Parliamentary Sovereignty: R (Miller) V Prime Minister; Cherry & Others V Advocate General For Scotland

In the case of R (Miller) v Prime Minister; Cherry & Others v Advocate General for Scotland[footnoteRef:1], following the prorogation of Parliament - a process formally enacted by the monarch by the recommendation of the Prime Minister[footnoteRef:2], once a Crown prerogative power presently governed by the Fixed-term Parliament act 2011[footnoteRef:3] - the appellants' Ms. Miller and Cherry QC MP argue the limits of royal prerogative power to prorogue, the legality of Prime Minister Johnson's advice to the Queen[footnoteRef:4] and the intention to prorogue. This landmark case explores key constitutional principles which arise from the arguments made; such as parliamentary sovereignty, parliamentary accountability and rule of law. [1: R (Miller) v Prime Minister; Cherry & Others v Advocate General for Scotland [2019] UKSC 41] [2: Jessica Elgot, 'What is prorogation and why is Boris Johnson using it?' The Guardian (28 July 2019)] [3: Fixed-term Parliament Act c.14 s.6 (1)] [4: Note 1 at para. 27]

In Scottish proceedings, the Outer House of the Court of Session rejects Cherry's claim for judicial review of Johnson's decision to prorogue Parliament, Judge Doherty rules that Cherry's "claim is non-justiciable"[footnoteRef:5] due to lack of contravention of the law. Additionally, he introduces the argument that this case was more of a political issue than legal; this is evident when he expresses that "accountability for the advice is to Parliament and ultimately, the electorate, not the courts". Nonetheless, the case was appealed to the Inner House of the Court of Session were the three judges unanimously agreed the prorogation was unlawful and that Johnson was attempting to "stymie Parliament scrutiny of the executive"[footnoteRef:6] in relation to the Brexit negotiations. Similarly, in England, Miller's case is rejected on the basis that the issue at hand was political and unsuitable for judicial resolution by the High Court of Justice[footnoteRef:7]. Both cases are appealed to the Supreme Court resulting in all 11 judges to unanimously determine that the prorogation was in fact justiciable and unlawful due to the infringement of constitutional principles without a valid justification[footnoteRef:8]. [5: Outer House, Court of Session, Opinion of Lord Doherty P680/19 [2019] CSOH 70 at para 13] [6: 'Supreme Court: Suspending Parliament was unlawful, judges rule' BBC News (24 September 2019)] [7: Owen Bowcott 'English Judges explain decision to reject prorogation challenge' The Guardian (11 September 2019)] [8: Note 1 at para. 47]

Unlike the High Courts of Justice, the Supreme Court argues that the lack of legal limits available on prorogation was not an issue, rather it's limits could be identified by the extent it affected fundamental constitutional principles. The case clearly outlines that prorogation is unlawful when "frustrating or preventing … the ability of Parliament from carry out its constitutional functions … and as the body responsible for the supervision of the executive"[footnoteRef:9]. In this case through the governments' failure to provide an explanation of prorogation and it's the five-week time frame, the court concluded that parliament – an elected representative of the electorate – has the right to scrutinise any legislation regarding Brexit. This ensures that new legislation is in relation to what citizens interests, otherwise parliamentary sovereignty may be jeopardised and threaten its legitimacy as a branch of government. Robin Cook's dictum "Good scrutiny makes for good government."[footnoteRef:10] best explains the importance of parliamentary sovereignty and its power to change and make any law as supported by Dicey[footnoteRef:11], in this case the five-

week propagation would have caused problems with Parliament's ability to scrutinise the any legislation concerning the withdrawal from the European Union. In R (Jackson) v Attorney General[footnoteRef:12], Lord Hope highlights that “Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or unacceptable that the people at large refuse to recognise it as a law.”, failure to give the public what they want can cause further problems. [9: Note 1 at para. 50] [10: Michael White, ‘Efficiency the key to Cook’s reforms’ (13 December 2001)] [11: A.V. Dicey, Introduction to the Study of the Law of the Constitution (1885)] [12: R (Jackson) v Attorney General [2005] UKHL 56, 1 AC 262]

Additionally, this case underlines that failure to uphold parliamentary sovereignty results in the lack of parliamentary accountability, the Supreme Court must intervene in order to uphold the convention of ministerial responsibility, the court notes that “the effect of prorogation is to prevent the operation of ministerial accountability to parliament during the period parliament stands prorogued”[footnoteRef:13] , it’s primordial to note that this view would still be held even if prorogation was ruled lawful – the judgement made in the case meant that political accountability has been strengthen by the court, an element which enhances democracy. Parliament’s role as the legislative is paramount in ensuring the government is accountable regarding rule of law issues and to confirm proposed legislation is in accordance with the principle of the rule.[footnoteRef:14]. Jennings further enforces that the rule of law places limitation on power for every authority excluding the representative legislature[footnoteRef:15]. When reconciling the doctrine of parliamentary sovereignty with rule of law Allan best describes that the rule of law limits the sovereignty of the parliament with the purpose of facilitating democracy[footnoteRef:16]. [13: Note 1 at para. 33] [14: Steve Hynes, ‘Parliamentary scrutiny of our legislation is being listed to misused executive power’ LAG (June 2017)] [15: WI Jennings, The Law and the Constitution (University of London, 1959) pp.91] [16: TRS Allan, Law, Liberty, and Justice: The Legal Foundations of Constitutionalism (OUP, 1993) pp.104]

Ultimately, the irony of the case is that is reinforces parliamentary sovereignty, this conclusion comes from the very same institution people feared threatened parliamentary sovereignty. Introduced in the Constitutional Reform Act 2005 the supreme court replaces the House of Lords role as the United Kingdom’s final court of appeal – this was believed to limit parliamentary sovereignty. This fact illustrates the separation of power which exist in legal system which ensure democracy. Many saw this ruling of this case as enforcement of parliamentary sovereignty in legal system, this view is also supported by Professor Vernon Bogdanor [footnoteRef:17]. The Supreme Court’s decision provides a guide on how courts should approach cases concerning prerogative powers in respect to parliamentary sovereignty and , the court emphasis that not all prerogative powers impede parliamentary sovereignty such as royal assent, essentially they are not bad, it’s the job of the parliament to use parliamentary sovereignty to limit it. [17: Blitz, James; Croft Jane, ‘Parliament the winner in prorogation case, say lawyers” Financial Times (25 September 2019)]