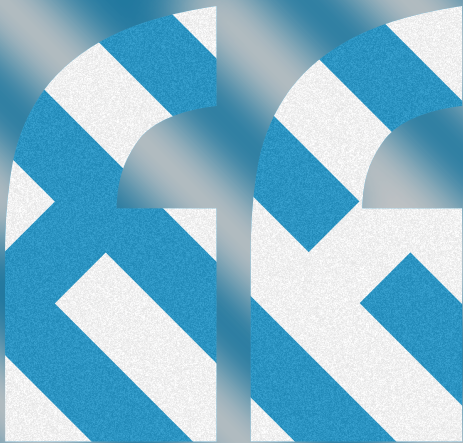


C L I F F O R D
C H A N C E



**A PROROGATION
THAT NEVER WAS**



— THOUGHT LEADERSHIP

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A PROROGATION THAT NEVER WAS

Parliament might have thought it was prorogued but, if so, Parliament was wrong according to the Supreme Court. Parliament has now resumed its sittings. But what impact the Supreme Court's decision will have on Brexit is more speculative.

Gina Miller has inflicted two serious defeats on the Government. In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, she persuaded the Supreme Court that an Act of Parliament was required to authorise the Prime Minister to give notice of the UK's intention to withdraw from the EU. Parliament, by an overwhelming majority, provided that authorisation in the European Union (Notice of Withdrawal) Act 2017. The case, though legally fascinating, had no practical effect.

Now, in *R (Miller) v The Prime Minister*, heard with the Scottish case of *Cherry v Advocate General for Scotland*, [2019] UKSC 41, the Supreme Court has upheld Mrs Miller's argument that the Prime Minister's advice to the Queen to prorogue Parliament for five weeks to 14 October 2019 was unlawful and of no effect. It is therefore for Parliament to decide whether and when it wishes to sit in order to exercise its role as legislature and in holding the Government to account. *Miller 2* is equally legally fascinating, and an affirmation of the right of Parliament not to be obstructed by the Government of the day in exercising its right to hold the executive to account must be welcomed (except, perhaps, by the Government), but whether the decision will have any greater impact on Brexit than the earlier Supreme Court decision is open to question.

The decision

On 28 August 2019, the Queen, acting (as she always does in such matters) on the advice of the Prime Minister, agreed that the current session of Parliament should be prorogued (ie ended) from a date between 9 and 12 September 2019 to 14 October 2019. The effect of prorogation would be that Parliament was not sitting for that period and, as a

result, would not be able to ask questions of the Government or pass legislation. The Prime Minister intended that Parliament should return on 14 October to hear a new Queen's speech setting out the Government's legislative programme.

The question in *Miller 2* was whether the Prime Minister acted lawfully in advising the Queen to prorogue Parliament for five weeks – a longer period than usually occurs at the end of a Parliamentary session. The Supreme Court decided that the Prime Minister's advice to the Queen was unlawful for, in summary, the following reasons:

- The courts have jurisdiction to decide whether a prerogative power (such as the monarch's power to prorogue Parliament) exists and, if so, its limits.
- The Prime Minister's advice to the Queen on prorogation must "have regard to all relevant interests, including the interests of Parliament".
- Parliament's legislative sovereignty and its right to hold the Government to account are fundamental constitutional principles. Accordingly, a prorogation that has "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out [these] constitutional functions" offends the limits on the power of prorogation and is unlawful.
- A short prorogation of a few days would not have that effect but, in the "quite exceptional" circumstances of an impending Brexit, a prorogation of five weeks does frustrate or prevent Parliament from carrying out its role, and therefore requires a reasonable justification.
- The Government has not offered "any reason – let alone a good reason – to advise Her Majesty to prorogue Parliament for five weeks".

- The decision to prorogue Parliament was therefore void, with the result that Parliament had not in fact been prorogued and can now decide whether and when it wishes to sit.

The consequences of the decision

The Supreme Court's decision was a surprise to many, all the more so because the judges were unanimous (11-0) in upholding the decision of the Inner House of the Court of Session in Scotland (which itself reversed the first instance decision) and in reversing the unanimous (3-0) decision by the English Divisional Court. Surprise aside, the potential consequences of the decision can be divided into three: political; legal; and for the Supreme Court itself.

The immediate political impact is a continuation of the prior publicity – ritual calls for the Prime Minister's resignation, accusations that he committed the cardinal sin of misleading the Queen (even though the Supreme Court made it clear that no one knew what had passed between the monarch and her Prime Minister), and so on. But that is more the stuff of political theatre than anything that is likely to change the trajectory of events.

In the slightly longer (but still short) term, Parliament has returned before the Prime Minister intended that it should. This now provides a platform for more political activity, including further attempts to embarrass the Government. The Supreme Court's reasoning will make it difficult for the Prime Minister to try to prorogue Parliament again for the entire period to 14 October, but he could perhaps justify a prorogation of a week or so before that date.

A little further away, there will be a general election (though it cannot realistically take place before 31 October). In this election, the expectation is that the Prime Minister will portray himself as being on the side of the (leave-voting) People against the (remain-voting) Establishment. From that point of view, the Prime Minister and his advisers might not be displeased with

the Supreme Court's decision – what better embodies the Establishment than the judges of the Supreme Court (except, perhaps, the Prime Minister himself)?

And in the even longer term, though the judgment itself notes that the circumstances in which the appeals have arisen are those which “have never arisen before and are unlikely to ever arise again”, the Supreme Court's ruling that the courts have jurisdiction to decide on the existence (and extent) of prerogative powers should dissuade future minority governments from tactical uses of prorogation.

Legally, the decision is that the prorogation was void, ie it never happened, and Parliament is free to sit again should it so wish. If it does so wish, it can pass further laws, whether regarding Brexit or anything else. But it's not obvious what significant additional laws Parliament would wish to pass regarding Brexit. Parliament has already played its primary legislative hand with the European Union (Withdrawal) (No 2) Act 2019, which it passed on 9 September. This Act requires the Prime Minister to request from the EU by 19 October a three-month extension of the UK's withdrawal date if Parliament has not by then approved a withdrawal agreement or approved the UK's leaving the EU without an agreement. The Government's did have some pending Brexit-related legislation, such as the Financial Services (Implementation of Legislation) Bill and the trade, agriculture and immigration and social security bills, which had been thought to lapse on prorogation. The court's decision could revive these bills, but it is unlikely that the Government will be too eager to bring them back before Parliament for fear of amendments and further embarrassment.

However, the court's decision will affect the timetable for Parliamentary consideration of some statutory instruments under the European Union (Withdrawal) Act 2018 preparing for a no deal Brexit on 31 October 2019. The Government made a number of statutory



instruments under that Act on 5 September, seeking to address the impact of Brexit on the financial services sector, using the urgency powers under that Act. These will lapse after 28 days (not including any period of prorogation) and therefore the voiding of the prorogation will accelerate the time by which Parliament must approve these instruments.

The final consequence could be for the Supreme Court itself. Many will regard *Miller 2* as a political decision – the Supreme Court itself said that it was a “one-off” decision and “unlikely ever to arise again”, which could be interpreted as special law made for Brexit. Any decision as to what is a reasonable justification for prorogation necessarily involves political considerations. The Supreme Court rejected as insufficient the Prime Minister’s concern that Parliament might undermine his negotiating position with the EU, and marked, in the fashion of an elderly schoolteacher, his Director of Legislative Affairs’ paper to the Prime Minister on prorogation, giving the paper a distinct F.

If the Supreme Court were perceived, as a constitutional court, to be a political player, there could be greater pressure for potential Supreme Court Justices to be cross-examined by Members of Parliament prior to appointment on their political views, as happens in the US. That could radically reshape the composition and approach of the Supreme Court.

And what of the constitution? The Supreme Court’s ruling, and the events leading up to it, may provide reasons to believe that a written constitution is necessary – and equally, may provide evidence that the UK’s unwritten constitution functions as it should do.

Conclusion

Miller 2 will cause short-term embarrassment to the Government, and may prove to have been a political mistake. But for the impending prorogation, the PM’s Parliamentary opponents might have meandered aimlessly in their disunity rather than focusing on passing the European Union (Withdrawal) (No 2) Act 2019 in the short time they thought was available to them. When it returns, Parliament could well be in a self-righteously indignant mood, with a desire to exacerbate the political problems faced by the Government.

The Supreme Court has also told us that prorogation was a legal mistake, though it provides a landmark decision for constitutional lawyers to debate for years to come. But so far as Brexit is concerned, it’s not obvious that *Miller 2* will have any material impact.

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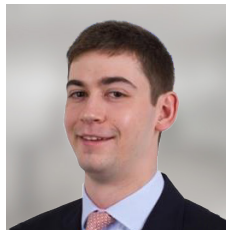
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