programme by bringing forward a new Queen's Speech. The period of prorogation is normally short, rarely exceeding two weeks and usually lasting a week or less.

As a matter of law, prorogation is an action taken under the Royal Prerogative. The Sovereign issues an Order in Council on the advice of her Ministers. An Order in Council specifies a date range within which Parliament is to be prorogued, and specifies a date on which it is next to stand summoned (i.e. when a new session is to begin in the absence of dissolution). A Royal Commission having been appointed, the House of Commons will then be summoned to attend the House of Lords. The Commission then conducts a prorogation ceremony, formally bringing the session to an end. If any Bills are awaiting Royal Assent, that Assent will be signified to those Bills as part of the prorogation ceremony.

A fuller account of prorogation and its effects on Parliament's functions can be found in the Commons Library Briefing Paper:

- [Prorogation of Parliament](#), 08589, 11 June 2019

1.2 Prorogation and Brexit

A prorogation of Parliament was always expected at some point during 2019. The Government indicated after the 2017 General Election that the first session would last around two years instead of the normal one year. However, the Government did not say when exactly it intended to bring the session to an end. The 2017-19 session would go on to become the longest (by sitting days) since the English Civil War.¹

The controversy to do with prorogation did not concern *whether* Parliament should be prorogued at all during 2019. Rather, it concerned *when* this should happen, and *for how long* Parliament should then stand prorogued. These factors would affect when Parliament would be sitting, and therefore what actions MPs and peers could take in Parliament to influence (among other things) the Brexit process.

It was suggested, most notably during the Conservative Party leadership contest, that a prolonged and/or carefully timed period of prorogation of Parliament could assist a Government seeking to leave the EU no later than 31 October 2019.² Prorogation could reduce, or even eliminate, the opportunity for MPs to exert Parliamentary pressure on the Government as to the timing of the Article 50 process.

Backbench and opposition MPs had previously piloted a private member's Bill through the House of Commons – against the Government's wishes – in April 2019. The [EU \(Withdrawal\) \(No. 5\) Bill](#) became the [EU \(Withdrawal\) Act 2019](#). It compelled the Government to seek a second extension of Article 50. Such a Bill could not have been passed had Parliament not been sitting. Prorogation could frustrate a Bill's progress even if a Parliamentary majority existed in favour of it.

1.3 Northern Ireland (Executive Formation etc) Act 2019

In the final days of Theresa May's premiership (and a matter of days before the month-long summer recess) backbenchers amended the Government's [Northern Ireland \(Executive Formation\) Bill](#).³

What did the Act require?

[Section 3](#) of the [Northern Ireland \(Executive Formation etc\) Act 2019](#) required the Secretary of State for Northern Ireland to publish regular

¹ House of Commons Library, [Is this the longest parliamentary session ever?](#), 10 May 2019

² Lizzy Buchan, [Brexit: Jacob Rees-Mogg urges Theresa May to suspend parliament if MPs back plans to block no-deal exit](#), *The Independent*, 23 January 2019; John Finnis, [Only one option remains with Brexit – prorogue Parliament and allow us out of the EU with no-deal](#), *Daily Telegraph*, 1 April 2019; Patrick Maguire, [Dominic Raab could prorogue parliament, and other lessons from tonight's Tory hustings](#), *New Statesman*, 5 June 2019; James Blitz, [Can the next PM close parliament to get a no-deal Brexit?](#), *Financial Times*, 6 June 2019; Andrew Woodcock, [Dominic Raab fails to rule out suspending parliament to force no-deal Brexit if he becomes PM](#), *The Independent*, 8 June 2019

³ The Bill was introduced to extend the period for cross-party talks on forming a new Northern Ireland Executive. Had it not passed; the Secretary of State for Northern Ireland would have been under an obligation to call a fresh Stormont General Election.

reports explaining what progress had been made towards forming a devolved Executive.⁴ The requirement to publish reports would only lapse if an Executive was formed. Specifically, reports had to be laid:

- on or before 4 September 2019;
- on or before 9 October 2019; and
- at fortnightly intervals thereafter until 18 December 2019.

Each report then had to be:

- laid before Parliament by the end of the day on which it was published; and
- debated by both Houses of Parliament no more than five days thereafter.⁵

If prorogation would have prevented either the laying of a report or the debating of a motion about it, section 3(4) would require Parliament to be summoned back early so that the statutory obligations could be met.

What was the purpose of section 3?

The objective of the amendments (which later formed part of section 3 of the Act) was freely acknowledged to be about Brexit, rather than solely about the formation of a Northern Ireland Executive.⁶ The effect of the amendments was to ensure Parliament would be sitting:

- immediately after the Parliamentary summer recess;
- after the anticipated party conference season but before the 17-18 October 2019 European Council summit; and
- after the European Council summit but before 31 October 2019.

1.4 Parliament's periodic adjournments

On 24 June 2019 the House of Commons [approved its summer recess](#): it would rise on 25 July 2019, returning on 3 September 2019.

A periodic adjournment (colloquially known as a "recess") was also anticipated for the party conferences between September and October 2019. In previous years this typically lasted three to four weeks, running from the middle of September. The dates of any such recess can vary, however. They are proposed by the Government each year but can only be agreed to by a decision of the House of Commons.

When the House rose for summer recess on 25 July 2019, no decision had been taken on having a conference recess and no Government motion for it had yet been laid.

⁴ [s. 3\(1-5\) Northern Ireland \(Executive Formation etc\) Act 2019](#)

⁵ [s. 3\(2\)\(b-c\) Northern Ireland \(Executive Formation etc\) Act 2019](#)

⁶ [HC Deb 9 July 2019 Vol 663 c241](#); [HL Deb 17 July 2019 Vol 799 c244](#)

2. The Prorogation decision

Summary

Before the end of summer recess, the Government announced that an Order in Council had been made to prorogue Parliament from a point between 9-12 September until 14 October 2019. This five-week prorogation would have been significantly longer than any other in modern times.

The dates chosen overlapped with when a conference recess *might* have been expected, and appeared to allow the statutory reports and debates – required by the [Northern Ireland \(Executive Formation etc\) Act 2019](#) – still to take place.

When the House of Commons returned from summer recess, the Speaker of the House of Commons authorised an emergency debate on a [substantive motion](#). This unprecedented step enabled backbenchers to “[take control of the order paper](#)” and then to pass a further Act of Parliament against the Government’s wishes prior to prorogation. The Bill received Royal Assent after only one day of debate in the Commons and only two days of debate in the Lords.

The [EU \(Withdrawal\) \(No. 2\) Act 2019](#) required the Government to seek a three-month extension of Article 50 in the absence of Parliamentary approval for either a deal or for leaving without a deal.

The prorogation ceremony took place shortly after 1am on Tuesday 10 September (during what was still sitting day Monday 9 September). The Speaker of the House of Commons openly criticised the prorogation as “not normal” and representing “an act of Executive fiat”. The vast majority of opposition MPs and Peers refused to take part in the ceremony.

The apparent impact of the prorogation was that thirteen Government Bills had been “lost” (for want of a carry-over motion) and that Parliamentary debates and committee proceedings were suspended until 14 October 2019.

2.1 Order in Council

On the morning of 28 August 2019 (i.e. before Parliament returned from summer recess) a meeting of the Privy Council took place at Balmoral Castle. An Order in Council (hereafter “the Prorogation Order”) was approved.

The text of the Order in Council said:

It is this day ordered by Her Majesty in Council that the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019, to be then holden for the despatch of divers urgent and important affairs, and that the Right Honourable the Lord High Chancellor of Great Britain do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly.⁷

This effectively meant that Parliament would stand prorogued for five weeks. This was longer than:

- any period of prorogation since 1930;⁸ and

⁷ [Orders Approved at the Privy Council held by the Queen at Balmoral on 28 August 2019](#)

⁸ Since 1931 the period of prorogation has rarely exceeded two weeks and has most often been a week or less.

- any conference recess since its introduction in 2003.⁹

2.2 EU (Withdrawal) (No. 6) Bill 2017-19

On 3 September the Speaker of the House of Commons granted an emergency debate on a motion that would allow backbenchers to “[take control of the order paper](#)”. The motion set aside the following sitting day for consideration of a private member’s Bill – the [European Union \(Withdrawal\) \(No. 6\) Bill](#) – presented by Hilary Benn.

The purpose of the Bill, which was then passed by both Houses and received Royal Assent on 9 September 2019, was to force the Government to seek an extension of Article 50 in certain circumstances. The [EU \(Withdrawal\) \(No. 2\) Act 2019](#) gave the Government until 19 October 2019 to secure Parliamentary approval for either:

- a withdrawal agreement and framework for the future relationship; or
- leaving the EU without a withdrawal agreement.

Unless MPs explicitly consented to either of those outcomes by the deadline, the Government would then be compelled to send a letter to the President of the European Council requesting a three-month extension of Article 50. If that three-month extension was then offered, the Government was compelled, as a matter of UK law, to accept it.

The Bill completed its passage through Parliament in highly unusual circumstances and against a greatly accelerated timetable. An emergency debate (under [Standing Order No. 24](#)) had never been used to vote on a [substantive motion](#) and the Bill received only one day of debate in the Commons and two days in the Lords.

2.3 Prorogation ceremony

At 1:11am on the morning of Tuesday 10 September¹⁰ the Royal Commission (appointed by the Lord Chancellor) entered the House of Lords Chamber to commence the prorogation ceremony. This Commission consisted of only three Peers, rather than the usual five, as the Official Opposition and Liberal Democrats refused to participate in the ceremony. As is customary, Black Rod was sent to the House of Commons to summon it to the Lords to hear the Commission for Royal Assent and Prorogation.

Normally when the House of Commons is summoned to attend the Lords most MPs will leave the chamber. However, on this occasion a substantial number of Opposition members protested against the prorogation, and remained on the opposition benches. Before departing to the Lords, the Speaker of the House of Commons [recorded his opposition to the prorogation decision](#). He said:

⁹ Parliament has been adjourned for longer in the past over September and October, though as part of an agreed long summer recess from July to October. The last such summer recess was in 2009.

¹⁰ For the purposes of Hansard and Votes and Proceedings, this was still the sitting day of Monday 9 September 2019.

Black Rod, I treat you and what you have to say with respect, and I recognise that our presence is desired by Her Majesty the Queen's Commissioners. They are doing what they believe to be right, and I recognise my role in this matter... I am perfectly happy, as I have advised others, to play my part, but I want to make the point that this is not a standard or normal Prorogation... It is one of the longest for decades, and it represents, not just in the minds of many colleagues but for huge numbers of people outside an act of Executive fiat.¹¹

The ceremony otherwise proceeded "as normal". As part of the ceremony, Royal Assent was signified to the [Parliamentary Buildings \(Restoration and Renewal\) Act 2019](#). It had completed its consideration by both Houses immediately before the prorogation ceremony.

It is customary, after the prorogation ceremony, for Members of the House of Commons to return to the chamber and to shake hands with the Speaker. However, on this occasion, a considerable number of Government MPs did not return.

The effect of these events appeared to mean Parliament had indeed been prorogued. Neither House would sit, Parliamentary committees would not be able to take decisions, and parliamentary questions could not be put to Ministers until Parliament next stood summoned on 14 October 2019. Thirteen Government Bills appeared to be "lost" on prorogation, as they were not the subject of a "carry-over" motion. This included five Bills directly concerned with preparing the UK for its withdrawal from the EU (including in the event of a "no-deal" exit).

¹¹ [HC Deb 9 September 2019 Vol 664 cc646-647](#)

3. Litigation prior to the Supreme Court

Summary

Two distinct strands of litigation were raised in connection with the prorogation of Parliament. One set of proceedings originated in the Scottish courts, whereas the other originated in the English courts. Ultimately, however, both formed part of a conjoined appeal to the UK Supreme Court. Four judgments were made prior to the UK Supreme Court case: three in Scotland and one in England.

Scottish litigation – *Cherry v Advocate General*

The case of *Cherry v Advocate General* was first heard [before Lord Doherty in the Outer House of the Court of Session](#). He refused the petition for judicial review, ruling that a decision to prorogue Parliament was non-justiciable and therefore not a matter on which the courts were competent to rule. His decision was appealed to the Inner House of the Court of Session.

[The Inner House of the Court of Session overturned Lord Doherty's judgment](#). Lord Carloway,¹² Lord Brodie, and Lord Drummond Young unanimously ruled both that prorogation was justiciable and that in this particular instance it was done unlawfully. The court concluded that prorogation was done for the improper purpose of “stymying Parliament”.

English litigation – *R (Miller) v Prime Minister*

The case of [R \(Miller\) v Prime Minister](#) (or “*Miller II*”) was heard before the Queen’s Bench Division in the High Court. The bench consisted of Lord Burnett,¹³ Sir Terence Etherton,¹⁴ and Dame Victoria Sharpe.¹⁵ The court ruled unanimously that prorogation and its length were not justiciable matters because they are “political” and “there are no legal standards against which to judge their legitimacy”.

3.1 Scottish courts – the *Cherry* litigation

The legal challenge in the Scottish courts (against a strategic prorogation of Parliament) was lodged pre-emptively (i.e. before it was known that the Prorogation Order would be made).

Who brought the challenge?

Joanna Cherry and 75 other individuals (most of whom were Parliamentarians) brought proceedings against the Advocate General for Scotland on 30 July 2019. The Lord Advocate subsequently intervened to make written representation on behalf of the Scottish Government.

In which courts was the petition heard?

Proceedings commenced in the Outer House of the Court of Session, before Lord Doherty, resulting in two judgments: one procedural ([on 30 August](#)) and one substantive ([on 4 September](#)).¹⁶

The case was then appealed by the petitioners to the Inner House of the Court of Session. The case was heard by a bench of three judges: Lord

¹² Lord President of the Court of Session

¹³ Lord Chief Justice for England and Wales

¹⁴ Master of the Rolls

¹⁵ President of the Queen’s Bench Division

¹⁶ [Cherry v Advocate General \[2019\] CSOH 68](#); [Cherry v Advocate General \[2019\] CSOH 70](#)

Carloway (Lord President), Lord Brodie and Lord Drummond Young. The Inner House ruling was made [on 11 September](#).¹⁷

What remedy did the petitioners seek?

At the procedural hearing in the Outer House, the petitioners sought an interim order suspending the Prorogation Order. They also sought an interim interdict prohibiting the Government from taking steps to make a further Prorogation Order.

At the substantive hearing in the Outer House, and in the Inner House appeal, the petitioners sought a declarator to the effect that the Prorogation Order was unlawful and that it therefore should be quashed. It would be as though the Prorogation Order had never existed and that anything done under it was of no legal effect.

The Outer House proceedings

Permission to proceed with the case was granted on 8 August. An oral hearing had originally been slated for 6 September.

Procedural Hearing

A further procedural hearing took place on 30 August, at which the timetable for proceedings was revised.¹⁸ In light of the Order in Council having been made, the substantive hearing was brought forward to 3 September. However, Lord Doherty refused to make any order suspending the Prorogation Order or to issue any interim interdict.¹⁹

Substantive Hearing

Following the substantive hearing, Lord Doherty ruled that prorogation was not a justiciable matter: it concerned “matters involving high policy and political judgment”. It concerned:

political territory and decision-making which cannot be measured against legal standards, but only by political judgments. Accountability for the advice is to Parliament and, ultimately, the electorate, and not to the courts.²⁰

He concluded that Parliament had intended, by omission, not to prohibit the prorogation in question:

Parliament is the master of its own proceedings, rules and privileges and has exclusive control over its own affairs. The separation of powers entails that the courts will not interfere. It is for Parliament to decide when it will sit and it routinely does so. It is not for the courts to devise further restraints on prorogation which go beyond the limits which Parliament has chosen to provide. Parliament can sit before and after prorogation. It has recently, in the Northern Ireland (Executive Formation etc) Act 2019, s 3, exercised its legislative power to make provision about periods when it should sit.²¹

¹⁷ [Cherry v Advocate General \[2019\] CSIH 49](#)

¹⁸ [\[2019\] CSOH 68](#), para 11

¹⁹ *ibid.*, para 9

²⁰ [\[2019\] CSOH 70](#), para 26

²¹ *ibid.*, para 28

The Inner House proceedings

Reclaimers' arguments

The reclaimers (Cherry and others) made a three-fold argument on the Prorogation Order.

Firstly, they argued the exercise of the prerogative power to prorogue was justiciable: that it concerns legal questions suitable to being determined by a court. Here, a court could determine whether the power to prorogue had been exercised (among other things) for an improper purpose, unreasonably, or so as to frustrate the will of Parliament (as expressed in statute).

Secondly, they argued this particular exercise of the power to prorogue was in fact done for an improper purpose²²: that the true objective of the Prorogation Order was to deny sufficient time for debate and scrutiny of a no deal Brexit (then the default outcome in EU law).

Thirdly, the reclaimers argued that the Prorogation Order sought to frustrate Parliament's intention when it passed the *EU (Withdrawal) Act 2018*. Sections 9, 10 and 13 of that Act, they asserted, indicated an intention that Parliament should have meaningful opportunity to scrutinise and influence the Government in the absence of a withdrawal agreement and in the approval and implementation of any such agreement if it is reached. A long prorogation either deprived or intended to deprive Parliament of that opportunity.

Government's arguments

The respondent argued "there were no judicial or manageable standards by which the courts could assess the lawfulness of ministerial advice to prorogue Parliament". Accordingly, the matter should be regarded as non-justiciable and the reclaiming motion should be dismissed. The Advocate General for Scotland argued this was a matter of "high policy" and "politics" rather than law.

Moreover, Parliament could regulate its own sittings by legislating in specific contexts, and had in fact done so as recently as with the [Northern Ireland \(Executive Formation etc\) Act 2019](#). But insofar as no statutory requirement was breached prorogation is governed, *at most*, by constitutional convention. Although constitutional conventions are important, they are not enforced by courts.

The Government also argued that, in any case, the reasons for prorogation were perfectly proper. It enabled the Government to present a new Queen's Speech, ended an abnormally long session, took account of traditional Parliamentary recesses, relied perfectly properly on political considerations, and left Parliament sufficient time both before and after the Queen's Speech to debate Brexit.

Intervener's arguments

The Lord Advocate (the Scottish Government's senior Law Officer) intervened in support of the reclaimers. He argued oversight of prorogation could not be left exclusively to Parliament: by its nature,

²² A long established ground of judicial review most notably recognised in [R \(Padfield\) v Minister for Agriculture \[1968\] UKHL 1](#)

prorogation deprives Parliament of the ability to hold Government to account for a period of time. The courts therefore also have a role.

In this particular case, he added, the decision to prorogue for five weeks was an “abuse of power” because it undermined a fundamental constitutional principle (that of the Government’s accountability to Parliament). The UK Government’s stated objectives could be achieved by a prorogation of just a few days.

The Lord Advocate argued that the longer a period of prorogation was, the more severely it interfered with the constitutional principle of responsible government. Accordingly, longer prorogations should require a more extensive and cogent justification than shorter ones.

The Judgment

The Inner House ruled unanimously in favour of the respondents, overturning the decision of Lord Doherty in the Outer House. All three judges found both that the power to prorogue Parliament was justiciable and that, in this specific instance, it had been exercised for an improper purpose and was therefore unlawful.

In finding the matter was justiciable (i.e. capable of review by the courts) the Inner House had regard to the constitutional context in which prorogation operates. Where it was alleged that the “true” purpose of exercising a prerogative power was “to stymie Parliamentary scrutiny of Government action” a court would properly be engaged. Such scrutiny was “a central pillar of the good governance principle which is enshrined in the constitution” meaning that it was a mistake to regard the dispute as one of “high policy or politics”.²³

On the facts, the Inner House found that the stated purpose of the prorogation by the Government was not the true one:

The true reason for the prorogation is to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance, given the issues at stake.²⁴

The Inner House observed that the prorogation had been sought “in a clandestine manner” (the legal team for the respondents in *Cherry* had not been aware that a prorogation decision was imminent when proceedings were first commenced). It also noted that no “practical reason” was given for the length of the prorogation.²⁵

3.2 English courts – the *Miller II* litigation

Who brought the challenge?

After the Prorogation Order was announced Gina Miller initiated proceedings for judicial review in the English High Court.²⁶ Four parties

²³ [\[2019\] CSIH 49](#), Lord President, para 51

²⁴ *ibid.*, para 53

²⁵ *ibid.*, paras 54-59

²⁶ Lisa O’Carroll and Severin Carrell, [Gina Miller’s lawyers apply to challenge Boris Johnson plan](#), *The Guardian*, 28 August 2019

were granted permission to intervene in the case, all of which ostensibly did so in support of the arguments of Gina Miller. They were:

- Baroness Chakrabarti (the then Shadow Attorney General);
- the Counsel General for Wales (on behalf of the Welsh Government);
- Sir John Major (the former Prime Minister); and
- the Lord Advocate (on behalf of the Scottish Government).

In which court was the petition heard?

The matter was heard before the Queen's Bench Division of the High Court of Justice (the Divisional Court). The matter was heard before Lord Burnett of Maldon (the Lord Chief Justice of England and Wales), Sir Terence Etherton (Master of the Rolls) and Dame Victoria Sharp (President of the Queen's Bench Division).

What remedy did the claimant seek?

Gina Miller sought a declarator to the effect that the advice given to prorogue Parliament, and the resulting Prorogation Order made as a consequence of that advice, were unlawful.

The claimant maintained that "the [Prorogation Order] could be quashed or revoked and Parliament recalled" but did not explicitly ask the Divisional Court to do this as:

in any event the Prime Minister accepts that, if the advice to Her Majesty was unlawful, he will take the necessary steps to comply with the terms of any declaration made by the court, making a quashing order unnecessary.²⁷

Claimant's arguments

Lord Pannick represented Gina Miller in the Divisional Court. He argued:

- the decision to prorogue was in principle a justiciable one; and
- in the specific circumstances there had been a "manifest abuse of power" in respect of which a judicial remedy was warranted.

Justiciability

Lord Pannick's argument on justiciability in the Divisional Court was essentially two-fold.

Firstly, he argued that no prerogative power is *per se* non-justiciable simply because it concerns a matter of "high policy". The test a court should adopt is whether there are "appropriate or judicial or legal standards" against which it can assess the purported prerogative act.²⁸

Secondly, he argued that even if some prerogative powers are *per se* non-justiciable, a court should only exceptionally reject a claim purely on justiciability grounds if the merits are otherwise well-founded. To do

²⁷ [R \(Miller\) v Prime Minister \[2019\] EWHC 2381 \(QB\)](#), para 58

²⁸ *ibid.*, para 27

otherwise would unjustly deny a claimant a remedy even if a relevant legal principle had been identified and its breach demonstrated.²⁹

Legality of the Prorogation

Lord Pannick advanced two distinct arguments about the Prorogation Order made on 28 August 2019:

- that it was made in breach of the legal principle of Parliamentary Sovereignty; and
- that it represented a “manifest abuse of power” when assessed against ordinary public law principles, being substantially influenced by extraneous and improper considerations.

The claimant and interveners’ submissions invited the court to draw an adverse inference about the Government’s intentions. It could be inferred from documents made available, including internal Government memorandums, that the length of prorogation was designed to frustrate Parliamentary manoeuvres with regard to the Brexit process.

Government’s arguments

The Government’s argument in the Divisional Court was much the same as it was in the Court of Session in Scotland: that the prorogation decision was a matter of high policy and that it was therefore non-justiciable, as was the question of how long prorogation would last.

Divisional Court judgment

The Divisional Court ruled unanimously in favour of the UK Government, dismissing the claim. It explicitly rejected both of Lord Pannick’s arguments on non-justiciability. The correct approach, it maintained, was first to look at whether the exercise of a power was justiciable before examining whether its exercise was in any sense unlawful.³⁰ The prerogative power of prorogation was non-justiciable.

Non-justiciability of prorogation itself

The Divisional Court concluded that prorogation was “inherently political in nature” and that there were “no legal standards against which to judge” either the legitimacy of prorogation itself or the length of a given period of prorogation.

It concluded that the historical precedent pointed to prorogation being done for myriad reasons; it was not limited to a narrow purpose of preparing the Government’s Queen’s Speech. The Court noted that prorogation was sometimes done explicitly for political advantage, most notably in 1948 to expedite the passage of a Bill in the absence of Lords support. Even if, as the claimants maintained, the purpose of the prorogation was to advance the Government’s political agenda on Brexit, it was not open to a court to find that it was therefore done for an improper purpose.³¹

²⁹ *ibid.*, para 28

³⁰ *ibid.*, para 41

³¹ *ibid.*, para 54

The length of the prorogation

For similar reasons, the Divisional Court concluded that it could not examine the appropriateness of the length of a prorogation. Except so far as Parliament had otherwise legislated (e.g. under the [Northern Ireland \(Executive Formation\) Act 2019](#)) there were no legal (or even conventional) limits on the prerogative power to prorogue Parliament.

The court noted (as the Government had set out in its skeleton argument) three periods of prorogation in 1901, 1914 and 1930. Each was longer than the August 2019 Prorogation Order had envisaged. This helped to show that it was, in its view “impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure.”³²

In practice this meant that a court was not competent to determine how long a Government might need to prepare for a Queen’s Speech, or for that matter how long Parliament needed effectively to scrutinise the Government on important parts of its policy platform. Those were “political” questions not legal ones.

Why was there no appeal to the Court of Appeal?

Normally (in England and Wales) a decision of the Divisional Court, if appealed, is then heard before the Court of Appeal. Only if a decision of the Court of Appeal is then challenged would the matter come before the UK Supreme Court. However, in certain circumstances, a case may be appealed directly from the High Court in England and Wales to the UK Supreme Court. This is known as a “leap frog” appeal and can be made under [section 13 of the Administration of Justice Act 1969](#).

A leap frog appeal was allowed in *Miller II* partly for reasons of urgency. Parliament was already acting as though it had been prorogued. It therefore was “losing” sitting days while litigation about the reasons for that took place.

It was also desirable, given the *Cherry* litigation, to have a binding ruling on both the Scottish and the English and Welsh courts. Decisions of the UK Supreme Court bind the (Scottish) Court of Session but those of the (English and Welsh) Court of Appeal have only persuasive authority in Scottish courts.

³² *ibid.*

4. UK Supreme Court judgment

Summary

Both the *Cherry* and the *Miller II* cases were appealed to the UK Supreme Court and heard before the same panel of 11 justices.³³ The Supreme Court ruled unanimously that the scope of the prerogative power of prorogation was a justiciable matter and in this instance that the prorogation was unlawful.

However, its reasons for this conclusion differed from those of the Inner House of the Court of Session. The Supreme Court set out a general rule that prorogation is beyond the scope of the prerogative power, and therefore unlawful, if its effect would be to:

frustrat[e] or prevent[] without reasonable justification the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.

The Supreme Court held, on the facts, that the UK Government had offered no justification (let alone a reasonable one) for a prorogation that was much longer than the norm, and that the Prime Minister's advice, and the resulting Prorogation Order, were therefore unlawful. The court made a declaration that Parliament was not prorogued, having also rejected the argument that the prorogation ceremony was a proceeding in Parliament (and therefore could not be questioned by a court).

4.1 Summary of proceedings

Leave was granted for the Advocate General (in Scotland) and Gina Miller (in England) to appeal against the respective decisions of the Inner House of the Court of Session and of the Divisional Court. The two cases were conjoined and heard as one appeal before the UK Supreme Court, before the maximum of 11 justices. The Court delivered a unanimous judgment on 24 September 2019 after three days of oral argument (17-19 September).

New interveners

The four interveners from the Divisional Court case were represented (see page 14 above) in addition to the appellants and respondents. Two other interveners also participated: Raymond McCord (a victims' rights campaigner from Northern Ireland) and The Public Law Project (a legal charity). All interveners sought to argue that the prorogation was unlawful.

Main legal issues

The legal argument in the Supreme Court was broadly the same as that in the Inner House of the Court of Session and the Divisional Court. The judgment summarised the issues of contention as follows:

- (1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?
- (2) If it is, by what standard is its lawfulness to be judged?
- (3) By that standard, was it lawful?
- (4) If it was not, what remedy should the court grant?³⁴

³³ [Miller v Prime Minister and Cherry v Advocate General \[2019\] UKSC 41](#) (hereafter *Miller II/Cherry*)

³⁴ *ibid.*, para 27

Judgment

The court ruled that the matter did concern justiciable questions. Like the Inner House, it concluded that the prorogation was unlawful and that Parliament should be deemed not to have been prorogued. However, it applied a different legal test: one which focused on the effect of prorogation on Parliament's constitutional functions, rather than the Government's "purpose" or "motive" for proroguing.

Justiciability

The Supreme Court concluded that the prorogation was justiciable. In doing so, it distinguished between two types of judicial review.

On the one hand, there is review of the "exercise of a prerogative power within its legal limits". This is what the Divisional Court had understood to be the matter before them. Framed this way, it could be relevant to argue that an executive decision concerned matters of "high policy" or was essentially "political" in nature and that the courts therefore had no justification for becoming involved.

On the other hand, there is review of the "scope" of a prerogative power. Scope concerns "the lawful limits of the power and whether they have been exceeded". It concerns the existence and extent of the power, rather than the manner of its exercise.

At common law, questions of scope were "by definition questions of law" and for the courts to answer. It was no answer on questions of scope for the Government to say the matter concerned "high policy".³⁵

Standard of judicial review

The Supreme Court proposed a legal test against which all exercises of the prerogative power to prorogue ought to be judged:

A decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation the court will intervene if the effect is sufficiently serious to justify such an exceptional course...³⁶

In formulating this test the court insisted that it would:

- pose no problems for "normal" prorogations as the interference with sovereignty and accountability would be "relatively minor and uncontroversial"; and
- still allow longer periods of prorogation if a Prime Minister could provide a reasonable justification for Parliament's functions having been more severely curtailed.³⁷

The test also does not preclude political considerations being taken into account when deciding when and for how long to prorogue Parliament.

³⁵ *ibid.*, para 36

³⁶ *ibid.*, para 50

³⁷ *ibid.*, para 51

Lawfulness or otherwise of the September 2019 Prorogation

The Supreme Court concluded that the five-week prorogation was a clear and significant frustration or prevention of Parliament fulfilling its core constitutional functions. It took into account both the timing and the length of the prorogation, and the importance of the constitutional context (the UK's expected EU withdrawal on 31 October 2019).³⁸

Proroguing Parliament for 5 of 8 weeks before exit curtailed its ability to legislate and to scrutinise (and denied Parliament a say on those matters). This would restrict (for example) scrutiny of Government legislation (primary and secondary) and Parliament's statutory role in the Brexit process.³⁹

Moreover, the Government had not provided the court with a "reasonable justification" for such a prolonged curtailment of Parliamentary functions, as distinct from a shorter one:

It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason – let alone a good reason – to advise Her Majesty to prorogue Parliament for five weeks, from 9th to 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful.⁴⁰

Remedies

The question of what remedy the court would provide was a more prominent issue in the Supreme Court than in either the Divisional Court or the Inner House. The UK Government sought to argue that any declaration made by the Supreme Court should be narrow: it should not declare that Parliament was not prorogued, because in its view prorogation was a "proceeding in Parliament" and could therefore not be questioned.⁴¹

The Supreme Court rejected this proposition. The execution of a Prorogation Order was something done to Parliament by the Crown's Commissioners, not something over which either House had any say. The court concluded in explicit terms that Parliament had not been prorogued and that it was for the Speaker of the House of Commons and Lord Speaker, not the Government, to decide when and in what manner Parliament was next to sit, there being no legal obstacle to it doing so.⁴²

4.2 Justiciability of Prorogation

The UK Supreme Court reached a different conclusion on prorogation's justiciability from that of the English Divisional Court. It did so as it framed the dispute in a different way. For the UKSC, the dispute was about the **scope of the power** (which is inherently a justiciable matter) rather than about the **manner of its exercise**. Academic commentary

³⁸ *ibid.*, para 56

³⁹ *ibid.*, paras 57 and 60

⁴⁰ *ibid.*, para 61

⁴¹ *ibid.*, para 63

⁴² *ibid.*, paras 68-70

on the *Miller II* judgments broadly splits based on which of these ways of framing of the dispute is perceived to be the more appropriate.⁴³

It should also be borne in mind that, although the UKSC and the Inner House of the Court of Session in Scotland both ruled that prorogation was justiciable, they did so both in different senses and for different reasons. The UKSC did not (need to) rule on the justiciability of a challenge grounded in the “motive” or “purpose” of the Prime Minister’s actions, and explicitly acknowledged such a challenge would “raise[] some different questions in relation to justiciability”.⁴⁴

Scope of the power or manner of its exercise?

There is a long-standing distinction in public law between judicial review of the existence and scope of a legal power (on the one hand) and judicial review of the manner of the exercise of a power within its legal limits (on the other).⁴⁵ In the context of prerogative powers and justiciability, these types of question are treated differently from one another. The former is always regarded as clear question of law, which is justiciable. The latter is less straightforward, and requires a court first to consider whether there are legal standards, beyond simply the *vires* of a decision, against which a prerogative act may be judged.

The UK Supreme Court took the view that at least some of the legal arguments before them addressed the extent of the prerogative power to prorogue, rather than simply the manner of the exercise of the power within its legal limits.

By contrast, the Divisional Court proceeded on the assumption that this was an argument about how the power was exercised rather than what the power could be used to do.

It is this distinction, rather than as such a substantive disagreement about what the legal principles of judicial review are, that explains the different conclusions on justiciability of the two courts.

Relevance or otherwise of “high policy”

The Divisional Court placed considerable weight on the suggestion that a prorogation decision involved an issue of “high policy” and was a “political” exercise of the prerogative power. It did so because it conceived of the issue as being one about the exercise rather than the extent of the prerogative power. It sought to follow the approach of Lord Roskill in the GCHQ case, who had identified certain prerogative powers that in his view:

⁴³ See e.g. Mark Elliott, [The Supreme Court’s judgment in Cherry/Miller \(No.2\): A New Approach to Constitutional Adjudication](#), *Public Law for Everyone*, 24 September 2019; Alison Young, [Prorogation, Politics and the Principle of Legality](#), *UK Constitutional Law Association*, 13 September 2019; Martin Loughlin, [The Case of Prorogation](#), *Policy Exchange*, 15 October 2019; Timothy Endicott, [Don’t Panic](#), *UK Constitutional Law Association*, 13 September 2019

⁴⁴ [\[2019\] UKSC 41](#), paras. 53-54

⁴⁵ See [Council of Civil Service Unions v Minister for the Civil Service \[1985\] AC 374](#) (the GCHQ case); [Attorney General v De Keyser Royal Hotel Ltd. \[1920\] AC 508](#) and [Case of Proclamations \[1610\] EWHC KB J22](#).

could [not] properly be made the subject of judicial review... because their nature and subject matter are such as not to be amenable to the judicial process.⁴⁶

The Divisional Court's justification for following this course invoked the principle of the separation of powers. It maintained that in the UK's "unwritten" constitution matters of "high policy" properly rest with the executive rather than the judiciary.

The Divisional Court in *Miller II* acknowledged that "matters have moved on" since the GCHQ judgment.⁴⁷ Some of the "excluded categories" of prerogative power have since been considered wholly or partly suitable subjects for judicial review or have even come to be regulated or replaced by statute. However, it largely upheld the Government's claim that prerogation was, in essence, an "excluded category" because of the potentially broad range of political considerations that were inherent in prorogation advice, both as to its timing and its length.

"High policy" is, by contrast, only mentioned once in the UK Supreme Court's judgment. Having concluded that the matter before it engaged questions to do with the extent of the prerogative power to prorogue, it considered it essentially legally irrelevant to argue that its purported exercise in this case had political characteristics:

The courts have the responsibility of upholding the values and principles of the constitution and making them effective... [they] cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.⁴⁸

The Supreme Court did not comment on whether, in any case, prorogation necessarily involves engagement with questions of "high policy" but this has also been doubted by some academics.⁴⁹

4.3 Limits on the extent of the power to prorogue

In finding that the matter was a justiciable one, the UK Supreme Court did not just have to demonstrate that there were legal limits on what the power of prorogation could be used for, but also to explain what they were, where they come from and how they actually limited it.

The court acknowledged this is a less straightforward exercise for prerogative powers than it is for statutory ones. With a statutory power, a court can, among other things, look to the words of the instrument itself, and interpret the meaning and context of those words. This cannot be done with prerogative powers since they are by their nature

⁴⁶ [Council of Civil Service Unions v Minister for the Civil Service \[1985\] AC 374](#) p. 418B

⁴⁷ [\[2019\] EWHC 2381 \(QB\)](#), para 36

⁴⁸ [\[2019\] UKSC 41](#), para 39

⁴⁹ Paul Craig, [Prorogation: Three Assumptions](#), *UK Constitutional Law Association*, 10 September 2019; Mark Elliott, [Prorogation and justiciability: Some thoughts ahead of the Cherry/Miller \(No 2\) case in the Supreme Court](#), *Public Law For Everyone*, 12 September 2019

residual powers that vest in the Crown, and are “not constituted by any document”.⁵⁰

There may be statutory constraints on a prerogative power, but they are not necessarily exhaustive as to its legal limits. Although the power of prorogation has effectively been restricted by statute in the past – most recently by the [Northern Ireland \(Executive Formation\) Act 2019](#) – this does not preclude the existence of other legal limits.⁵¹

On the contrary, the Supreme Court maintained, prerogative powers must also be exercised consistently with common law principles, since it is the common law that recognises prerogative power and its scope in the first place. Where a prerogative power is concerned with the “operation of Parliament” the relevant common law principles include “the fundamental principles of our constitutional law”.⁵²

The Supreme Court identifies two “fundamental principles” of UK constitutional law, in the form of “parliamentary sovereignty” and “parliamentary accountability” with which a prerogative power of prorogation must be exercised consistently.

The prorogation power itself does not extend, the Court ruled, to any course of action that is inconsistent with either of those two principles. A course of action will be inconsistent with the principles if it frustrates either or both of them “without reasonable justification”.

Parliamentary sovereignty

The sovereignty of Parliament has, for a long time, been the subject of judicial and academic scrutiny as to its legal scope. Its narrowest formulation is often associated with A.V. Dicey, to the effect that:

the principle of Parliamentary sovereignty means neither more nor less than... that Parliament... has the right to make or unmake any law whatever, and further, that no person or body is recognised... as having a right to override or set aside the legislation of Parliament.⁵³

The Divisional Court refused to depart from that narrow conception when invited to by Lord Pannick. It took the view that a wider conception amounting to “an ability to conduct its business unimpeded” was unsupported by existing judicial authorities and would run contrary to the principle of separation of powers.⁵⁴

The Supreme Court, by contrast, maintained that Parliamentary sovereignty does have a wider legal importance than simply requiring courts to recognise and enforce primary legislation. It saw, among others, the cases of [Proclamations](#) and [De Keyser](#) as embodying a broader principle: that the courts must protect the law-making capacity of Parliament against unwarranted executive encroachment. It added:

Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats

⁵⁰ [\[2019\] UKSC 41](#), para 38

⁵¹ *ibid.*, para 44

⁵² *ibid.*, para 38

⁵³ A.V. Dicey, [Introduction to the Study of the Law of the Constitution](#), 1915, pp. 3-4

⁵⁴ [\[2019\] EWHC 2381 \(QB\)](#), paras 62-63

posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.⁵⁵

In acknowledging this additional role for courts with regard to parliamentary sovereignty, the judgment added:

The sovereignty of Parliament would... be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament... An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.⁵⁶

Parliamentary accountability

The Supreme Court judgment is also notable for distinguishing between parliamentary sovereignty and parliamentary accountability. This is not a distinction that features in the Divisional Court judgment.

This second principle is defined in the following terms:

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, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.⁵⁷

In insisting this is a *legal* principle of the constitution, the Supreme Court pointed to previous examples of judicial recognition of it. These cases had informed courts' understanding of both the separation of powers and the non-justiciability of certain matters.⁵⁸ However, the UKSC also described Parliamentary accountability as the "animating principle" of various statutes, which have either required Parliament to sit frequently or to be summoned back early from prorogation or adjournment if certain conditions are met.⁵⁹

Long versus short prorogations

The Supreme Court was satisfied that, in almost all cases, a short prorogation would not in fact "place in jeopardy" Parliamentary sovereignty and accountability. However:

the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.⁶⁰

⁵⁵ [\[2019\] UKSC 41](#), para 41

⁵⁶ *ibid.*, para 42

⁵⁷ *ibid.*, para 46

⁵⁸ [R \(Nottinghamshire County Council\) v Secretary of State for the Environment \[1986\] AC 240](#) and [Mohammed \(Serdar\) v Ministry of Defence \[2017\] UKSC 1](#)

⁵⁹ [\[2019\] UKSC 41](#), para 47

⁶⁰ *ibid.*, para 48

For the Supreme Court, therefore, the length of prorogation was relevant to a legal analysis of its legality. Moreover, whether a long prorogation had the effect of frustrating or preventing Parliament from discharging its functions was regarded as a “question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts”.⁶¹

This is another important respect in which its judgment differs from the Divisional Court. It regarded the length of a prorogation as something that was completely unsuitable for judicial analysis:

even if the prorogation in the present case must be justified as being to enable preparations for the Queen’s Speech, the decision how much time to spend and what decisions to take for such preparations is not something the court can judge by any measurable standard.⁶²

4.4 The legal test adopted and applied

The Supreme Court, based on the foregoing, developed a test against which any decision to Parliament must hereafter be judged:

A decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation the court will intervene if the effect is sufficiently serious to justify such an exceptional course...

Effect and justification versus purpose and motive

The Supreme Court’s test for the legality of prorogation was different from that of the Inner House of the Court of Session.

The Inner House had applied an orthodox “improper purpose” test. This involved looking at why the Government had advised the Queen to prorogue Parliament, and by implication the motives of those involved.

The Supreme Court’s approach avoids an explicit judicial oversight of the purpose of a prorogation, or the motivations of those seeking it. Instead, it considers the issue in the context of what effect it has on Parliament and what justification the Government is able to offer for it.

The need for a “reasonable justification”

Unreasonableness (also known as irrationality) is a distinct ground of judicial review which has been recognised in UK law for more than seventy years.⁶³ In its loosest sense, something will be unlawful if no reasonable decision-maker applying their mind to the question would have taken the decision in question.

⁶¹ *ibid.*, para 51

⁶² [\[2019\] EWHC 2381 \(QB\)](#), para 60

⁶³ [Associated Provincial Picture Houses Ltd. v Wednesbury Corporation \[1948\] 1 KB 223](#) and [Council of Civil Service Unions v Minister for the Civil Service \[1985\] AC 374](#), p. 410G

The concept of reasonableness is also relevant, however, in more complex contexts. For example – where a statutory power comes into conflict with a constitutional principle or fundamental right, a court might address the issue in terms of whether something was reasonably “necessary” or reasonably “justified” when interpreting the meaning of the statute. In its 2017 judgment in [ex parte UNISON](#) the Supreme Court said the following, for example (emphasis added):

Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is **reasonably necessary** to fulfil the objective of the provision in question...

even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation... the degree of intrusion must not be greater **than is justified** by the objectives which the measure is intended to serve.⁶⁴

The Supreme Court effectively “borrowed” this approach from review of statutory powers, and applied it to a prerogative power in the present case, re-affirming the relevant passages in [ex parte UNISON](#).⁶⁵

This means that a “reasonable justification” must be provided for any given prorogation. What might constitute a reasonable justification will be context sensitive, with the length of the prorogation, among other things, being taken into account.

Test applied to the September 2019 prorogation

First and foremost, the Supreme Court maintained that it was obvious the prorogation decision frustrated or inhibited parliament from carrying out its constitutional functions for a prolonged period. It pointed out that, among other things, the prorogation effectively:

- prevented Parliament from sitting for five of the eight weeks between summer recess and 31 October 2019;
- prevented the House of Commons from deciding for itself whether, when and for how long it would go into conference recess;
- curtailed Parliament from being able to carry out scrutiny activities it could otherwise have continued with, even if both Houses had adjourned for a conference recess; and
- curtailed the ability of Parliament to hold the Prime Minister to account for an imminent and significant constitutional change.

Short prorogations normally need only minimal justification

The Supreme Court made clear that, with “short” periods of prorogation, a simple justification from the Government for curtailing Parliament’s ability to function would almost always suffice. To the extent that there was an interference with parliamentary sovereignty and/or parliamentary accountability, it would be sufficient justification

⁶⁴ [R \(UNISON\) v Lord Chancellor \[2017\] UKSC 51](#), paras 80-82 and 88-89

⁶⁵ [\[2019\] UKSC 41](#), para 49

simply to say that the Government wished to end one Parliamentary session and to begin another.⁶⁶

Only in “unusual circumstances” would further justification be needed for a short prorogation. Even if a further justification were needed, the court would be mindful of the Prime Minister’s constitutional role in advising the monarch on those matters. It would also proceed with “caution” and “sensitivity” when determining whether that justification was “reasonable”.⁶⁷

Longer prorogations need more extensive justification

The Supreme Court did not regard the September 2019 prorogation as falling within this category of prorogation for which minimal justification was needed. It did not accept as a reasonable justification the Government’s stated reason that it wished to end the existing Parliamentary session and to prepare for a Queen’s Speech. That justification did not explain why the prorogation was for five weeks rather than what was normal (about a week).

The court relied on the evidence of Sir John Major, former Prime Minister, in reaching this conclusion. His evidence – which the Supreme Court had described as “unchallenged” – was to the effect it is highly unusual for a Queen’s Speech to need more than four to six days preparation, and that it had never in modern times needed five weeks.⁶⁸

The court also concluded that the Government’s internal memorandum – prepared at the time by the Director of Legislative Affairs in Number 10 – made no attempt to justify a prolonged curtailment of Parliament’s functions. It had – at most – justified only a short [wash-up](#) period, rather than a long one. The memorandum also had not justified why Parliament should be prorogued during the traditional party conference season, rather than that each House have the power to decide if, when and for how long it should adjourn.⁶⁹

In these circumstances, the Supreme Court said the following:

It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful.⁷⁰

4.5 Remedies

The Inner House of the Court of Session had declared in its judgment not only that the Prime Minister’s advice to prorogue was unlawful, but also that the resulting Prorogation Order and the resulting prorogation itself was “null and of no effect”.

⁶⁶ *ibid.* para 51

⁶⁷ *ibid.*

⁶⁸ *ibid.* para 59

⁶⁹ *ibid.* para 60

⁷⁰ *ibid.* para 61

The UK Government's Article 9 argument

In the Supreme Court, the UK Government argued that, even if the court could declare the advice was unlawful, it could not declare that the prorogation was therefore null and void. Since the prorogation ceremony takes place in the House of Lords, it argued, the prorogation was itself a "proceeding in Parliament" for the purposes of Article IX of the [Bill of Rights \[1688\]](#) or could otherwise be considered to trespass onto matters falling within Parliament's "exclusive cognisance".⁷¹ If this argument was sustained, it would prevent the courts from "questioning" those proceedings: they would have to be treated as valid, regardless of how they were arrived at.

Supreme Court rules Article 9 is not engaged

The Supreme Court rejected this submission, re-affirming the principles from the case of [R v Chaytor](#)⁷² on MPs' expenses:

The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.⁷³

The Court therefore distinguished between proceedings that are within the control of Parliament – which form part of its "core or essential business" – and acts of the Crown that are done to Parliament without its deliberation or agreement.

Having concluded that no parliamentary proceedings would be questioned by the granting of any given remedy, the Court then declared that the advice was unlawful, the Prorogation Order lacked a legal basis, and that the resulting prorogation was therefore void.

Describing how the law should treat what happened in Parliament in the early hours of 10 September 2019, the Supreme Court said:

The logical approach to [the validity of the prorogation is] to start at the beginning, with the advice that 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.⁷⁴

⁷¹ A similar, but not identical, provision to Article IX of the [Bill of Rights Act \[1688\]](#) is found in the [Claim of Right Act 1689](#) of the Parliament of Scotland.

⁷² [\[2010\] UKSC 52](#)

⁷³ [\[2019\] UKSC 41](#), para 68

⁷⁴ *ibid.*, para 69

4.6 A Parliamentary session restored

The effect in law of the UK Supreme Court's judgment on 24 September 2019 was that Parliament had not in fact been prorogued in the early hours of 10 September 2019.

The Parliamentary session beginning in 2017 had therefore not come to an end. Parliamentary committees could formally sit and take decisions as before. Bills that otherwise would have been lost were once again "live" at the stage in the legislative process they had reached by 9 September 2019.

Parliament could sit again

Most importantly of all, there was no legal impediment to either House of Parliament sitting at the earliest available opportunity. The House of Commons had already lost nine sitting days between 10 and 24 September inclusive. The next (default) sitting day would be Wednesday 25 September 2019.

The Supreme Court made clear that, although the Government had said it would comply with any ruling, the sitting of Parliament did not require its acquiescence. There was no need, for example, for Parliament to be summoned under the [Meeting of Parliament Act 1797](#): it was not prorogued in the first place. As the court put it:

Unless there is some Parliamentary rule to the contrary of which we are unaware, the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. That would, of course, be a proceeding in Parliament which could not be called in question in this or any other court.⁷⁵

On 25 September 2019, the House of Commons sitting commenced with a statement from the Speaker of the House. He explained the terms of the judgment to the House of Commons. He went on to explain two important procedural matters.⁷⁶ The Lord Speaker, likewise, addressed those matters in a statement in the House of Lords.⁷⁷

Parliament's official report

When the Royal Commissioners deliver a message to prorogue Parliament, that fact is recorded in the Journal of the House of Commons. The House is not, on these occasions, "adjourned" at the end of the day's proceedings, as would be the case at the conclusion of a normal sitting day's proceedings.

The Speaker's Statement explained that the item relating to the Prorogation of Parliament in the Journal of Monday 9 September 2019 would be "expunged" and that the House would instead exceptionally be recorded as "adjourned at the close of business". The Lord Speaker's statement similarly indicated that items would be deleted from the

⁷⁵ *ibid.*, para 70

⁷⁶ [HC Deb 25 September 2019 Vol 644 c652](#)

⁷⁷ [HL Deb 25 September 2019 Vol 799 c1405](#)

Minute of Proceedings of 9 September and that the Lords would be recorded as adjourned at 1.40am.

Prorogation and Royal Assent

Royal Assent is signified by the Monarch by Letters Patent under the Great Seal. In modern times, it is usually then notified to each House of Parliament, sitting separately, by the Speaker of that House. Royal Assent takes effect once this has happened in both Houses.

However, if Bills are awaiting Royal Assent immediately before prorogation, it can instead be authorised by the Royal Commission as part of the prorogation ceremony.⁷⁸

During the ceremony in the early hours of 10 September 2019, the Royal Commission purported to authorise Royal Assent for the [Parliamentary Buildings \(Restoration and Renewal\) Act 2019](#).

In his statement of 25 September, the Commons Speaker advised:

Royal Assent to the Parliamentary Buildings (Restoration and Renewal) Bill, which formed part of the royal commission appointed under the quashed Order in Council, will need to be re-signified.⁷⁹

The Lords Speaker also intimated this to the House of Lords.⁸⁰

The Supreme Court judgment did not itself state that Royal Assent would need to be “re-signified”. It merely stated that the Royal Commission to prorogue Parliament had not been validly constituted because the Prorogation Order was itself unlawful. The inference that re-signification was necessary appears instead to have been drawn by the Government and/or Parliamentary authorities.

Parliament validly prorogued on 8 October 2019

Having reconvened on 25 September, Parliament proceeded to sit for a further two weeks. A [new Prorogation Order](#) was made on Tuesday 8 October 2019, giving rise to a prorogation ceremony later that day. Under the terms of that Order, Parliament next stood summoned on 14 October 2019, to hear a new Queen’s Speech.

The ceremony, which passed without incident, included the authorisation of Royal Assent for the [Parliamentary Buildings \(Restoration and Renewal\) Bill 2019](#) and the [Census \(Return Particulars and Removal of Penalties\) Act 2019](#).

Many of the Government’s Bills, including Brexit Bills on *Trade*, *Agriculture* and *Fisheries*, were all lost on prorogation on 8 October 2019. Those Bills were not reintroduced in the short 2019 session, but new Bills on the same issues form part of the Government’s legislative programme in the current Parliament.

⁷⁸ [Erskine May, para 8.8](#); Note that the form of words for the Letters Patent varies depending on whether Royal Assent is pronounced, pronounced at the same time as prorogation, or notified to each House separately. See [The Crown Office \(Forms and Proclamations Rules\) Order 1992](#), Schedule, Part IV

⁷⁹ [HC Deb 25 September 2019 Vol 644 c652](#)

⁸⁰ [HL Deb 25 September 2019 Vol 799 c1405](#)

5. Impact of *Miller III/Cherry*

Summary

The *Miller III/Cherry* judgment has developed the law on prorogation. A common law test now applies to any and all exercises of that prerogative power, over and above existing statutory limits. How the new legal test will apply in practice remains largely untested, though short prorogations (of less than a week) are unlikely to attract much judicial scrutiny.

Longer periods of prorogation likely cannot be justified solely on the grounds that the Government wishes to introduce a new Queen's Speech. Unless further justification can be provided by Governments, it seems that prorogations of longer than a fortnight could become even rarer than they are already.

The new test also presents a challenge for "time-sensitive" prorogations, most notably when a Government has lost, or is expected to lose, the confidence of the House of Commons.

In the aftermath of the Supreme Court judgment, some attention has turned options for reform of prorogation. The Public Administration and Constitutional Affairs Committee's inquiry, launched in October of 2019, saw a range of options for reform discussed. Ideas suggested by academics included:

- making prorogation a "proceeding in Parliament" (thus non-justiciable);
- requiring prorogation to receive prior Parliamentary approval; and
- giving Parliament a statutory power to "unprorogue" itself.

The House of Lords Constitution Committee's also published a report in September 2020. In [A Question of Confidence? The Fixed-term Parliaments Act 2011](#) the Committee invited the Government and Parliament to consider whether – as part of a review of the 2011 Act, Parliament's role in prorogation should also be revisited. This view was shared by PACAC in [its own report into the Fixed-term Parliaments Act](#), also published in September 2020.

The Government launched [the Independent Review of Administrative Law](#) on 31 July 2020. Its terms of reference require the panel to consider the (non-)justiciability of prerogative powers.

5.1 Legal limits on prorogation

The Supreme Court judgment confirms the existence of two types of legal limit on prorogation:

- statutory constraints; and
- a common law "reasonable justification" requirement.

5.2 Statutory limits

Acts of Parliament limit prorogation in several different ways.

Historic statutory basis for Parliament sitting

The English Parliament's [Bill of Rights \[1688\]](#) and the Parliament of Scotland's [Claim of Right Act 1689](#) both provide that:

for redress of all grievances and for the amending strengthening and preserving of the laws Parliaments ought to be [held frequently/frequently called].

These statutes do not specify how often Parliaments must be held, or for how long they must sit once summoned. However, their necessary implication is that Parliament cannot stand prorogued indefinitely. The Supreme Court judgment affirms this is one effect of those statutes.⁸¹

Historically the English Parliament's *Triennial Acts* were more specific. They concerned the frequency with which successive Parliaments were summoned, and the maximum length of a given Parliament. Statutory provision for dissolution is, by necessary implication, a limit on the length of time for which Parliament can be prorogued.⁸²

- [The Act passed in 1641](#) by the English Parliament required Parliament to meet for a fifty-day session at least once every three years. Parliament could only be prorogued or dissolved early if the Crown and both Houses of Parliament assented.
- The Acts passed in 1664 and [1694](#) required a Parliament to be summoned every three years, but did not specify for how long a given Parliament must then sit.

Parliament's authorisation of financial matters

In practice, Parliament cannot be prorogued for longer than a year without causing substantial disruption to the functioning of a modern Government. This is because significant elements of both taxation and government spending are underpinned by annual legislation. Income tax and corporation tax, for example, must be renewed annually via a *Finance Act*. The House of Commons can provisionally authorise the renewal of collection of taxes via a [ways and means resolution](#) but prorogation or dissolution deprives such a resolution of its effect.⁸³

Most of the Government's expenditure must be authorised through the supply and estimates process. The Commons sits on at least three [estimates days](#) to debate and vote on proposed departmental expenditure. Parliament must also be sitting to approve the [Supply and Appropriation Bills](#), the content of which is determined by the estimates.

The Crown's power to shorten prorogation by proclamation

A Prorogation Order always provides a date on which Parliament next stands summoned. Once Parliament is prorogued, the Crown can (by proclamation) bring forward that date to an earlier day. This power is statutory. It is exercised under the [Meeting of Parliament Act 1797](#).

This statutory power cannot be used to summon a new Parliament (i.e. following a General Election) earlier than it would otherwise have been summoned, but it can be used to bring forward the second and subsequent sessions of any given Parliament.⁸⁴

⁸¹ [\[2019\] UKSC 41](#), para 44

⁸² The same principle applied to the *Septennial Act* (as amended) and applies to the *Fixed-term Parliaments Act 2011*.

⁸³ House of Commons Library, [The Budget and the annual Finance Bill](#), SN00813, 13 March 2020; [section 1 Provisional Collection of Taxes Act 1968](#).

⁸⁴ [Erskine May para 8.11, fn 1](#); Parliament was summoned "early" by proclamation following prorogation in 1799, 1854, 1857, 1900 and 1921.

Parliament to be summoned on the demise of the Crown

If the monarch dies and Parliament has not already been dissolved for a General Election, the [Succession to the Crown Act 1707](#) requires it to sit immediately. This curtails any period of prorogation or adjournment.

Parliament to be summoned in specific circumstances

Some of the Government's powers are considered to be of a kind that require particularly timely Parliamentary scrutiny. In these cases, statute provides that Parliament must be sitting within a given number of days of the power being exercised. If this can only be achieved by curtailing a period of prorogation or adjournment, then that legally must happen (via a proclamation). The two notable examples of this are:

- when the Government makes emergency regulations under the [Civil Contingencies Act 2004](#); and
- if reserve forces are called out on permanent service under the [Reserve Forces Act 1996](#).

The effect of these statutes is to curtail Prorogation Orders or periods of adjournment that have already been decided, or are already in force.

Mandatory Parliamentary business and prorogation

The [Northern Ireland \(Executive Formation etc.\) Act 2019](#) used a similar mechanism as the 1996 and 2004 Acts, but in a slightly different way. It pre-emptively prevented Parliament from being prorogued or adjourned at specific points in the 2019 Parliamentary calendar. It did so by introducing mandatory items of Commons business on a recurring timetable. Reports had to be laid before Parliament on two specific dates and at fortnightly intervals thereafter. A Commons debate would have to take place within five calendar days of each report being laid, and if Parliament was prorogued or adjourned the statute provided that it had to be summoned back and to sit for at least five days thereafter.

5.3 Common law “reasonable justification”

The Supreme Court has supplemented the statutory constraints on prorogation with a common law rule. The rule has three essential components. A court will nullify a prorogation only if:

- it has the effect of frustrating or preventing Parliament from carrying out its constitutional functions;
- the Government lacks a reasonable justification for the prorogation; and
- the effect on Parliament is sufficiently serious to warrant judicial intervention.⁸⁵

These three elements, though distinct, are closely related. The shorter the prorogation, the less likely it is to be regarded as “frustrating”

⁸⁵ [\[2019\] UKSC 41](#), para 50

Parliament, the more readily apparent and reasonable the “justification” for it is likely to be, and the less likely it is that prorogation has a “serious” enough effect to warrant judicial intervention.

Do all prorogations “frustrate” or “prevent” Parliament from exercising its functions?

Effect on Parliament as a sliding scale

All prorogations inhibit Parliament from carrying on certain of its functions. However, the Supreme Court said that not all prorogations do this to the same extent. Some might be said barely to “frustrate” Parliament at all:

The extent to which prorogation frustrates or prevents Parliament’s ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts.⁸⁶

The Supreme Court accepted that the “effect” of a normal short prorogation (i.e. of less than a week) is “relatively minor and uncontroversial”. There “can be no question of such a prorogation being incompatible with Parliamentary sovereignty” even though “Parliament cannot enact laws” while it is prorogued.⁸⁷

What does this mean in practice?

Extremely short prorogations may be regarded as not frustrating or preventing Parliament from being able to exercise its constitutional functions at all, and therefore would effectively be unchallengeable on common law grounds.

To take the most extreme example, in the 1940s most of the prorogation ceremonies in Parliament took place the day before a King’s Speech opened the next Parliamentary session. Therefore, no sitting days were lost; the main “change” was in the business transacted.

Normal prorogations – of under a week – are likely to be treated as not having a “sufficiently serious” effect on Parliament’s functions to warrant judicial oversight, save perhaps in exceptional circumstances.

Short prorogations and “reasonable justification”

The Supreme Court explicitly recognises that a “reasonable justification” for a short prorogation can almost always be readily discerned:

The Prime Minister’s wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary.⁸⁸

Governments have several plausible reasons for seeking a new Parliamentary session. A Queen’s Speech lets a it (among other things):

- refresh its legislative agenda;

⁸⁶ *ibid.* para 51

⁸⁷ *ibid.* para 45

⁸⁸ *ibid.* para 51

- demonstrate it has the confidence of the House of Commons;
- reintroduce obstructed legislative proposals; and
- revisit other Parliamentary business already decided in the previous session.

For each of these ends “matters of political judgment” (as the Supreme Court put it) will be relevant when justifying a decision to prorogue.

Refreshing the Government’s legislative agenda

In the 20th and 21st centuries, Parliament has only once had a session that lasted longer than two years (the 2017-19 session). It is normal for Governments to seek to refresh their legislative agendas, and they mostly do so on a nearly annual basis. Refreshing, or resetting, the legislative agenda might be thought particularly important if there is a change of Prime Minister, or even of governing party or parties, during the course of a Parliament.

Demonstrating the confidence of the lower House

The Queen’s Speech remains an important test of whether the Government commands the confidence of the House of Commons. This might be thought especially important for:

- minority governments;
- new Prime Ministers; and
- governments with only small notional majorities.

Reintroducing rejected legislation

If (for example) the House of Lords has not passed a Government Bill, the Prime Minister might still want to begin a new session. A Public Bill can receive Royal Assent without bicameral support if:

- the Commons has passed an identical Bill in consecutive sessions;
- the Lords is deemed to have rejected the Bill twice; and
- one year has elapsed since the Commons Second Reading in the first of those two sessions.

Revisiting other Parliamentary business

The “[same question rule](#)” in the House of Commons normally prevents “substantially the same” matter being decided upon for a second or subsequent time in the same Parliamentary session.⁸⁹

However, this rule does not impede the House of Commons from revisiting substantially the same question in a subsequent session.

[On 18 March 2019](#), the then Speaker of the House ruled that the Government could not bring forward the same approval motion in relation to the withdrawal agreement and framework for the future relationship, which the Commons had already rejected on 12 March.⁹⁰ One possibility mooted was that the Government could bring back the same “deal” in a new session, though this ultimately did not happen.

⁸⁹ [Erskine May para 20.12](#)

⁹⁰ [HC Deb 18 March 2019 Vol 656 cc775-776](#)

Box 1: Prorogations in 1948

In mid-November 1947, the House of Commons approved the *Parliament Bill* on its Second Reading. The Bill completed the rest of its Commons stages in December 1947. However, the House of Lords declined to give the Bill a Second Reading in June 1948.

In that era, Parliament would normally have a long summer adjournment covering most or all of August and September. Parliament typically would be prorogued only once a year, usually in October or November, or immediately prior to dissolution.

However, in 1948, there were two prorogations. Parliament was prorogued on Monday 13 September for a King's Speech on Tuesday 14 September, and again on Monday 25 October for a King's Speech on Tuesday 26 October. This inserted an additional session, lasting just over a month, between the 1947-48 and 1948-49 Parliamentary sessions.

The House of Lords' power to block a Public Bill was not, at that time, unlimited. However, the House of Commons could not override the upper House unless it passed the same Bill in three consecutive Parliamentary sessions (as required by the *Parliament Act 1911*).

By holding a short session in 1948, the Government could be more confident of meeting this requirement in the lifetime of the 1945 Parliament. Indeed, the *Parliament Bill* became an Act in December 1949, as part of the prorogation ceremony before the February 1950 General Election.

Had Parliament kept to its more normal "annualised" sessions, the Bill might still have become an Act, though possibly several months later than it did. It would also have needed a further session in late 1949/early 1950, given continued opposition to the Bill from the House of Lords.

Longer prorogations

A plausible consequence of the UK Supreme Court's judgment is that longer periods of prorogation will become even rarer than was previously the case. Since the 1931 General Election, the gap between sessions in the same Parliament has only twice exceeded a fortnight.⁹¹ Given the uncertainty as to whether longer periods of prorogation would be lawful, Governments may err on the side of caution to reduce the risk of further prorogation litigation. As Professor Anne Twomey put it in evidence to the Public Administration and Constitution Committee (PACAC) in October 2019:

Putting on my hat as a former Government legal officer, if I were advising a Prime Minister or a Premier in relation to Prorogation—which indeed I have in the past, in New South Wales—after this decision, I would be advising them to be, first of all, careful when you decide to prorogue if you are going to prorogue for more than a relatively short period of time. One week, two weeks—if you are going anything further than that, you have to have some kind of a justifiable reason. You would need to think about it and work out what kind of reasonable justification you can give and whether you can show that you are doing it for a purpose other than simply to shut down and avoid parliamentary scrutiny or parliamentary action in relation to legislation. You would need to be able to marshal those arguments and, if you cannot marshal them, you should not be doing it.⁹²

⁹¹ Recess lasted 15 days in 2007 and 20 days in 2014. See House of Lords Library, [Lengths of Prorogation since 1900](#), LLN-2019-0111, 3 October 2019

⁹² PACAC, [Oral Evidence: Prorogation and implications of the Supreme Court judgment](#), HC 2666, 8 October 2019, Q.8

A five-week prorogation is too long “for a Queen’s Speech”

The main reason why the UK Government lost the [Miller III/Cherry](#) case was because of the length of the prorogation and (as the UK Supreme Court saw it) the Government’s lack of a justification for it.

The UK Supreme Court was in no doubt that a five-week prorogation “frustrated” or “prevented” Parliament from carrying on its constitutional functions. This can be contrasted with short prorogations, where there could be “no question of such a prorogation being incompatible with Parliamentary sovereignty”.⁹³

A prorogation lasting five weeks was considered to be a more substantial constraint on Parliament’s constitutional functions than the “normal” prorogation of less than a week. Its implications for Parliament were more severe, and were further compounded by the widely known political context of the Article 50 process.

The Supreme Court examined at some length whether the “normal” justification for a prorogation – the desire to bring forward a Queen’s Speech – could apply to one of five weeks. It reached the conclusion that it could not, taking particular judicial notice of the evidence of the former Prime Minister, Sir John Major:

The unchallenged evidence of Sir John Major is clear. The work on the Queen’s Speech varies according to the size of the programme. But a typical time is four to six days. Departments bid for the Bills they would like to have in the next session.

Government business managers meet to select the Bills to be included, usually after discussion with the Prime Minister, and Cabinet is asked to endorse the decisions. Drafting the speech itself does not take much time once the substance is clear. Sir John’s evidence is that he has never known a Government to need as much as five weeks to put together its legislative agenda.⁹⁴

This observation does not impose a hard time limit on prorogations “for a Queen’s Speech”. It remains plausible, for example, that longer than six days may “reasonably” be sought between prorogation and a new session. However, a Government might have to justify, with reference to the specific circumstances, why their Queen’s Speech needs, or should have, a longer lead-in period than is the norm.

Longer prorogations in “benign” political circumstances

In 2014, Parliament was prorogued on 14 May and did not sit again until 4 June. This gap of 20 calendar days between sessions in the same Parliament was the longest since 1930. However, this period also coincided with what is usually the Whitsun adjournment, and with campaigning in the 2014 European Parliamentary elections. It might therefore be argued that – in practice – the loss of Parliamentary time was less significant than initially appears.

The UK Government – similarly – argued in [Miller III/Cherry](#) that a five-week prorogation was less drastic an interference in Parliament’s functioning than first appeared. An internal Government memorandum

⁹³ [\[2019\] UKSC 41](#), paras 46 and 56

⁹⁴ *ibid.* para 59

pointed out that the five-week prorogation overlapped with when there is usually a periodic adjournment for party conference season.⁹⁵

This argument was dismissed by the Supreme Court for essentially two reasons. It did not accept that prorogation and adjournment were functionally interchangeable.⁹⁶

Firstly, the House of Commons formally approves each of its periodic adjournments.⁹⁷ It must do so because they each represent a departure from the default sitting arrangements in the Standing Orders.⁹⁸ By contrast, it is the Government that decides the timing and length of a prorogation; neither House decides the contents of a Prorogation Order.

Secondly, the consequences for Parliamentary business are different for adjournment and prorogation. The two Houses need not adjourn at the same time; prorogation affects both simultaneously. Parliamentary committees can function as normal during adjournment; their formal activities are paused while Parliament stands prorogued. Bills and other Parliamentary business are mostly unaffected by adjournment; by default, Bills and future business “fall” on prorogation.

The Supreme Court judgment may make 2014-style prorogations even less common. One alternative to (e.g.) a three-week prorogation is for the Government to secure approval for (say) a two-week periodic adjournment and then to prorogue Parliament for the “normal” week or less. In “benign” political circumstances, periodic adjournments reliably command the support of the lower House.⁹⁹

Time-sensitive prorogations

The Supreme Court’s test does not just affect prorogations that are unreasonably long. The timing of a short prorogation may have a more drastic effect on the ability of Parliament to carry out certain of its constitutional functions than a longer one happening in politically benign circumstances. This may be particularly relevant in the context of confidence votes in the House of Commons.

Proroguing when a confidence motion is imminent

There are no modern examples in the UK of a Government proroguing Parliament to avoid or delay a motion of no confidence. However, there are examples in other Westminster systems, most notably from Canada in 2008, of prorogation seemingly being used for those ends.

If the effect of a prorogation is to prevent, or significantly to delay, the lower House from testing its confidence in the Government it would clearly interfere with Parliament’s constitutional functions.¹⁰⁰ As the law

⁹⁵ *ibid.* paras 17, 18 and 56

⁹⁶ *ibid.* paras 6, 56 and 70

⁹⁷ [Standing Order No. 25](#)

⁹⁸ During a Parliamentary session, [Standing Order No. 9](#) requires the House of Commons to sit on every Monday, Tuesday, Wednesday and Thursday.

⁹⁹ After prorogation was annulled, the Government proposed that the Commons should periodically adjourn for a shortened conference recess. The House rejected this proposal by 306 votes to 289; [HC Deb 26 September 2019 Vol 664 cc916-920](#)

¹⁰⁰ This point is made even by those who are critical of the Supreme Court judgment. Richard Ekins, for example, made this point [in written evidence](#) (paras 6-8) to the Public Administration and Constitutional Affairs Committee in October 2019.

currently stands, it at least arguably also interferes with a statutory role of the House of Commons, under the [Fixed-term Parliaments Act 2011](#).

A Government might try to argue that there are unique or unusual circumstances to justify delaying a particular vote of no confidence. However, it is not clear why prorogation would be a necessary mechanism to achieve those ends. By default, Government business takes precedence in the House of Commons.

It is only a constitutional convention that time is made in short order for a motion of no confidence in the name of the Leader of the Opposition to be debated in Government time. If a Government was determined to act contrary to that constitutional convention, it could delay a confidence motion without actually proroguing Parliament.

Proroguing after a confidence motion has been lost

Under the [Fixed-term Parliaments Act 2011](#), a General Election is the default outcome if the House of Commons has passed a motion of no confidence in the Government.¹⁰¹ That election can only be averted if:

- the Government regains the confidence of the House of Commons; or
- there is a change of administration and the new Government gains the confidence of the House.

However, both scenarios depend on the House of Commons being able to sit at some point during a statutory fourteen day waiting period. If MPs cannot sit, they cannot vote on a “motion of confidence” in the Government, and the General Election cannot be averted.

In the absence of a common law constraint, a Government could decide that Parliament should be prorogued throughout the fourteen-day period. This would deprive MPs of any “official” means by which to express a view on the formation of an alternative Government.

However, the existence of a common law constraint changes the situation. A Prime Minister who has lost the confidence of the lower House may find it difficult to persuade a court that he or she has a “reasonable justification” for prorogation, even for less than a week.

5.4 Reform of the law on prorogation

The Public Administration and Constitutional Affairs Committee launched an inquiry into the constitutional implications of the prorogation judgment in October 2019, but did not report before dissolution in November 2019. One evidence session took place. It subsequently referred to prorogation [in its September 2020 report](#) on the [Fixed-term Parliaments Act 2011](#).¹⁰²

Witnesses were asked whether prorogation should remain a prerogative power, subject to statutory and common law constraints, or whether

¹⁰¹ The Government plans to repeal the [Fixed-term Parliaments Act 2011](#) but has not yet indicated with what it will be replaced.

¹⁰² House of Commons Public Administration and Constitutional Affairs Committee, [The Fixed-term Parliaments Act 2011](#), HC 167, 15 September 2020

the power itself should instead be put on a statutory footing. They were also asked whether the substance of the existing rules should be preserved, clarified or changed by Act of Parliament.

The Lords Constitution Committee published a report in September 2020, [A Question of Confidence? The Fixed-term Parliaments Act 2011](#).¹⁰³ It suggested that the anticipated statutory review into the [Fixed-term Parliaments Act 2011](#):

may wish to consider whether the prorogation of Parliament should require its approval in the same way the Commons approves its recess dates.¹⁰⁴

Legal limits – set by courts or by Parliament?

Critics of the Supreme Court judgment have argued, both to the PACAC inquiry and elsewhere, that prorogation should be regarded as a non-justiciable matter because of the inherently political considerations it involves. Those arguing this typically perceive the judgment as an example of judges improperly entering the political realm. It has been suggested that Parliament might use primary legislation to “overturn” the Supreme Court’s judgment for the purposes of future prorogations.

Legislating to make prorogation a proceeding in Parliament

Professor Richard Ekins¹⁰⁵ (a critic of the Supreme Court Judgment) has argued that, “as a standing matter”, it would be “unwise” to legislate on prorogation. If legal limits on prorogation have to exist on the prerogative power, however, his preference was that Parliament, rather than the courts, should decide what those limits are. His preference was also that prorogation should stay a power exercised by the executive.¹⁰⁶

In his written evidence to PACAC, Professor Ekins specifically argued that Parliament should legislate to provide that prorogation is a “proceeding in Parliament” for the purposes of the [Bill of Rights Act \[1688\]](#). The effect of a provision like that would be to prevent in future any courts from “questioning” the validity of prorogation.¹⁰⁷

Otherwise restricting the justiciability of prerogative powers

The UK Government’s criticism of the judgment also focused on the justiciability (or otherwise) of prorogation advice and orders. It recently launched an [Independent Review of Administrative Law](#).¹⁰⁸

The review’s [Terms of Reference](#) explicitly ask the panel to look at the justiciability of prerogative powers. Although prorogation is not directly mentioned, external observers including Professor Mark Elliott (of the

¹⁰³ House of Lords Constitution Committee, [A Question of Confidence? The Fixed-term Parliaments Act 2011](#), HL Paper 121, 4 September 2020

¹⁰⁴ Ibid. para 144

¹⁰⁵ Head of Policy Exchange’s Judicial Power Project and Professor of Law, University of Oxford

¹⁰⁶ PACAC, [Oral Evidence: Prorogation and implications of the Supreme Court judgment](#), HC 2666, 8 October 2019, Q. 29

¹⁰⁷ Richard Ekins, [Written evidence to PACAC](#), October 2019

¹⁰⁸ Cabinet Office, [Government launches independent panel to look at judicial review](#), 31 July 2020

University of Cambridge) have suggested the *Miller III/Cherry* judgment is the Government's impetus for reviewing these arrangements.¹⁰⁹

An executive or a legislative power?

Professor Meg Russell¹¹⁰ welcomed the Supreme Court judgment, but acknowledged the Supreme Court's legal test leaves the limits of the prerogative power to prorogue somewhat uncertain.

She argued that Parliament, rather than the Government, should have the legal power to decide whether and when prorogation should happen and that this should be underpinned by statute.

A possible mechanism she and Lord Sumption¹¹¹ suggested in evidence to PACAC was that, as with periodic adjournment and early dissolution, a decision to prorogue should require (at least) a supporting resolution of the House of Commons.¹¹² This would relocate this constitutional power to prorogue from the executive to the legislature.

This approach would also preclude judicial oversight, as a House of Commons decision to approve prorogation would (unlike an Order in Council to prorogue) presumably constitute a "proceeding in Parliament" for the purposes of Article IX of the *Bill of Rights Act*.

Allow the legislature to "unprorogue" itself?

Professor Anne Twomey¹¹³ urged caution against seeking to codify the law on prorogation, advocating the benefit of "flexibility" in the current arrangements.¹¹⁴ However, she also suggested another means by which Parliament could be given greater control over prorogation, while respecting the Government's power of initiative.

Twomey suggested that the UK might borrow a mechanism from other Westminster systems: a statutory mechanism by which Parliament can "unprorogue" itself. An Act might (for example) stipulate that if an absolute majority of MPs wish to sit, Parliament can return early from prorogation or adjournment.¹¹⁵

Such a mechanism, she argued, would also remove any involvement of the courts in prorogation: it could no longer be argued that prorogation prevented Parliament from sitting against its will.

¹⁰⁹ Mark Elliott, [The Judicial Review Review – I: The Reform Agenda and its Potential Scope](#), *Public Law for Everyone*, 3 August 2020

¹¹⁰ Director Constitution Unit, University College London

¹¹¹ Former Justice of the Supreme Court

¹¹² PACAC, [Oral Evidence: Prorogation \(etc.\)](#), 8 October 2019, QQ. 46-47

¹¹³ Professor of Constitutional Law, University of Sydney

¹¹⁴ PACAC, [Oral Evidence: Prorogation \(etc.\)](#), 8 October 2019, Q. 4

¹¹⁵ The current mechanism for a recall from an adjournment is in Commons [Standing Order No. 13](#) and places initiative for seeking a recall with the Government.

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