Dicey After Brexit: Mini-Maximalism at the United Kingdom Supreme Court

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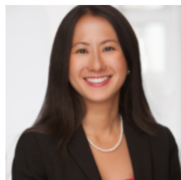

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On December 1, 2020, the United Kingdom Government published draft legislation to repeal the Fixed-term Parliaments Act 2011, which would revive the prerogative power to dissolve Parliament.[2] The Prime Minister would acquire the power to call general elections at will at any point during the parliamentary term. That power would be unchecked by the courts: the Bill specifically provides that the courts cannot question the exercise of that prerogative power.[3] And so Boris Johnson's government fired its latest shot in an ongoing battle over where power should lie in Britain's constitutional governance.[4]

When Boris Johnson replaced Theresa May at Downing Street last year, he promised to "get Brexit done" by October 31, but was blocked by Parliament. In response, Johnson prorogued Parliament, suspending the legislative body for five weeks, a move that many viewed as an attempt to prevent Parliament from scrutinizing a "no deal" exit from the European Union in the final weeks leading up to Brexit.[5]

In an extraordinary decision delivered in September 2019, the United Kingdom Supreme Court unanimously ruled that the Prime Minister's prorogation of Parliament was unlawful. [6] All eleven justices in *Miller II* held that the judiciary could review the scope of the prorogation power, dismissing the government's argument that the Prime Minister's advice to the Queen to prorogue Parliament was a political question outside the court's judicial sphere.[7] Lady Hale, the Supreme Court's President, declared that the Prime Minister's prorogation of Parliament unlawfully frustrated or prevented "without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as a body responsible for the supervision of the executive."[8] Reading the Court's single-voice judgment on live television—and sporting a now famous spider brooch[9]—Lady Hale put the Court's ruling starkly: "This means that when the Royal Commissioners walked into the House of Lords it was as if they walked in with a blank sheet of paper."[10]

The Supreme Court's *Miller II* decision was immensely consequential. Most immediately, right after the Supreme Court's ruling, the Speaker of the House of Commons, John Bercow, announced that Parliament would reconvene the next day.[11] More broadly, *Miller II* displayed a Supreme Court willing to assert judicial power and take on a more enhanced role in the constitutional order.

"Although the United Kingdom does not have a single document entitled 'The Constitution,'" wrote Lady Hale for the Court, "it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice," which "includes numerous

principles of law, which are enforceable by the courts in the same way as other legal principles."[12] Significantly, the President of the Supreme Court expressly asserted the authority of the courts to enforce the United Kingdom's constitution:

> In giving them effect, the courts have the responsibility of upholding the
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> values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.

Lady Hale's robust language regarding the courts' task echoes another chief justice's famous articulation that it is "emphatically the province and the duty of the judiciary to say what the law is."[13]

In *Marbury v. Madison*, Chief Justice Marshall employed expansive reasoning establishing the judiciary's powers with a narrow holding that bore minimal consequences for the case at hand. As I discussed in a previous column,[14] that *maxi-minimalist* approach has been adopted by courts in various parts of the world seeking to empower their institutional position.

The United Kingdom Supreme Court, though, employed an inverse strategy of *mini-maximalism*. A court taking a mini-maximalist approach tends to downplay its expansion of judicial power using narrow reasoning couched in formalistic interpretive terms, even as it delivers a highly consequential ruling of immediate impact. Judges adopting this posture minimize the adoption of judicially self-empowering mechanisms, portraying them as orthodox legal doctrine.

When the United Kingdom Supreme Court pronounced Boris Johnson's prorogation of Parliament illegal, it asserted authority over a matter of high politics that many had assumed Britain's highest court would hesitate to enter.[15] The immediate impact of the *Miller II* decision was undeniable: in one fell swoop, the Court rendered Parliament no longer suspended; indeed, the following day, Members of Parliament resumed sitting. The Court's assertion of judicial review over the executive in this matter has been hailed as monumental,[16] and, in many ways, unprecedented.[17]

Yet Lady Hale portrayed the Court's intervention as based on "entirely orthodox" constitutional principles and legal precedent.[18] She held the

matter was justiciable because the Court was merely reviewing the scope—rather than the exercise—of the prerogative power.[19] The Court's decision was also framed as protecting the supremacy of Parliament, although reasoning also relied heavily on an innovative application of a principle of parliamentary accountability. As one commentator put it, the Supreme Court "cleverly presented its conclusion as the unproblematic consequence of centuries-old constitutional precedents" to "disguise the novelty of its reasoning and to make the result appear more inevitable than it was."[20] By presenting its reasoning as a conventional application of a power that it had long possessed, the Supreme Court sought to minimize its expansive judicial review in a decision of major constitutional and political consequence.

A mini-maximalist approach, though, can be risky. Judicial rulings that have obvious and immediate impact may provoke political or popular backlash. Prime Minister Boris Johnson said he disagreed "profoundly" with the *Miller II* decision; indeed, a member of his Cabinet called it "a constitutional coup."[21]

Since his re-election last year, Prime Minister Johnson has begun to make good on the Conservative Party's promise to "take back control" from the courts.[22] In July 2020, the government announced the creation of an independent commission to review the courts' powers.[23] And the Internal

independent commission to review the courts' powers.[23] And the Internal Market Bill, published on September 9, includes provisions that seek to oust judicial review over regulations made by ministers that breach the United Kingdom's international obligations.[24]

The Government's most recent bill repealing the draft Fixed-term Parliaments Act likewise contains a clause designed to remove the courts' jurisdiction over the prerogative power to dissolve Parliament. The explanatory notes accompanying the Bill expressly acknowledge that the clause eliminating judicial review is meant "to address the distinction drawn by the Supreme Court in [*Miller II*]…as regards the court's role in reviewing the scope of the prerogative power, as opposed to its exercise."[25]

Of course, it remains to be seen how the showdown between the executive and the judiciary will play out. Even if the Bill is passed into law, the courts may find ways not to give effect to an ouster clause seeking to exclude judicial review. As Cambridge constitutional law professor Mark Elliott observes, "it would be naïve to assume that a determined court would be unable, in the face of the ouster, to preserve any vestige of judicial review." [26]

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In a speech given a year before the *Miller II* decision, Lady Hale described the Supreme Court as looking "more and more like a constitutional court."[27] Britain's Supreme Court is a relatively young apex court, created barely ten years ago to replace the appellate committee of the House of Lords as part of the constitutional reforms introduced by Tony Blair's Labour government.[28] The Court's prorogation judgment paints "a picture of a supreme court judiciary that is prepared to serve as a guardian of constitutional principle in a way and to an extent that previous generations of apex court judges in the U.K. were not."[29]

That judicial assertiveness is particularly remarkable when viewed in the context of the United Kingdom's traditional constitutional principles. As Albert Venn Dicey articulated in his seminal work in 1885, the "dominant characteristic" of Britain's political order has long been understood to be the sovereignty of Parliament.[30] Dicey encapsulated Parliament's supremacy as "the right to make or unmake any law whatever; and further, no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." For centuries, Britain has existed without a codified constitution, embodying a system of political constitutionalism premised on legislative, not judicial, supremacy. Unlike its American counterpart, the United Kingdom Supreme Court has no power to strike down acts passed by the legislature.[31]

Miller II demonstrates an apex court willing to take on a more empowered role in a constitutional order, post-Brexit, in the midst of a major political and legal transition.[32] Although the Supreme Court framed its prorogation decision as protecting Parliament's supremacy, it did so while asserting its own authority to delineate the very boundaries of the constitution's foundational principles.

Still, a court that delivers a highly consequential ruling, even if it attempts to downplay its assertiveness, takes a greater judicial gamble compared to one that bides its time.[33] Political crises that turn into constitutional battles can make or break a court. The Johnson government's effort to limit judicial review over the dissolution of Parliament is the latest installment in a battle to define how power should be constrained, and who should enforce it. The executive and the courts are renegotiating the dynamics of a constitutional order traditionally based on legislative supremacy. As the government's return salvo demonstrates, the situation in the United Kingdom remains

especially dicey.

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[1] Yvonne Tew is the author of Constitutional Statecraft in Asian Courts (OUP, 2020), available now from OUP or Amazon. She is currently working on a project on *Strategic Judicial Empowerment*.

[2] Draft Fixed-term Parliaments Act 2011 (Repeal) Bill (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940027/Draft-Fixed-term-Parliaments-Act-Repeal-Bill.pdf.

[3] Draft 2011 (Repeal) Bill, Clause 3.

[4] *See, e.g.*, *The Executive Unchained*, The Economist (Nov. 21, 2020).

[5] *See Parliament suspension sparks furious backlash*, BBC News (Aug. 26, 2019), https://www.bbc.com/news/uk-politics-49504526.

[6] R (on the application of Miller) v. The Prime Minister, Cherry and Others v. The Advocate General for Scotland [2019] UKSC 41 (hereinafter *Miller II*).

[7] *Id.* at para. 28, 35.

[8] *Id.* at para. 50.

[9] Lou Stoppard, *Big Spider Love: The Brooch That Ate Brexit*, N.Y. Times (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/style/brenda-hale-brexit-brooch.html.

[10] Summary of *Miller II* [2019] UKSC 41, https://www.supremecourt.uk/cases/docs/uksc-2019-0192-summary.pdf.

[11] Bianca Britton, *Lawmakers return to Parliament after court rules against Boris Johnson's prorogation*, CNN (Sept. 25, 2019), https://www.cnn.com/2019/09/25/uk/mps-return-to-parliament-gbr-intl/index.html; Ashley Cowburn, *Jeremy Corbyn tells Boris Johnson to resign after PM's parliament suspension ruled illegal,* Independent (Sept. 24, 2019),https://www.independent.co.uk/news/uk/politics/boris-johnson-news-corbyn-supreme-court-decision-ruling-resign-brexit-a9117981.html.

[12] *Miller II*, at para. 39.

[13] Marbury v. Madison, 5 U.S. 137, 177 (1803)("It is emphatically the province and duty of the judicial department to say what the law is").

[14] Yvonne Tew, *Losing the Battle to Win the War: Judicial Self-Empowerment Through Maxi-Minimalism,* I·CONnect (Oct. 7, 2020), http://www.iconnectblog.com/2020/10/losing-the-battle-to-win-the-war-

judicial-self-empowerment-through-maxi-minimalism/.

[15] *See* Mark Landler, *Britain's Supreme Court Is Thrust Into Center of Brexit Debate*, N.Y. Times (Sept. 18, 2019), https://www.nytimes.com/2019/09/18/world/europe/britain-supreme-court-proroguing-parliament.html (prior to the ruling, constitutional law professor Tom Ginsburg stated he would be "surprised" if Britain's Supreme Court held the prorogation unlawful, predicting that "the judges would view such a ruling as opening the door to a regular judicial review of government

policies”).

[16] *See, e.g.*,Thomas Poole, *Understanding what makes “Miller & Cherry” the most significant judicial statement on the constitution in over 200 years,* Prospect (Sept. 25, 2019), https://www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years; Mark Landler, *Brexit Turmoil Intensifies as Court Rebukes Boris Johnson*, N.Y. Times (Sept. 24, 2020), https://www.nytimes.com/2019/09/24/world/europe/uk-supreme-court-brexit.html.

[17] For commentary describing the Court’s decision as a departure from longstanding constitutional principles, *see, e.g.*, John Finnis, *The unconstitutionality of the Supreme Court’s prorogation judgment*,The Pol’y Exchange 9 (Sept. 28, 2019), https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/; Stephen Tierney, *Has ‘far more assertive’ Supreme Court over-reached in Miller 2?*, Legal Bus. (Oct. 2, 2019), https://www.legalbusiness.co.uk/blogs/guest-comment-has-far-more-assertive-supreme-court-over-reached-in-miller-2/.

[18] Aileen McHarg, *The Supreme Court’s prorogation judgement: guardian of the Constitution or architect of the Constitution?,* 24 Edinburgh L. Rev. 88, 94. *See also* Steven Spadijer, *Miller No. 2: Orthodoxy as Heresy, Heresy as Orthodoxy*, U.K. Const. L. Ass’n. (Oct. 7, 2019), https://ukconstitutionallaw.org/2019/10/07/steven-spadijer-miller-no-2-orthodoxy-as-hersey-hersey-as-orthodoxy/.

[19] *See* Paul Daly, *Some Qualms about R (Miller) v Prime Minister [2019] UKSC 41,* Admin. L. Matters (Sept. 24, 2019), https://www.administrativelawmatters.com/blog/2019/09/24/some-qualms-about-r-miller-v-prime-minister-2019-uksc-41/ (arguing that the “neatness of the distinction” between the scope and exercise of the prerogative power as “breaks down in the instant case”).

[20] *See* Aileen McHarg, The Art of Judicial Disguise, The Pol’y Exchange (Sept. 30, 2019), https://judicialpowerproject.org.uk/aileen-mcharg-the-art-of-judicial-disguise/.

[21] Jason Groves, ‘*Who runs this country?’: Boris Johnson’s allies blast ‘constitutional coup’ after judges rule PM broke the law by suspending Parliament and he’s forced to fly back from New York* today to *face a furious resumed Commons*, The daily mail (Sept. 24, 2019), https://www.dailymail.co.uk/news/article-7500691/Boris-blasts-runs-Britain-PM-Johnsons-allies-declare-war-judiciary.html.

[22] Suella Braverman, *People we elect must take back control from people we don’t. Who includes the judges*, Conservative Home (Jan. 27, 2020), https://www.conservativehome.com/platform/2020/01/suella-braverman-people-we-elect-must-take-back-control-from-people-we-dont-who-include-the-judges.html.

[23] Press Release, *Gov’t launches indep. panel to look at judicial review*, U.K. Ministry of Justice (July 31, 2020), https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review.

[24] United Kingdom Internal Market Bill (Bill No. 177/2020) (UK)

https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf. *See* Mark Elliott*, One step forward, two steps back? Judicial review and the government’s amendments to the internal market bill,* Public Law for

Everyone (Sept. 25, 2020), https://publiclawforeveryone.com/2020/09/25/one-step-forward-two-steps-back-judicial-review-and-the-governments-amendments-to-the-internal-market-bill/.

[25] Draft Fixed-term Parliaments Act 2011 (Repeal) Bill (2020)

[26] Mark Elliott*, Repealing the fixed-term parliaments act,* Law for Everyone (Dec. 2, 2020), https://publiclawforeveryone.com/2020/12/02/repealing-the-fixed-term-parliaments-act/. *See also* Alison L Young, *The Draft Fixed-term Parliaments Act 2011 (Repeal) Bill: Turning Back the Clock?,* UK Const. Law Ass'n (Dec. 4, 2020), https://ukconstitutionallaw.org/2020/12/04/alison-l-young-the-draft-fixed-term-parliaments-act-2011-repeal-bill-turning-back-the-clock/.

[27] Brenda Hale, President of the U.K. Sup. Ct., *Should the Law Lords have left the House of Lords?,* Address Before the Michael Ryle Memorial Lecture 2018 (Nov. 14, 2018).

[28] The United Kingdom Supreme Court was established in 2009 pursuant to the Constitutional Reform Act of 2005. *See generally* Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 N.W. U. L. Rev. 543 (2014).

[29] Owen Bowcott, *After 10 years, the supreme court is confident in its role,* The Guardian (Sept. 26, 2019), https://www.theguardian.com/law/2019/sep/26/after-10-years-the-supreme-court-is-confident-in-its-role (quoting Cambridge constitutional law professor Mark Elliott).

[30] A.V. Dicey, Introduction to the Study of the Law of the Constitution 3

(8th ed. 1915) 3-4.

[31] The Human Rights Act of 1998 authorizes courts to declare a piece of primary legislation "incompatible" with the HRA. But such a declaration does not "affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and . . . is not binding on the parties to the proceedings in which it is made." Human Rights Act, §4 (U.K.).

[32] *See* Mark Elliott, *The United Kingdom's Constitution and Brexit: A 'Constitutional Moment'?* 7, U. of Cambridge Fac. of L. Paper No. 22 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3609965.

[33] *Cf.* Yvonne Tew, *Losing the Battle to Win the War: Judicial Self-Empowerment Through Maxi-Minimalism,* I·CONnect (Oct. 7, 2020), http://www.iconnectblog.com/2020/10/losing-the-battle-to-win-the-war-judicial-self-empowerment-through-maxi-minimalism/.