

# Constitutionality, Convention and Prorogation

*Paul Craig\**

## 1 Introduction

It is readily apparent that the decision in *Miller/Cherry*<sup>1</sup> has generated considerable comment, some favourable to the decision, some critical thereof.<sup>2</sup> I fall into the former camp, for the reasons explicated in an article that has been recently published.<sup>3</sup> I do not intend to repeat that analysis in the present article, although I will draw on it in the subsequent discussion where relevant. John Finnis falls squarely into the latter camp, and has been strongly critical of the Supreme Court's decision.<sup>4</sup> My earlier article responded, inter alia, to this critique, and John Finnis has now come back twice with argumentation against the *Miller/Cherry* decision,<sup>5</sup>

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<sup>1</sup> *R (on the application of Miller) v Prime Minister, Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

<sup>2</sup> A selection of the relevant literature is provided in P Craig, 'The Supreme Court, Prorogation and Constitutional Principle' [2020] PL 248, fns 4-8.

<sup>3</sup> Ibid.

<sup>4</sup> John Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment', Policy Exchange, <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/>.

<sup>5</sup> John Finnis, 'The Law of the Constitution before the Courts, Supplementary Notes on the Unconstitutionality of the Supreme Court's Judgment', Policy Exchange, <https://policyexchange.org.uk/publication/the-law-of-the-constitution-before-the-court/>; John Finnis, "'Changing the Ground Rules" of our Constitution: Miller/Cherry', [2020] Supreme Court Yearbook.

including a response to part of my earlier argument. This article constitutes a response to John Finnis' latest thoughts on this issue.

There are a number of strands to John Finnis' critique. A principal component thereof is the suggestion that the Supreme Court converted constitutional convention into law, and used it as a ground for review in a manner that had not been known hitherto. This argument assumes centre-stage in all three of John Finnis' contributions, more especially the latter two.<sup>6</sup> The argument is nonetheless misconceived, and it is instructive to discern why this is so.

It is important in this respect to disaggregate four issues that are entangled in the Finnis critique: prerogative/prorogation, constitutional convention, parliamentary accountability and justiciability. These issues are elided in much of John Finnis' argument. It is therefore important to separate and understand the constitutional relationship between them. We begin with the relationship between the prerogative, constitutional convention and justiciability.

## **2 Prerogative, Constitutional Convention and Justiciability: The Conceptual Dimension**

### **(a) Prerogative and Constitutional Convention: First Principles**

The relationship between the prerogative, constitutional convention and justiciability is central to John Finnis' critique. The reality is that there are at least two different visions of that relationship in the Finnis account. They are both problematic, as will be seen below.

We should nonetheless clear the ground at the outset, since it is important for the sake of analytical clarity not to elide issues that are conceptually distinct. Prorogation is a species of prerogative power. It is not a constitutional convention, although such conventions may

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<sup>6</sup> See, eg, Finnis (n 4) 7-9.

impact on the way in which the prerogative power is used.<sup>7</sup> Prerogative power is subject to legal constraint. The courts will determine the existence, and extent of such power, and they will also adjudicate on the manner of its exercise, subject to limits of justiciability discussed below. This is all standard fare.<sup>8</sup> We can now consider the relationship between the prerogative and justiciability in John Finnis' account.

## **(b) Law, Constitutional Convention and Justiciability: The Definitional Binary Divide**

### *(i) The Central Thesis*

The dominant strand in John Finnis' article is that there is a definitional, binary divide between law and convention. Law is justiciable, signifying legally enforceable; convention is non-justiciable, signifying not legally enforceable. This is the dominant story in the article. The zone of convention is ipso facto non-justiciable,<sup>9</sup> in the sense that it is not law and therefore not legally enforceable. Thus, the UK constitutional order involved a 'network of legal (justiciable) and conventional (non-justiciable) rules'.<sup>10</sup>

The answer to *Miller/Cherry* was therefore simple: what was at stake in the case was a constitutional convention, which was by its very nature non-justiciable. There is, on this view,

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<sup>7</sup> This is in accord with the articulation of the relationship between prerogative and convention given by Dicey, see, AV Dicey, *An Introduction to the Study of the Law of the Constitution* (ECS Wade, 10<sup>th</sup> ed, MacMillan) 426-428.

<sup>8</sup> *Case of Proclamations* (1611) 12 Co Rep 74; *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Laker Airways Ltd v Department of Trade* [1977] QB 643; *R v Secretary of State for Home Department, ex p Fire Brigades Union* [1995] 2 AC 513; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>9</sup> Finnis (n 4) 10.

<sup>10</sup> *Ibid* 13.

no need for consideration as to whether a particular convention is non-justiciable. The binary divide, as articulated and applied by John Finnis, short-circuits the need for such deliberation, since it means that any and all constitutional conventions are per se non-justiciable.

This argument is not sustainable. There is much that might be said about this binary divide, as attested to by the literature that questions the plausibility of this strict dichotomy. Thus, there are interesting issues concerning the extent to which conventions are, or should be, legally cognizable,<sup>11</sup> which take us beyond the scope of the present inquiry.<sup>12</sup> The salient point for present purposes is however more narrowly circumscribed.

*(ii) Judicial Review and Constitutional Convention: The Framework*

We start from the proposition that courts determine the existence and extent of prerogative power, and also its manner of exercise, subject to justiciability constraints. There is, post-*GCHQ*, parity of treatment concerning the review of statutory and prerogative power. The answer to such inquiry may turn on a plethora of issues, including the meaning of the particular prerogative; past cases; historical evidence as to the provenance and reach of the prerogative; statute that touches on the prerogative; and constitutional conventions insofar as they exist and are relevant.

The courts will have regard to such considerations when adjudicating on whether a prerogative exists, its limits and manner of exercise. It would be contrary to constitutional

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<sup>11</sup> See, eg, *Attorney General v Jonathan Cape Ltd* [1976] QB 752; *R v Chaytor* [2010] UKSC 52;

<sup>12</sup> See, eg, TRS Allan, 'Law, Convention Prerogative: Considerations Prompted by the Canadian Constitutional Case' (1986) 45 CLJ 305; M Elliott, 'Parliamentary Sovereignty and the New Constitutional Order' (2002) 22 LS 340; J Jaconelli 'Do Constitutional Conventions Bind?' (2005) 64 CLJ 149; N Barber, 'Laws and Constitutional Conventions' (2009) 125 LQR 294; F Ahmed, R Albert and A Perry, 'Judging Constitutional Conventions', Oxford Studies Legal Research Paper 59/17.

principle if control over prerogative power were to be per se negated where the relevant criteria include convention. We must distinguish between two propositions, which John Finnis elides in his argument, and we must understand the implications of both.

*(iii) Judicial Review and Convention: Swords*

The UK courts have made clear that constitutional conventions are not legally binding and cannot be legally enforced. Thus, failure to adhere to the Sewel Convention cannot be a cause of action and hence the foundation for a legal action.<sup>13</sup> This proposition has been questioned,<sup>14</sup> but it is the law in the UK that a constitutional convention cannot be used as a sword, in the sense of constituting the legal cause of action in itself.<sup>15</sup> John Finnis assumes that because constitutional conventions are not legally enforceable in their own right, there is therefore no legal action when the executive exercises a prerogative power in breach of the convention. This is a non-sequitur.

Consider the following example. The executive takes action that is not in accord with a convention. It uses a prerogative power in violation of the conventional rules. The judicial controls over prerogative power are invoked. Judicial review is concerned with the contested ministerial action, which is subject to the standard controls on prerogative power, cast in terms of existence, limits and manner of exercise, subject to limits of justiciability. The Supreme Court has held that breach of the convention will not be legally enforced by the courts.<sup>16</sup> This

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<sup>13</sup> Finnis (n 4) 6-9.

<sup>14</sup> See above (n 12).

<sup>15</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [141], [146].

<sup>16</sup> *Ibid* [142]-[143].

can be accepted. It does not however mean that the ministerial action is immune from judicial review of prerogative power.

This can be readily demonstrated. Let us imagine that there is a constitutional convention, which provides that a prerogative power can be used only in situations A, B and C. The executive breaches this convention by using it in situation X, which is quite different from A, B and C. Breach of the established convention does not in itself render exercise of the prerogative in situation X unlawful.

However, the ministerial action is still open for review in accord with established criteria relating to the existence, extent and manner of exercise of the prerogative power. It may be that it can withstand scrutiny under the normal criteria for judicial review, even though it was in breach of a convention. It may be that this is not possible. The reviewing court may decide that deployment of the prerogative in situation X overstepped the limits of the prerogative power, that it impinged on rights or that it was unsustainable in terms of manner of exercise. The convention may be part of the background considerations that informs this conclusion. This will depend on the facts, and the reasons that underpinned the ministerial action.

The fact that the constitutional convention thereby breached might not be justiciable, in the sense that it does not embody enforceable legal rules in its own right, does not therefore immunize the ministerial action from the normal rules of legal scrutiny of prerogative power. There is moreover administrative law doctrine, such as that relating to legitimate expectations and consistency, where the courts draw on rules, action or behaviour that might not be legally enforceable in their own right, when determining the legality of executive action.<sup>17</sup> Conventions can generate legitimate expectations.<sup>18</sup>

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<sup>17</sup> See further in this respect Allan (n 12), and Ahmed, Albert and Perry (n 12).

<sup>18</sup> *GCHQ* (n 8).

The preceding proposition represents the existing law, not some desired reform thereof. It can be simply tested. In scenario 1 there is no constitutional convention, and the minister exercises the prerogative power for reason X as elaborated in the preceding example. It will perforce be open to review on the normal grounds to test whether it comports with the criteria relating to existence, extent and exercise of prerogative power. Scenario 2 is the same as scenario 1 in all respects, save for the fact there is a constitutional convention of the kind set out above. The courts will not, as we have seen, enforce the constitutional convention. This does not however immunize the minister's exercise of discretion from the normal criteria of judicial review. To suggest the contrary would be constitutionally absurd. The same ministerial action, to activate the prerogative power for reason X, would be immune from the ordinary incidence of judicial review in its own right, where it had in addition violated a constitutional convention.

*(iv) Judicial Review and Convention: Shields*

The preceding discussion was concerned with the incidence of judicial review when a constitutional convention has been breached. There is a further important dimension to the relationship between judicial review and convention. This concerns the reviewability of a constitutional convention in its own right.

The existence of a constitutional convention pertaining to prerogative power does not ipso facto immunize it from consideration when the judicial controls over prerogative power are invoked. If this were so constitutional conventions thus conceptualized would become shields, such that they would be generally immune from consideration where there is a legal action concerning a prerogative power. This is untenable. There is no warrant for regarding constitutional conventions as generic shields.

Consider the following by way of example. There is a constitutional convention relating to the meaning, limits or application of a prerogative power, which informs the way in which the executive uses that power. There is a legal challenge to this use of the prerogative power. The challenge may, for example, raise definitional issues as to the fit between the convention and the meaning or reach of the prerogative power; it may be argued that exercise of the prerogative in accord with the convention would impinge on rights; or it may be contended that the purpose of the particular convention does not accord with that of the prerogative power to which it relates.

The courts determine the existence, and extent of this prerogative power, and its manner of exercise subject to justiciability. A particular constitutional convention might be deemed by the court to be non-justiciable, judged by its subject-matter. Constitutional conventions as a generic category are not however immune from consideration, nor does the content of a convention have canonical status in such a judicial review action.

The contrary argument would render constitutional convention superior in this respect to formal law, in the sense that it could not be reviewed in the context of any legal action. It would moreover per se nullify legal controls over prerogative power if the mere placing of the convention before the court were to signify that it could not be questioned when determining the limits or manner of exercise of the prerogative power.

To question the constitutional convention in the context of a legal action does not convert a constitutional convention into law. To find that the legal action is unproven does not render the convention legally enforceable in its own right. To find that the legal action is proven does not mean that the court is thereby determining the formal validity of the convention.

The salient legal issue throughout remains the existence, limits and manner of exercise of the prerogative power. If Parliament wishes to accord peremptory legal force to its desired

meaning or application of the prerogative, then it would have to enshrine the content of the relevant convention in statute.

### **(c) Law, Constitutional Convention and Justiciability: The Subject-Matter Divide Broadly Conceived**

#### *(i) The Central Thesis*

There is however a different relationship between law, constitutional convention and justiciability evident in parts of John Finnis' article. The binary divide adumbrated above was premised on a wholesale distinction between law/justiciable, and constitutional convention/non-justiciable. The subject matter of the particular constitutional convention was a secondary issue, since all such conventions were by definition not legally binding and hence non-justiciable in that sense of the term.

The alternative focus is on justiciability conceived in terms of subject-matter suitability for review. However, John Finnis takes a very narrow view of what constitutes the limits of prerogative power, and a commensurately broad view of the circumstances in which review for limits and for manner of exercise should be regarded as non-justiciable in terms of subject matter.

This view is however equally problematic. The nature of the argument, and the problems therewith, are apparent in John Finnis' critique of the way in which the Supreme Court in *Miller/Cherry* dealt with *GCHQ*. He is sharply censorious, stating that the Supreme Court 'mangled and defied' the earlier ruling in *GCHQ*.<sup>19</sup> The sharper the critique, the better it must be. If you claim that the Supreme Court mangled and defied an earlier ruling of the House

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<sup>19</sup> Finnis (n 5) 16-17.

of Lords, you had better make sure that you are correct in this regard. The argument is encapsulated in the following quotation.<sup>20</sup>

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

This argument is incorrect. The premise is wrong, so too is the conclusion. It does not reflect the reasoning in *GCHQ*. This is so for the following reasons.

*(ii) The GCHQ Reasoning about the Prerogative: Predicated on Three Categories, not Two*

The *GCHQ* reasoning is not predicated on two categories, existence and exercise. This is readily apparent from a reading of the judgment concerning the history of review of prerogative power. The House of Lords proceeds in accord with established authority. Thus, as Lord Fraser states, the courts will ‘inquire into whether a prerogative power exists or not, and if it does exist, into its extent’.<sup>21</sup> He contrasted this with review of exercise, which had not, prior to *GCHQ*, been subject to judicial review.

The same sentiment was expressed by Lord Scarman, who stated that it was beyond doubt that in Coke’s time and thereafter ‘judicial review of the exercise of prerogative power was limited to inquiring into whether a particular power existed and, if it did, into its extent’, stating that the limitation precluding review of manner of exercise had now gone.<sup>22</sup>

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<sup>20</sup> Ibid 17; see also Finnis (n 4) 15-17.

<sup>21</sup> *GCHQ* (n 18) 398.

<sup>22</sup> Ibid 407.

Thus, the House of Lords historical inquiry concerning judicial review of prerogative power was clearly predicated on three categories, not two: existence, extent and manner of exercise.

*(iii) The GCHQ Reasoning about Grounds of Review: Predicated on the Divide between Illegality and Rationality*

This is further affirmed by the House of Lords' elaboration of the grounds of review. Lord Diplock articulated his trilogy of grounds of review: illegality, irrationality and procedural propriety, with which Lord Roskill and Lord Scarman agreed.<sup>23</sup> Rationality review covered *Wednesbury*. Illegality encapsulated whether the decision-maker correctly understood the law that regulated his power and gave effect to it. This was 'par excellence a justiciable question to be decided, in the event of a dispute' by the courts.<sup>24</sup> Lord Diplock stated clearly that the prerogative could be subject to review for illegality.<sup>25</sup> He acknowledged that it might in principle be subject to rationality review, but he was more cautious as to whether this would be suitable in terms of the subject matter of the prerogative power.<sup>26</sup>

Lord Roskill reasoned in the same manner. He endorsed Lord Diplock's grounds of review,<sup>27</sup> stated that the manner of exercise of statutory power could be challenged on 'one or more' of the three grounds of review, and that there was no logical reason why this should not

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<sup>23</sup> Ibid 410.

<sup>24</sup> Ibid 410.

<sup>25</sup> Ibid 411.

<sup>26</sup> Ibid 411.

<sup>27</sup> Ibid 415.

be so for prerogative power,<sup>28</sup> subject to constraints of justiciability that flowed from the subject-matter of the prerogative power.

The House of Lords' reasoning concerning the grounds of review was therefore based on a clear distinction between illegality, which covered existence and limits, and rationality that covered exercise. Illegality includes, inter alia, error of law, propriety of purpose, and relevancy review, with the default position being that the courts substitute judgment on these issues for that of the primary decision-maker, the rationale being that they are thereby delimiting the ambit of the relevant power. The parity of treatment between review of statutory power and prerogative power meant that legality controls crafted in terms of propriety of purpose would be equally applicable in the context of the prerogative as with statute. The parity of treatment was equally applicable for the application of constitutional principles and common law rights.

*(iv) The Novelty of GCHQ: Extension of Judicial Review to Cover Exercise of Prerogative Power*

The novelty of *GCHQ* was to extend the scope of judicial review to encompass the way in which the prerogative power was exercised, subject to limits of justiciability, as well as its existence and extent. The normative foundation was that review should be driven by subject matter not source, with the consequence that there should prima facie be parity of treatment between review of statutory power and prerogative power. The executive should gain no advantage in this respect by acting pursuant to the prerogative.

*(v) Summation*

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<sup>28</sup> Ibid 417.

Reflect then on the foregoing. The House of Lords' elaboration of review over the prerogative proceeded on three categories, existence, limits and manner of exercise, not two. The House of Lords elaboration of the grounds of review proceeded on a clear distinction between existence and limits, both of which went to legality, and manner of exercise which was subject to rationality review. The House of Lords was clear that legality review was justiciable in the context of prerogative power. The novelty of *GCHQ* was to extend review to its exercise, connoting review beyond legality to encompass rationality review.

John Finnis would then have us believe that in circumscribing this extended review for exercise in terms of justiciability the House of Lords intended ipso facto to preclude review cast in terms of limits/illegality, even though such review had existed for four hundred years, even though the judgment was predicated on the divide between existence, limits and exercise, and even though it affirmed legality review for the prerogative. It would mean that review would be precluded even where the prerogative power was used to change the law or affect rights, since these constitute classic limits to a prerogative power. There is no warrant for this. There is moreover, as we shall see below, no a priori normative reason why justiciability concerns should preclude review of the limits of prerogative power.

John Finnis' argument that *GCHQ* proceeded on a dichotomy between existence and exercise in which there was no place for a separate category of limits is therefore wrong, and so is the claim that the Supreme Court 'mangled and defied' the *GCHQ* reasoning. There is room for argumentation as to whether the error alleged in *Miller/Cherry* should be regarded as going to limits or exercise, but this is a distinct issue, which I addressed in my earlier article, to which reference can be made.<sup>29</sup> There can in any event be difficult line drawing exercises in all areas of the law.

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<sup>29</sup> Craig (n 2) 260.

#### **(d) Law, Constitutional Convention and Justiciability: The Subject Matter Divide Revisited**

It is fitting to conclude this section by setting out briefly my thoughts concerning relationship between law, constitutional convention and justiciability. It draws on more detailed consideration to the justiciability issue in my previous article, to which reference can be made.<sup>30</sup>

*GCHQ* was premised on parity of treatment between review of statutory and prerogative power, subject to limits of justiciability. The House of Lords was cognizant of the relationship between prerogative and constitutional convention, in the sense that it was mindful of the fact that the latter might well impact on the circumstances in which the former was exercised. The parity of treatment between review for the two forms of discretionary power, statutory and prerogative, meant that the normal tools of review would be applicable in both instances. This included review for illegality that encompasses error of law, propriety of purpose and relevancy review. Their Lordships ruling affirmed, as we have seen, the applicability of the Diplock trilogy of grounds of review. The parity of review was qualified where the subject matter was such as to preclude or limit meaningful review, and in this sense render the contested issue non-justiciable.

There are in principle two meanings of non-justiciability that a legal system might adopt. They are both logically possible, in the sense that either choice might be made. Justiciability might be premised on the twin assumptions that the purpose being pursued is legitimate given the nature of the power in question, and that there are good reasons why the court should not intervene concerning exercise of an allowable purpose. Justiciability might

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<sup>30</sup> Craig (n 2) 260-264.

alternatively be predicated on the assumption that there are no judicially cognizable limits as to purpose, because there are no meaningful boundary lines that can be drawn in this regard.

If we opt for the former we regard exercise of power as being bounded by purpose, such that justiciability operates only within those boundaries, to the extent that is felt to be warranted. If we opt for the latter, we decide that an issue is wholly non-justiciable and there is no legal scrutiny, irrespective of the purpose for which the power was exercised. Viewed in the context of prorogation, this would mean that it matters not whether the purpose was to remove an awkward Parliament so that the executive could pursue what it regarded as the good of the body politic, whether it was driven by a foreign power, or whether prorogation was animated by corruption. Prorogation would be legally uncontrolled whatsoever the rationale driving its deployment. I agree with Mark Elliott and George Letsas<sup>31</sup> that the former meaning of justiciability is to be preferred, such that the legitimacy of the purpose pursued given the nature of the power is a condition precedent to consideration of justiciability. This does not convert constitutional convention into law. It does nothing more than apply the *GCHQ* reasoning and principle to the instant case.

Nor should we assume that prerogative power is non-justiciable by resort to generalized statements concerning the fact that prorogation entails high-policy. This is in part because prorogation does not normally entail high policy at all; it is in part because the very elision between high policy and non-justiciability is a non-sequitur; and it is in part because the courts

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<sup>31</sup> George Letsas, 'Non-Justiciability of Prorogation: A Matter of Law and Logic?', U.K. Const. L. Blog (19th Sept. 2019) (available at <https://ukconstitutionallaw.org/>); Mark Elliott, 'Prorogation and justiciability: Some thoughts ahead of the Cherry/Miller (No 2) case in the Supreme Court', <https://publiclawforeveryone.com/2019/09/12/prorogation-and-justiciability-some-thoughts-ahead-of-the-cherry-miller-no-2-case-in-the-supreme-court/> .

routinely adjudicate the boundaries of allowable purpose, including political purpose.<sup>32</sup> I have no doubt that timing prorogation to suit a foreign state would involve high policy in some sense of that phrase, but it furnishes no reason for suggesting that it should be non-justiciable. The fact that the courts do review for purpose does not however preclude latitude being given to the political branch of government in this respect, as is clear from the existing jurisprudence, and from *Miller/Cherry* itself.<sup>33</sup>

### **3 Prerogative, Constitutional Convention and Justiciability: The Empirical Dimension**

The critics' argument against *Miller/Cherry* is premised on empirical assumptions concerning the scope of the constitutional convention about prorogation, and hence the measures that should be deemed to be non-justiciable. There are in reality two different versions of this argument that should be disaggregated. The first contends that there are no meaningful bounds to prorogation, the second that even if there are such bounds, they cannot be legally enforced. They are both problematic and will be considered in turn.

#### **(a) Prorogation: The Boundless Prerogative<sup>34</sup>**

Richard Ekins contends that prorogation can in, accord with constitutional convention, be used for party advantage and deployed for any purpose, including ridding the executive of a troublesome Parliament. The only limitation acknowledged by Ekins is that prorogation could

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<sup>32</sup> J Rowbottom, 'Political Purposes and the Prorogation of Parliament', U.K. Const. L. Blog (3rd Sept. 2019) (available at <https://ukconstitutionallaw.org/>).

<sup>33</sup> *Miller/Cherry* (n 1) [58].

<sup>34</sup> This section draws on my previous article.

not legitimately be used to avoid a vote of no confidence, although even this would not, in his view, be unlawful.<sup>35</sup>

The thesis is deficient in empirical terms because the claim as to what is an acceptable use of prorogation is premised on examples drawn from different Westminster-type systems. The way in which prorogation is used in different countries is of comparative interest, but the results cannot be aggregated, explicitly or implicitly, and then applied to all such jurisdictions. This methodology cannot tell us what is regarded as an acceptable use of prorogation within a particular country, such as the UK. This is more especially so given that most instances of prorogation have occurred outside the UK.<sup>36</sup> Thus, by way of comparison, it would be absurd to claim that a constitutional convention as to Presidential pardon in a particular country was to be determined by aggregating the diverse instances where the power was used in different Presidential systems, even if they had some historical connection.

Ekins' thesis is also empirically flawed in relation to evidence that pertains to the UK. Constitutional conventions are predicated on evidence of behaviour that establishes the convention; an assumption by the participants that they are bound by the rule embodied in the convention; and identification of some purpose served by the convention.<sup>37</sup> We apply this to prorogation. The norm is that prorogation is short, it signals the end of one parliamentary session and the beginning of another and raises no controversy. Parliament's website is instructive, stating that 'in recent decades, when Parliament has met all the year round, the

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<sup>35</sup> R Ekins 'Parliamentary Sovereignty and the Politics of Prorogation', Policy Exchange, at 8-9, 13-14, <https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of-Prorogation3.pdf> .

<sup>36</sup> A Twomey, *Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) Ch 8.

<sup>37</sup> Sir Ivor Jennings, *The Law of the Constitution* (University of London Press, 2<sup>nd</sup> ed, 1938) 11.

prorogation of one session has usually been followed by the opening of a new session of Parliament a few days later.’<sup>38</sup> This is the empirical norm, which is accepted and is the core content of the convention.

In some instances prorogation may be used for other purposes, such as to secure some party advantage, the nature of which may vary significantly. It is, however, not self-evident whether this should be regarded as violating the normal constitutional convention, or as expanding the circumstances in which the power can be used. Let us assume for the sake of argument that the latter might occur. This is, however, conditional on proof of the requisite empirical evidence and mental element. The more far-reaching the effect of the prorogation, the better must be the empirical evidence and proof of the mental element within that particular country.

There is, therefore, no warrant for concluding that because it might, for the sake of argument, be felt that prorogation can be used to, for example, terminate private members’ bills, that it can also be used for some quite different reason, such as to close down a recalcitrant Parliament in the manner posited by government ministers and the prime minister in the context of Brexit. The same is true in relation to the prorogation of Parliament in 1948. The circumstances were clearly factually and normatively distinct from those that occurred in *Miller/Cherry*. If the events of 1948 had been tested in accord with the criteria in *Miller/Cherry* it is moreover quite possible that the prorogation would have been held to be lawful. The Supreme Court might well have concluded that there was a ‘reasonable justification’ for the prorogation in that instance, because it was designed to advance democracy by overcoming opposition in the House of Lords.

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<sup>38</sup> <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/prorogation1/prorogation/>

There is moreover no warrant for concluding that we should accept at face value the government's rationale for prorogation, that it was to pave the way for a new parliamentary session, where the argument was unsustainable in empirical terms, and where the prime minister and government ministers had repeatedly averred that prorogation was an acceptable method to achieve Brexit in the face of a recalcitrant Parliament.

### **(b) Prorogation: Bounded but Unenforceable**

John Finnis may well agree with Richard Ekins, but the argument that he deploys draws principally on Dicey, and is quite different to that set out above. This is readily apparent from the quotation taken from Dicey, to the effect that if the executive prorogued Parliament such that it did not sit for two years, this might well be contrary to constitutional convention, but it would involve no actionable legal violation.<sup>39</sup> This is said to constitute proof positive that constitutional conventions are not justiciable.

Dicey's view was however clearly not that the convention relating to prorogation was boundless in the manner suggested by Ekins. Dicey does not claim that there is the requisite empirical evidence, combined with the necessary mental element, to imbue such executive action with the force of convention. To the contrary, the argument was that the existing convention might be flouted, but that there would be no actionable legal wrong flowing from this per se, which would only occur if the absence of Parliament were to render illegal some other governmental action.

The Diceyan view is however a good deal less conclusive than John Finnis would have us believe. Dicey was acute in his perception about the relationship between the prerogative and convention, stating accurately that the latter was a mechanism for determining the

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<sup>39</sup> Finnis (n 4) 6, quoting Dicey (n 7) 446.

application of the former. He gave however no consideration to the legal constraints on prerogative power, and the way in which those impacted on the reviewability of convention.

This is more especially important given the developments in judicial review of the prerogative since the time of Dicey's scholarship. *GCHQ* has been analysed above. The foundational premise was parity between statutory and prerogative discretionary power. The preceding discussion of this issue is therefore salient in this respect: ministerial invocation of the prerogative is subject to review for compliance with the standard criteria concerning the existence, limits and manner of exercise of prerogative power; and the content of the constitutional convention itself can be tested in this regard, it does not constitute a shield that precludes such review.

## **4 Prerogative, Constitutional Convention and Justiciability: The Normative Dimension**

The empirical evidence does not therefore support the broad claims as to the content of the constitutional convention concerning use of prorogation. We should also dwell on the normative dimension of the argument.

### **(a) Prorogation and Convention: The Normative Issues**

It is generally accepted that prorogation cannot be used to avoid a vote of confidence,<sup>40</sup> but we should nonetheless be very wary of the converse proposition, to the effect that it can therefore be used in all other circumstances. This is more especially so because the evidence as to when prorogation can be used is concerned almost exclusively with when the head of state can

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<sup>40</sup> A Twomey, *Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) Ch 8.

legitimately refuse to accept ministerial advice to prorogue.<sup>41</sup> The fact that the head of state may be constrained in this respect, does not however mean that the same constraints pertain to courts when focusing on the legality of the advice proffered to the head of state pursuant to the prime minister's prerogative discretionary power. The critics elide the two perspectives. This is wrong. The monarchical and judicial perspective is quite different. There are constitutional reasons why the monarch, or her representative, is constrained as to when they can reject the advice of the Prime Minister. The monarch is moreover not a court in the modern sense of the term. She is therefore ill-equipped to consider forensic arguments as to the purpose underlying the request for prorogation and whether it was sustainable. The considerations are quite different when courts focus on whether the advice proffered to the monarch pursuant to the prerogative discretionary power was lawful.

This is more especially so, given the consequences of adherence to the Ekins' thesis. It would mean that prorogation could be used to achieve any objective desired by the government, and there would be no legal limit to this power if the government retained its majority in Parliament, since it would not be subject to a vote of no confidence. There is no normative foundation for this arrogation of power.

Constitutional conventions are expressive of, and underpinned by constitutional principles.<sup>42</sup> Winning an election properly accords the governing party the power to carry through its legislative programme. It affords no normative basis for the conclusion that the government can, for example, dispense with Parliament whenever it wishes to do so. Representative democracy produces an elected Parliament, wherein the Opposition play a key role, as well as the government. Moreover, the fact that Parliament does not have to sit permanently does not afford any basis for the executive to be able to dispense with Parliament

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<sup>41</sup> Ibid Ch 8.

<sup>42</sup> Ibid 26-27.

if it proves troublesome. The argument is a non-sequitur, because it proceeds from the correct, albeit reductionist, premise that parliamentary sovereignty does not demand that Parliament should sit permanently, to the unfounded conclusion that executive curtailment, for almost any reason, of the time for which Parliament is in session is therefore legitimate. The conclusion follows in no way from the premise.

### **(b) Prorogation and Sovereignty: The Normative Issues**

Parliamentary sovereignty is the UK's core constitutional precept. It is grounded in the modern day on the premise that a Parliament duly elected on an inclusive franchise represents the will of the nation, and should therefore be legally omnipotent. Prorogation is a prerogative power. It is not necessary for the functioning of a representative democracy, since there is nothing to preclude a Parliament elected for five years sitting for that period, although there would perforce be vacations. The prerogative power of prorogation is not invested with democratic imprimatur in terms of the circumstances in which it can be deployed. There is therefore no normative warrant to suggest that the executive should be able to use prorogation for any purpose whatsoever, subject to no legal constraints, more especially where the intent and effect is to constrain the duly elected MPs in the House of Commons, which include backbench MPs of the political party from which the Government is drawn, in addition to opposition MPs who are members of other political parties. The claim that prorogation for whatsoever reason in no way 'no way defies, qualifies, or departs from parliamentary sovereignty',<sup>43</sup> irrespective of whether it is very lengthy, and irrespective of whether it is used to terminate passage of a Bill, or avoid scrutiny by Parliament is untenable. So too is the idea that government accountability ex post facto can remedy the harm caused by the prorogation.

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<sup>43</sup> Ekins (n 35) 13.

To accept the contrary would be to recast the boundaries of parliamentary sovereignty as traditionally conceived.<sup>44</sup> Parliament would remain omnipotent, in the sense that there are no bounds to its legislative authority, but the executive could determine when the legislature exercised that legislative authority. It could choose to prorogue Parliament whenever it so wished, including in order to prevent Parliament exercising its voice, through legislation or otherwise, merely because the executive believed that what Parliament might do is undesirable. The executive's decision in this respect would be legally unchallengeable, irrespective of the ground on which the prorogation decision is based. To conclude that the courts were powerless in circumstances such as *Miller/Cherry* would have turned the clock back nearly four centuries and have accorded the executive the power wielded by the Stuart monarchs.

John Finnis takes issue with my claim that there was no authority in any textbook, article or judicial decision for the proposition that the executive could wield such power over the legislature. He draws on Dicey to suggest that the executive does indeed have such power, which was beyond the control of the courts. He argues that parliamentary sovereignty was bounded by executive power over prorogation, which could be exercised for any purpose.<sup>45</sup>

I do not accept this argument. Let us be fully cognizant of the foundation for this claim, and the conclusion therefrom. It is based on five lines in Dicey's work, which were set out earlier, to the effect that even if the executive prorogued Parliament in breach of established convention, there was nothing that could be legally done about it. The difficulties with this argument were set out above, and will not be repeated here. The conclusion drawn therefrom is that Parliament can be prorogued for any purpose whatsoever, even though Dicey did not say this, nor did he adduce evidence to this effect. John Finnis would then have us conclude based on these five lines that the relationship between the executive and Parliament had not

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<sup>44</sup> Craig (n 2) 264.

<sup>45</sup> Finnis (n 5) 12-14.

advanced beyond the Stuart monarchs, such that Parliament in the twenty-first century really does sit at the grace and favour of the executive, which can control the sittings thereof for whatsoever reason it chooses.

John Finnis' account of what is said to flow from Dicey concerning the relationship between prorogation and sovereignty is further problematic because it ignores relevant aspects of Dicey's work. Thus, if parliamentary sovereignty was subject to executive will in the manner set out above you would expect it to be fully acknowledged and centre stage in Dicey's discussion of sovereignty, since it fundamentally circumscribes the very meaning of the sovereignty that inheres in the elected Parliament. It does not feature in this respect, notwithstanding that it is much more significant as a possible circumscription of parliamentary sovereign power than many issues that Dicey does consider.<sup>46</sup> This is especially noteworthy given that Dicey spends considerable time considering and dismissing various kinds of limits on parliamentary supremacy. The Finnis account is also suitably selective in what he draws from the Diceyan account of conventions, ignoring the discussion as to the objective of conventions. Thus, for example, Dicey concludes that constitutional conventions consist of customs, whatever their historical origin, which are 'maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately through the elective House of Commons, of the nation'.<sup>47</sup>

I do not therefore accept that Dicey is authority for the expansive conclusions drawn from his writings. The idea that sovereignty is subject to executive will through prorogation that is unbounded as to purpose, in the manner for which John Finnis argues, does not moreover feature in the standard text books, it does not feature in the standard articles and it does not feature in judicial decisions.

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<sup>46</sup> Dicey (n 7) 39-85.

<sup>47</sup> Ibid 430-431.

If prorogation is to be of such breadth, the executive should, in accord with the legality principle, secure democratic legitimacy for this through legislation. Prorogation is a prerogative discretionary power. It is subject to the principle of legality, in accord with the parity of treatment between prerogative and statutory discretionary power that underpins *GCHQ*.<sup>48</sup> This is more especially so because the prerogative lacks the democratic legitimacy that attaches to statutory discretionary power. The normative foundation for the legality principle is a fortiori applicable in this context.<sup>49</sup> It means that if the executive seeks to use prorogation to attain a purpose that is contrary to the foundations of our constitutional order, such as the closing down of a recalcitrant Parliament, then it cannot rely on a vague or general prerogative power. It must have express statutory authority for such action, and thereby, in the words of Lord Hoffmann, confront the political cost of its action.<sup>50</sup> It should therefore be incumbent on the government to seek the passage of legislation that unequivocally and expressly accords it such authority.

## **5 Parliamentary Accountability, Constitutional Principle and Constitutional Convention**

### **(a) Parliamentary Accountability as Constitutional Principle**

Parliamentary accountability was one of the twin principles elaborated by the Supreme Court to test the legality of prorogation, hence its centrality in subsequent debate about the decision. Parliamentary accountability is a constitutional principle. The precise conceptual relationship

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<sup>48</sup> *GCHQ* (n 8).

<sup>49</sup> The principles of judicial review may apply somewhat differently to the prerogative in respect of certain types of judicial review claim, such as fettering of discretion, but the general regime of such controls is equally applicable to prerogative and statutory discretionary power, *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [65]-[66].

<sup>50</sup> *R v Secretary of State for the Home Department, ex p Simms & O' Brien* [2000] 2 AC 115.

between this constitutional principle and constitutional convention has been contested. Adam Perry sees an intimate link between them, insofar as the principle of parliamentary accountability is informed by more particular constitutional conventions relating to accountability, such as ministerial responsibility, which are based on political custom. He describes this as a conventional principle.<sup>51</sup> Mark Elliott takes a different view, arguing that the Supreme Court did not legally enforce the constitutional convention of executive accountability to Parliament, and thus did not treat that convention as a legal principle. It took cognizance of the ‘underlying constitutional reason or principle that underpins and animates the convention of accountability to Parliament’, which was that in a parliamentary democracy there must be adequate opportunity for the executive to be held to account by Parliament.<sup>52</sup>

I find Mark Elliott’s view more persuasive. There may be constitutional conventions as to how parliamentary accountability operates in particular contexts. Thus, there will commonly be such conventions that determine the functioning of, for example, the parliamentary committee system. The constitutional principle of parliamentary accountability is not however exhausted by such instances, nor does its judicial application turn on proof of a particular constitutional convention, as is evident from the case law discussed below. There will perforce be more general background assumptions as to the nature of the political system that underpin this constitutional principle, such as the existence of government and opposition,

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<sup>51</sup> A Perry, ‘Enforcing Principles, Enforcing Conventions’, U.K. Const. L. Blog (3rd Dec. 2019) (available at <https://ukconstitutionallaw.org/>)).

<sup>52</sup> M Elliott, ‘The Supreme Court’s judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?’, <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/>

political parties and the like. This is however equally true of all such principles, parliamentary accountability being no different in this respect from any other principle.

The choice between the two views is not however central to the ensuing discussion, the focus of which is how far parliamentary accountability informs judicial review. Parliamentary accountability is clearly a constitutional principle that informs the application of judicial review in important areas. This is not altered by the fact that there may be conventions that relate to application of this principle. There was nothing untoward in the Supreme Court drawing on this constitutional principle as part of the criteria for determining the limits of prorogation. It broke no new ground in this respect. Parliamentary accountability is an established feature of judicial review, as noted by the Supreme Court. There is an empirical and normative dimension to this use of parliamentary accountability.

#### **(b) Parliamentary Accountability as Constitutional Principle: The Empirical Dimension**

Let us begin with the empirical dimension. We should be mindful of the breadth of instances where parliamentary accountability features prominently in legal discourse, since it is not a rare occurrence. Critics, including John Finnis, give the impression that it is a rarity. This is mistaken. It includes, but is not confined to, instances where the courts limit judicial review in cases concerning, for example, review of economic resource allocation.<sup>53</sup> However, it also includes much case law concerning the deference/respect/weight that should be afforded to the

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<sup>53</sup> *Miller/Cherry* [2019] UKSC 41, [47], citing by way of example *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240, 250, and *Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1, [57].

executive or Parliament under the Human Rights Act 1998, which is premised on the assumption that parliamentary accountability and responsibility warrant such restraint.<sup>54</sup>

This can be exemplified by Lord Bingham's reasoning in *Animal Defenders*.<sup>55</sup> Thus in deciding that a blanket ban on political advertising was compatible with Convention rights, Lord Bingham held that significant weight should be accorded to Parliament's judgment because it was reasonable to expect that democratically-elected politicians would be sensitive to measures necessary to safeguard the integrity of our democracy; Parliament had resolved that the prohibition of political advertising on television might infringe Article 10 ECHR, but nonetheless decided to proceed with the legislation and Parliament's judgment on this issue should not be lightly overridden; and legislation had to lay down general rules, which meant that a line must be drawn, and it was for Parliament to decide where.

We see the same theme in Lord Sumption's judgment in *Carlile* where he stated that 'even in the context of Convention rights, there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable',<sup>56</sup> examples being decisions involving important policy choices, broad questions of economic and social policy, or issues involving the allocation of finite resources.

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<sup>54</sup> See, eg, from a large case law, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681; *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

<sup>55</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312.

<sup>56</sup> *Carlile* (n 54) [28].

The approach is evident in *Carson*,<sup>57</sup> where the House of Lords adopted the US distinction between strict scrutiny for discrimination on grounds of race, gender, sexual orientation and the like, with rationality review being applicable to other forms of differential treatment. The instant case was held to fall into the latter category, with the result being that where differences of treatment were made on grounds such as ability, occupation, wealth or education the courts would demand some rational justification. These differences in treatment were, said Lord Hoffmann, normally dependent on considerations of the public interest, which were ‘very much a matter for the democratically elected branches of government’.<sup>58</sup>

*Hooper*<sup>59</sup> is equally interesting for present purposes, since it reveals judicial acceptance of legislative justification for discrimination cast in terms of remedying past disadvantages. The extent to which such measures are consistent with equality has long been debated in the academic literature. The claimants were widowers, who alleged discrimination contrary to Article 14 and 8 ECHR on the ground that if they had been widows they would have been entitled to certain benefits that were denied to them as widowers. The House of Lords acknowledged that the discrimination was based on gender and therefore subject to strict scrutiny. It nonetheless upheld the legislative scheme. Lord Hoffmann surveyed the legislative rationale for and history of such pensions. He concluded that differential treatment between men and women was justified given that older widows as a class were likely to be needier than older widowers as a class, more especially given that for much of the last century it was unusual for married women to work. He concluded moreover that the comparative disadvantage of women in the labour market had not disappeared. It was for Parliament to decide when the special treatment for women with respect to this particular benefit was no longer required.

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<sup>57</sup> *Carson* (n 54).

<sup>58</sup> *Ibid* [16], [55].

<sup>59</sup> *Hooper* (n 54).

Parliamentary accountability underscores the reasoning in the preceding cases. It is the bedrock on which the constitutional justification for respect or weight is based. The court does not abstain from adjudication, or merely accept without more the legislative choice as conclusive. Nor does it decide the rights-based issue for itself as a matter of first impression and substitute judgment, without consideration of the imperatives driving the legislative or executive choice. The court considers the choice concerning rights against the backdrop of the problem that the legislation sought to resolve, giving due weight to the reasons for that choice. This judicial approach to the HRA is in my view fully warranted.<sup>60</sup>

The previous cases are merely examples, which could be multiplied many times over from the body of jurisprudence associated with the Human Rights Act 1998.<sup>61</sup> The principle of parliamentary accountability clearly forms part of the legal reasoning used by the court. It is not merely ancillary or incidental in this regard. To the contrary, it is pivotal to the legal standard of review applied by the court. It is in that respect invested with legal relevance and dispositive of legal outcome. It is being used in the same way as *Miller/Cherry*, as a background principle to guide the application of judicial review. Parliamentary accountability cannot therefore be regarded merely as a convention, in contradistinction to law. The claim that the Supreme Court illegitimately transformed a convention concerning parliamentary accountability into a legal norm is not therefore sustainable. Parliamentary accountability had

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<sup>60</sup> P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) Ch 2.

<sup>61</sup> See, for further high-profile examples, *R (International Transport Roth GmbH) v Secretary of State for the Home Department* [2003] QB 728; *R (ProLife Alliance) v BBC* [2004] 1 AC 185; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420; *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719.

legal salience within the fabric of judicial review prior to the present case, and this feature was not created by *Miller/Cherry*.

**(c) Parliamentary Accountability as Constitutional Principle: The Direct Normative Dimension**

Let us now consider the normative dimension to this inquiry. John Finnis contends that there is a difference between the legal import accorded to parliamentary accountability in the preceding sense and the use made of it in *Miller/Cherry*. He argues that it has been used to limit judicial review, whereas in *Miller/Cherry* it was being used to augment such review.<sup>62</sup>

This does not withstand examination. It misses the crucial point, which is that the beneficiary in both instances is Parliament. Parliamentary accountability as used in the case law on judicial restraint and justiciability benefits Parliament, because such accountability is felt to warrant the limits on judicial review in the relevant cases. Parliamentary accountability as used in *Miller/Cherry* benefits Parliament by circumscribing the executive's prorogation power, which would otherwise foreclose Parliament's scrutiny and accountability function.

The nomenclature is not fortuitous, it is a constitutional principle of parliamentary accountability. The two types of case are predicated on the same conceptual premise. Thus, the assumption underlying cases on judicial restraint and justiciability is that the relevant matter will be considered by Parliament exercising its scrutiny and accountability functions. The assumption underlying *Miller/Cherry* is that such scrutiny and accountability should not be unduly foreclosed by prorogation.

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<sup>62</sup> Finnis (n 4) 9.

#### **(d) Parliamentary Accountability as Constitutional Principle: The Broader Normative Dimension**

We should moreover press further, since there is a broader dimension to this normative inquiry, which reveals moreover a paradox that underpins the Finnis critique, and those of similar persuasion.

The constitutional principle of parliamentary accountability bears a close affinity to, and connection with, the separation of powers. The former might be regarded as a sub-part of the latter, or as an independent principle. There are taxonomic arguments for either approach, but there is no discernible substantive difference in outcome. Thus, parliamentary accountability and responsibility is clearly significant in separation of powers thinking that underpins relations between the legislature and the executive, and between Parliament and the courts. This is readily apparent from the case law adumbrated above. It informs judicial doctrine in multiple spheres, and is central to the limits of judicial review. Thus, insofar as such judicial oversight is predicated, *inter alia*, on the rule of law, parliamentary accountability and responsibility play a central role in defining the limits to such review. The latter constitutional principle underpins the generally agreed juridical assumption that courts should not intervene with discretionary determinations or legislative choices, merely because the courts might have decided matters differently, if they had been the primary decision-makers.

This invites the obvious inquiry as to the critics' view of the judicial application of this constitutional principle, to which the answer is readily forthcoming. Herein lies the paradox adverted to above. They are fully supportive of the use of such constitutional principles to determine the powers of the courts in relation to Parliament or the executive. They regard this as constitutionally warranted. They want the principle to be invested with legal force and applied by the courts. They contend that the courts should be more deferential in this respect than they are at present. This is a defining feature of the Judicial Power Project literature, to

which John Finnis is a notable contributor. They do not regard parliamentary accountability thus conceived as a constitutional convention that is devoid of legal effect. There is no fierce critique that the courts are thereby transforming constitutional convention into law. To the contrary, they believe that parliamentary accountability and responsibility should be given very great weight, by the very force of the constitutional principle that it embodies.

They nonetheless seek to argue that the deployment of the same constitutional principle in cases where there is tension between legislature and executive is constitutionally illegitimate and unwarranted. This is untenable. Demarcation of the respective powers of executive and legislature is an essential facet of the constitution. It speaks to the structural features of a polity. Delineation of the powers of the executive in relation to the legislature is moreover a key feature of administrative law, and in doing so the courts will not infrequently draw on constitutional principles when undertaking judicial review.<sup>63</sup>

The principle of parliamentary accountability is equally relevant in the present context as in the others to which it is applied. A constitutional principle does not lose its status where the operative issue is the respective powers of the executive and legislature, as forcibly attested to by the way in which the principle of parliamentary sovereignty underpins the case law concerning prerogative power, thereby protecting Parliament against the executive. There is equally no reason why the constitutional principle of parliamentary accountability should lose salience in this context. This is more especially so given that the Supreme Court was faced with a zero-sum game, since any decision it made would resolve the tension between legislature and executive in favour of one or the other. There was no fence sitting to be had. The constitutional principle of parliamentary accountability is equally applicable in this instance as in others. It is

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<sup>63</sup> Craig (n 2) 252-3; A Young, 'Prorogation, Politics and the Principle of Legality' (*UK Constitutional Law Association Blog*, 13 September 2019), <https://ukconstitutionallaw.org/>; A Bogg, 'The Common Law Constitution at Work: *R (on the application of Unison) v Lord Chancellor*' (2018) 81 MLR 509.

integral to the very idea of such principles that they cannot be regarded as legitimate when they support the ends favoured by those of a particular persuasion, and regarded as illegitimate when this proves not to be so.

## 6 Conclusion

I do not intend to summarise the preceding argument. Suffice it to say the following. The relationship between the prerogative, parliamentary accountability, constitutional convention, and justiciability are central to the *Miller/Cherry* litigation. Clarity as to the relationship between these concepts is essential.

There are other facets of the discussion concerning *Miller/Cherry*, relating to the factual application of the standard of review articulated by the Supreme Court, and the fact that the prorogation was held not to be protected by Article 9 of the Bill of Rights. I dealt with those issues in detail in my earlier article,<sup>64</sup> and do not intend to repeat them here. John Finnis and I clearly disagree about these dimensions of the case, just as we do about the other issues involved in the litigation. Suffice it to say the following in this regard. John Finnis argues from the premise that prorogation was not deemed unlawful in the Bill of Rights to the conclusion that this therefore shows that Parliament was content that prorogation could be exercised for any purpose and that it was boundless. I do not accept this reasoning, nor do I think that it accords with a purposive interpretation of that legislation.

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<sup>64</sup> Craig (n 2) 270-276.