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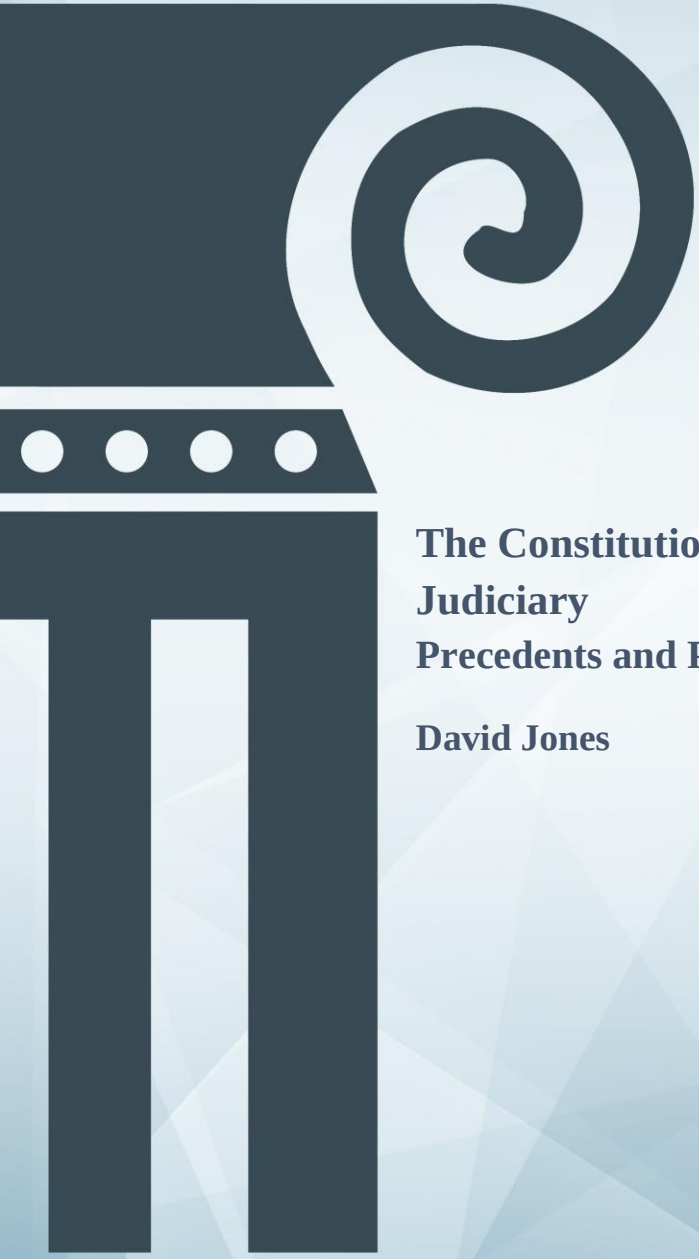

The Constitutional Role of the Judiciary
Precedents and Position

David Jones

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The Constitutional Role of the Judiciary *
Precedents and Position

I The Government, the Judges and the UK Constitution

The introduction, in the new Parliamentary session, of the Dissolution and Calling of Parliament Bill will be welcomed by all MPs who had to endure the agonies of late 2019, when the clear and urgent need for a general election was frustrated by the inflexibility of the Fixed-term Parliaments Act 2011.

The Government's lack of a sufficient Commons majority meant that Parliament was effectively paralysed, with the Government unable to get its business through. In the event, the logjam was broken when the Liberal Democrats put forward an amendment to the Act that enabled the election to be called. Given that the election was held on 12th December, it was almost literally a case of turkeys voting for an early Christmas.

The Bill, when enacted, will restore the constitutional position that prevailed prior to the 2011 Act, enabling the Monarch to call an election at any time, on the advice of the Prime Minister.

Importantly, the Bill also provides expressly that the exercise of the powers to call an election will not be open to question in the courts: they will be off limits to judges.

The constitutional role of the courts - an issue that arises periodically, mostly when judges do something to upset politicians - became particularly contentious after the judgments in the two "***Miller***" cases of 2017[1] and 2019[2]. Each provoked considerable national interest and also caused considerable affront to many parliamentary colleagues.

The first Miller case ("Miller 1") turned on the question of whether the authority of Parliament should be obtained by the Government before triggering the

* This is the updated and revised text prepared for publication of an analysis by David Jones for the Politeia - BPP Law School series, *The Constitutional Role of the Judiciary* on 23 April 2021

[1] [2017] UKSC 5

[2] [2019] UKSC 41

Article 50 procedure that was the necessary first step toward the United Kingdom's departure from the European Union following the 2016 referendum.

The Government asserted that that was unnecessary, and that an article 50 notice could be given without such authority, relying on prerogative powers - the powers the executive has historically exercised over, for example, making treaties or until recently, going to war or making peace.

In Miller 1 the Supreme Court held that the Government was wrong.

My personal interest in the question arose because I was Minister of State at the Department for Exiting the European Union at the time and took the European Union (Notification of Withdrawal) Bill through the House of Commons – a process that was necessitated by the judgment in Miller 1.

I read law at university before entering politics, forming a nodding acquaintance with the constitutional principles enunciated by the Victorian jurist, A V Dicey, who was firmly of the view that, in this country, Parliament is sovereign. He said:

> *The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.*

The interesting question is whether Dicey's principle of Parliamentary sovereignty is one that the courts will continue to recognise and uphold, particularly after the enactment of the new Bill.

II Limiting the Boundaries of Constitutional Power

Brexit brought to the fore many notable issues concerning the constitutional role of the judiciary. Indeed, it was always likely that it would, given that it was the greatest constitutional upheaval in almost half a century.

These issues were thrown into sharp focus by the two Miller cases; and whilst my personal view is that the Miller 1 judgment was correct, I am not so sure about Miller 2.

The question in that case was whether the prorogation of Parliament at a particularly sensitive time, when the clock was ticking towards the 31st October 2019 - at which point the UK would potentially leave the EU without a deal – was lawful. The Supreme Court held that it was not, and effectively told MPs that prorogation had not happened and to return to the House.

Miller 2 has been the subject of considerable controversy because, until then, it had been assumed that the exercise of the Royal Prerogative to prorogue Parliament was not a matter that could be challenged in the courts – it was not justiciable. In the 1985 ***Civil Service Unions***[3] case, Lord Roskill expressed the view that there were a number of instances of exercise of prerogative power that were "excluded categories" and therefore not justiciable; he cited the dissolution of Parliament, which might be regarded as an act similar to prorogation. The ***Everett***[4] case of 1989 also referred to cases of "high policy" as being non-justiciable.

Most immediately relevant to Miller 2, however, was the decision that led to the Supreme Court appeal, namely that in the Divisional Court, where a very heavyweight tribunal consisting of the Lord Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division held that prorogation was not justiciable. It was therefore unsurprising that, when the Supreme Court decided that it was, the decision was heavily criticised not only by politicians but by respected legal commentators for being overtly political, rather than founded on firm legal grounds.

It is almost inevitable that courts determining actions that are inherently political – as Miller 2 was – will attract the criticism that its judges are overreaching their role and straying into what is properly the preserve of the Government or Parliament. And so it was with Miller 2.

Now, I do not for a moment believe that the members of the 11-strong bench that unanimously determined the action were, to a man and woman, fanatical Remainers bent on doing their utmost to ensure that Brexit was frustrated and

[3] [1984] UKHL 9
[4] [1989] QB 811

we remained tied indefinitely to the European Union. I can't accept that British judges behave that way.

But Miller 2 does raise questions that need to be pursued, for example:

- Why did the Supreme Court make little or no reference to the decision of the Divisional Court at first instance, which, to repeat, was a tribunal comprised of some of the most senior judges in the land? Surely the conclusions of that Court merited the courtesy of at least being discussed before being overturned?
- Was it right that the Court should discount the documentary evidence adduced at the hearing as providing no reason, let alone any good reason, for the Prime Minister's decision to seek to prorogue Parliament? Surely that was a political decision for him to make, for which the Court arguably substituted its own political decision; and
- Was it right that the Court should effectively nullify the decision of the Monarch to agree to the prorogation of Parliament? The Court acknowledged that it had no knowledge of what was discussed at the meeting of the Privy Council that led to the Queen's agreement to prorogue. Is it not at least arguable that the Court, by deciding as it did, usurped the function of the Monarch herself?

The courts, and the Supreme Court in particular, do have an important constitutional role in, so to speak, patrolling the boundaries of the powers that are properly the preserves of the executive on the one hand and Parliament on the other.

However, the Miller cases are arguably dangerous, in that they may be seen to be an unacceptable extension of that role. In purporting to explain the limits of prerogative powers, they may in reality be positively constraining those powers in a way that is constitutionally objectionable.

The Supreme Court, in Miller 2, held that exercise of the prerogative power so as to prorogue Parliament for a matter of weeks was unlawful.

What next?

Might it decide that a treaty concluded pursuant to the prerogative power was unlawful and strike that down? Might it decide that the use of military force

without Parliamentary approval is also unlawful? Imagine the potentially catastrophic impact on the nation's security if, at a moment of extreme national peril, the Government were obliged to engage in litigation brought forward by an aggrieved pacifist.

III The Constitutional Role of the Judiciary - Two Views, One Solution

As things turned out, the Miller 2 decision may well have contributed to the febrile political climate that led to the decisive Conservative victory at the December 2019 general election. Should the Government, with its commanding Commons majority, now be taking steps to clarify the role of the Supreme Court and the extent to which it may intrude on prerogative powers?

In cases of constitutional difficulty, Parliament is invariably capable of more than holding its own and finding a way forward. So it was in the autumn of 2019, when, after Miller 2, and having apparently been consigned to another stretch of exhausting wrangling, Parliament decided that it would circumvent the Fixed-Term Parliaments Act and agree to another general election, which solved the problem.

Generally speaking, the intervention of the Courts in the realm of politics is unwelcome and should be discouraged. The dangerous impact of the Miller case should therefore be neutralised by statute, providing explicitly for the non-justiciability of matters concerning the relationship between Parliament and Government, as, indeed, the Dissolution and Calling of Parliaments Bill seeks to do in respect of the calling of elections. I believe that Parliament should go still further and legislate to exclude matters such as prorogation from the purview of the courts. Dicey's principle that Parliament is sovereign means that that would settle the issue once and for all.

Or would it?

Given the willingness of the Supreme Court in Miller 2 to intrude onto what was previously thought to be non-justiciable territory, would it really lay off, even if told by Parliament to do so? Can we, in short, always expect the courts to respect and submit to the sovereignty of Parliament?

As long ago as 1968, in the ***Anisminic***[5] case, the House of Lords refused to observe a statutory provision that excluded its jurisdiction to intervene in a tribunal decision – a so-called "ouster clause". More startlingly, in the 2005 case of ***Jackson***[6], which concerned the Hunting Act, Lord Bingham appeared to cast doubt on the Diceian concept of Parliamentary sovereignty, when he remarked:

> *The supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.*

That dictum appears to constitute a direct challenge to Parliament, setting down a marker as to what might happen if it were to seek to constrain the powers of the Court – as in the case of the Dissolution and Calling of Parliament Bill.

And given the troubling implications of Miller 2, Parliament may well decide it has no option but to apply further constraints. The interesting question will be what will happen when that is done. Will the courts continue to entertain cases such as Miller 2?

The 2019 case of ***Privacy International***[7], in which the Court once again refused to observe an ouster clause, suggests that they might. In that case, the Court appeared to assert that there may be limits to Parliamentary authority in the form of an overriding principle of the rule of law– a proposition that appears to be founded on Lord Bingham's "different hypothesis of constitutionalism", and one that would no doubt cause Professor Dicey to stir gently in his hitherto undisturbed grave.

[5] [1969] 2 AC 147
[6] [2005] UKHL 56
[7] [2019] UKSC 22

The present position therefore appears to be that the constitutional role of the judiciary is unclear; Parliament has one view of it, the judges another. Furthermore, the judges would appear to have their own, rapidly evolving view of the constitutional role of Parliament itself.

The courts' apparent challenge to Parliamentary authority is being met with measures such as the "non-justiciability" clause in the new Bill; there is probably more to come.

But the fact remains that the Miller cases have caused considerable nervousness in the neo-Gothic edifice that faces the Supreme Court across Parliament Square.

It was such nervousness that led to the inclusion in section 38 of the European Union (Withdrawal Agreement) Act 2020 of the ringing declaration:

> *It is recognised that the Parliament of the United Kingdom is sovereign.*

The troubling question is what will happen if, when the force of that declaration comes to be tested, the response of the Supreme Court is: "Says who?"

ENDS

The Rt Hon David Jones MP

20th May, 2021

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