# Yes, Prime Minister? A commentary on *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41[*]

## I. Introduction

1. In a referendum held on 23 June 2016, the United Kingdom voted to leave the European Union. Since then, the government's attempts to initiate the withdrawal process have not only been fraught with political disagreement and delays, but have also prompted several constitutional law challenges.

2. On 24 September 2019, the UK Supreme Court ("**UKSC**") gave its highly anticipated judgment in *R (on the application of Miller) v The Prime Minister* ("***Miller***"). The central issue was whether the UK Prime Minister's advice to the Queen that Parliament should be "prorogued" (i.e. suspended) for a period of five weeks was lawful.

3. This commentary will first describe the context and material facts, which explains the constitutional importance of the case. In the second section, it will address the grounds of the decision. Finally, it discusses the implications of the decision, drawing brief parallels to the approach adopted by the Singapore courts regarding matters of justiciability.

## II. Background and material facts

4. Prorogation is one of the ways by which the current session of Parliament can be brought to an end. In the UK, prorogation is a prerogative power[1] exercised by the Crown, on the advice of the Privy Council and the government.[2] While it is prorogued, Parliament is unable to meet, debate, and pass legislation or government policies. Thus, prorogation became the subject of significant public interest and litigation because of fears that it could be used to prevent further debate and delay of government policies leading up to Brexit.

5. How did this prorogation occur? On 15 August 2019, the Director of Legislative Affairs in the Prime Minister's Office, Nikki da Costa, wrote a memorandum to the Prime Minister. She recommended that the Prime Minister's Permanent Private Secretary approach the Palace with a request for prorogation, to begin on a day between 9th to 12th September, until 14th October.

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[1] A prerogative power refers to the discretionary powers that the Crown has, whether such powers are in fact exercised by the Queen or by her ministers: see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th Ed, 1915) at p. 421.

[2] House of Commons Library Briefing Paper (No 8589, 11th June 2019).

6. On 27th or 28th August 2019, the Prime Minister advised the Queen to prorogue Parliament for that proposed period of time. On 28th August 2019, the Privy Council met with the Queen and made an Order in Council, ordering that Parliament be prorogued on those dates. On the same day, the decision to prorogue Parliament was made public.

7. Following the prorogation decision, two sets of court proceedings commenced. One was before the courts in England and Wales, and the other before the courts in Scotland. In England, Mrs Gina Miller initiated proceedings before the High Court, seeking a declaration that the Prime Minister's advice to the Queen was unlawful.

8. On 11 September 2019, the Divisional Court dismissed the claim on the ground that the issue was not justiciable.[3] It decided that the issues were inherently political in nature, and there were no legal standards against which to judge their legitimacy.[4] The Divisional Court granted Mrs Gina Miller a "leap-frog" certificate so that her appeal could go directly to the UKSC.[5]

9. However, the Inner House of the Court of Sessions, the supreme civil court in Scotland, heard another appeal on the same issue. It held that the advice to the Queen was justiciable,[6] that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the executive government, and hence the prorogation was unlawful and null.[7] The Advocate General for Scotland appealed.

## III. Grounds of Decision

10. Thus, there were two separate cases regarding the same issue of prorogation, with opposing outcomes. The UKSC decided to hear both appeals together in Miller, in view of the disagreement between the courts in England and Wales and Scotland, as well as the "grave constitutional importance" of the case. On appeal, four issues arose for the court's consideration:

    (a) Was the question of whether the Prime Minister's advice to the Queen was lawful even justiciable (i.e. capable of being decided by the courts)?
    (b) If it was justiciable, by what standard was its lawfulness to be judged?
    (c) By that standard, was it lawful?
    (d) If it was not, what remedy should the court grant?

    Before considering the first issue of justiciability, the court clarified four important introductory points.

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3 *R (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB) ("*Miller (HC)*") at [1].
4 *Id*, at [51].
5 *Id*, at [1].
6 *Cherry v The Advocate General* [2019] CSIH 49 ("*Cherry*") at [50] – [51].
7 *Id*, at [58].

11. First, in advising the Queen on prorogation, the Prime Minister had a constitutional responsibility to have regard to all relevant interests, including the interests of Parliament.[8]

12. Second, although the courts could not decide *political* questions, it could decide a *legal* dispute which arose from a matter of political controversy.[9] The court recognised that almost all important decisions made by the executive have a political hue to them.

13. Third, the fact that the minister was *politically* accountable to Parliament did not mean that he was immune from *legal* accountability to the courts. Ministers are accountable to Parliament only for what they do as regards efficiency and policy. In matters of law, they are responsible only to the courts.[10] Moreover, the effect of prorogation would be to prevent any possibility of the minister being held accountable to Parliament in the first place.[11]

14. Fourth, if the issue was justiciable, deciding it would not offend the principle of separation of powers. Indeed, the court would be giving effect to the separation of powers by ensuring that the government did not use the power of prorogation unlawfully, i.e. to prevent Parliament from carrying out its proper functions.[12]

### *A. Was the question of whether the Prime Minister's advice to the Queen was lawful even justiciable?*

15. The Prime Minister argued that the court should decline to consider whether the matter was justiciable. The advice rendered to the Queen did not raise any legal question, on which the courts could properly adjudicate. Instead, the Prime Minister was accountable only to Parliament. The courts should not enter the political arena but should respect the separation of powers principle.[13]

16. However, the court rejected the Prime Minister's arguments and held that the matter was justiciable. It stated that in deciding whether a prerogative power was justiciable, it was necessary to distinguish between two different inquiries.[14]

17. The first inquiry was whether the court could decide on the existence and limits of the prerogative power in question. It was trite, and accepted by all parties to the proceedings, that this first inquiry was justiciable.[15]

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8 *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 ("*Miller (UKSC)*") at [30].
9 *Id*, at [31].
10 *Id*, at [33].
11 *Ibid*.
12 *Id*, at [34].
13 *Id*, at [28].
14 *Id*, at [35].
15 *Id*, at [35], referring to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

18. The second inquiry was whether the prerogative power, although exercised within its legal limits, could nonetheless be challenged on the basis of one or more of the recognised grounds of judicial review. This would depend on the nature and subject matter of the particular prerogative power being exercised. For instance, matters which related to issues of "high policy" may not be justiciable.[16] Examples of "high policy" matters are making treaties, making law, and mobilising the armed forces.[17]

19. The court decided that this case engaged the first inquiry.[18] In other words, the question was: **what are the limits of the Prime Minister's power to advise the Queen to prorogue Parliament?** To answer this, the court had to turn to the second issue, to determine the legal standard by which the lawfulness of the Prime Minister's advice was to be judged.

### *B. If it was justiciable, by what standard was its lawfulness to be judged?*

20. While the UK does not have a written Constitution, it nonetheless has constitutional principles developed by the common law, statutes, conventions, and practice.[19] These principles determined the boundaries of prerogative powers.[20] In this case, the court drew upon two fundamental principles to decide the limits of the power of prorogation.

21. The first principle was Parliamentary *sovereignty*: that laws enacted by the Crown in Parliament were the supreme form of law.[21] This required that everyone, including the government, comply with laws enacted by Parliament. While prorogation had the effect of preventing Parliament from enacting laws for a period of time, it was not unlawful by default. For instance, if the prorogation was only for a short time (as was customary practice) such that the impact of prorogation was relatively minor, it would not infringe the principle of Parliamentary sovereignty.[22] On the other hand, if there was no legal limit on the executive's use of the prerogative power to prevent Parliament from exercising its legislative authority for as long as it pleased, this would undermine the principle of Parliamentary sovereignty.[23]

22. The second principle was Parliamentary *accountability*: that the conduct of the government must be held accountable to Parliament, through mechanisms such as Parliamentary scrutiny of legislation.[24] Similarly, this principle would not be infringed

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16 *Id*, at [36].
17 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811, 820.
18 *Miller (UKSC)*, *supra* n 8, at [52].
19 *Id*, at [39].
20 *Id*, at [40].
21 *Id*, at [41].
22 *Id*, at [45].
23 *Id*, at [42].
24 *Id*, at [46], referring to *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [249]; *Bobb v Manning* [2006] UKPC 22 at [13].

if Parliament was prorogued for the usual length of time (i.e. for short periods). However, the longer that Parliament stood prorogued, the greater the risk that responsible government might be replaced by unaccountable government, which was antithetical to democratic ideals.[25]

23. Thus, the court concluded that the relevant standard to judge the limits of the prorogation power was whether the prorogation had the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions, as a legislature and as the supervisor of the executive's conduct.[26] However, the court added that it would intervene only if the effect was sufficiently serious to justify such an exceptional course.[27]

24. The court would also have to be careful in considering the Prime Minister's justification for prorogation. It would have to bear in mind that the prorogation decision fell within the area of responsibility of the Prime Minister, and that it could involve a range of considerations, including matters of political judgment.[28] Regardless, the court still bore the responsibility of determining whether the Prime Minister has remained within the *legal* limits of the prorogation power.

### *C. By that standard, was the Prime Minister's advice lawful?*

25. Applying that legal standard, the court held that the Prime Minister's advice to exercise the prorogation power was clearly unlawful.[29] The prorogation had the effect of preventing Parliament from holding the government accountable during the lead up to (the-then) Brexit day on 31 October 2019.

26. The court considered that the requested prorogation was not an ordinary one. It prevented Parliament from carrying out its constitutional role for *five* weeks, out of a possible eight weeks until the UK would withdraw from the EU on 31 October. While those five weeks included the usual three-week period which Parliament went into recess for party conferences, the court considered that in the exceptional circumstances, Parliament might have decided that parliamentary scrutiny of government activity was more important than going into recess.[30] In any event, even if Parliament did decide to go into recess, it would still be able to hold the government to account.[31] Prorogation meant that Parliament could not do this.

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25 *Id*, at [48].
26 *Id*, at [50].
27 *Ibid*.
28 *Id*, at [51].
29 *Id*, at [56].
30 *Id*, at [56].
31 *Ibid*.

27. The court also found that there was no reasonable justification for the Prime Minister's action which had such an extreme effect on the fundamentals of democracy.[32] The Prime Minister had not given any reason for closing down Parliament for five weeks. He had only focused on the need to give a new Queen's Speech on 14 October 2019. However, that did not explain the need to prorogue Parliament for five weeks.

28. The court accepted the unchallenged evidence of Sir John Major,[33] who served as Prime Minister from 1990 to 1997. He testified that the Queen's Speech typically required only four to six days, and not five weeks, to prepare. Neither did the memorandum between Nikki da Costa and the Prime Minister explain why the government needed five weeks to prepare for its legislative agenda.[34] The court was unable to conclude that there was any reason, let alone a good reason, for the Prime Minister to advise the Queen to prorogue Parliament for five weeks. Accordingly, the court held that the Prime Minister's actions were unlawful.

### *D. If it is not, what remedy should the court grant?*

29. The court held that since the Prime Minister's advice to prorogue Parliament was unlawful, it was null and of no effect.[35] It followed that the Order in Council and the actual prorogation which were subsequently based on that advice was likewise unlawful, null and of no effect.

30. The Prime Minister argued that the court could not declare the prorogation null and of no effect because the prorogation was a "proceeding in Parliament" which, under Article 9 of the Bill of Rights of 1688, could not be impugned or questioned in any court. The court rejected this argument. Prorogation was not a "proceeding in Parliament" because it was not a decision which Parliament had reached by speaking or voting on it. On the contrary, prorogation was imposed upon Parliament, and sought to bring Parliament's functions to an end.[36] Thus, the court was not precluded by Article 9 from considering the validity of the prorogation.

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32 *Id*, at [58].
33 Sir John Major served as Prime Minister from 1990 to 1997.
34 *Miller (UKSC)*, *supra* n 8, at [60].
35 *Id*, at [70].
36 *Id*, at [68].

## IV. Discussion

31. *Miller* has drawn strong and diverse reactions from commentators as well as the government. The court struck a noticeably bold tone in asserting its responsibility to decide whether *any* exercise of power had exceeded its limits, and that it would not "shirk that responsibility merely on the ground that the question raised [was] political in tone or context".[37]

32. On one view, *Miller* merely affirms well-established constitutional legal principles, such as the separation of powers, Parliamentary accountability, and Parliamentary sovereignty in a case with extraordinary political and constitutional implications. On another view, the court had overreached its authority into the political arena, thereby constituting improper judicial interference.

33. In this article, I make three observations. First, *Miller* represents a principled position on the proper role of the courts in judicial review. Second, I discuss the court's reasoning in using the illegality ground of judicial review. Third, I compare similarities in the court's approaches in the UK and Singapore jurisdictions.

### *A. The role of the courts in judicial review*

34. This article takes the position that the court's approach in *Miller* was principled and powerfully reasoned. *Miller* demonstrates with remarkable clarity how the courts can fulfil its intended role as guardians of the constitution by reviewing decisions made by public authorities. It is trite that the separation of powers principle requires that the court should only intervene in legal, and not political, matters.[38] This judicial restraint is well-founded because it respects the idea that certain political matters fall outside of the institutional competence of the courts. However, while this principle is easy to state as a dichotomy, its application is more difficult. The lines which divides the legal and political spheres are often very fine ones.[39]

35. On its surface, prorogation appeared to be an intrinsically political issue, which the court should ordinarily be wary of engaging with. However, the court in *Miller* did not shy away from this. It was willing to look beyond the form and identify whether it engaged a *legal* question, regardless of the political implications.

36. Thus, the court characterised the relevant legal question as whether the Prime Minister's actions infringed on the constitutional principles of Parliamentary sovereignty and accountability, which the courts are then fully entitled to adjudicate. During the course of oral proceedings, Lord Pannick QC analogised the situation to whether the ministers

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37 *Id*, at [39].

38 *Tan Seet Eng v Attorney-General* [2014] SGCA 39 at [90].

39 De Smith, S. A., Harry Woolf, Jeffrey L. Jowell, A. P. Le Sueur, and Catherine M. Donnelly. *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) at [11-004].

(acting as the junior partner in the relationship) could lawfully remove the scrutiny of its activities by Parliament (as the senior partners). Examined in that light, it is evident that any principled answer must a firm no. Otherwise, an unscrupulous government could hypothetically abuse the prorogation power to remove its accountability to Parliament.

### *B. Illegality head of review*

37. With respect to the applicable ground of judicial review, it is clear that the court grounded its reasoning on illegality, or *ultra vires*. However, one may observe that the court framed the inquiry of illegality as the *inadequacy* of the Prime Minister's reasons. While illegality review is typically understood as whether the executive had acted within the *scope* of its powers,[40] the inquiry of the *reasonableness* of an executive decision falls under irrationality review.[41] Thus, the court's approach suggests that there may be an overlap between illegality and irrationality review. Professor Mark Elliott has remarked that this could possibly amount to a significant extension of judicial review.[42] Perhaps this can be clarified in a subsequent decision.

38. Nonetheless, the court expressly recognised that the government must be accorded a great deal of latitude in exercising the power to prorogue Parliament.[43]This suggests that the court would adopt a deferential standard of review and not scrutinise the government's decision too closely. Ultimately, the government's decision need not be supported by the best justifications, but one that was merely "reasonable".

### *C. Parallel approaches between the UK and Singapore*

39. One may broadly draw parallels between the UKSC's approach to the question of justiciability and that adopted by the Singapore courts. Recently, the Singapore courts have had the opportunity to develop a similarly principled approach towards the issue of justiciability.

40. In *Tan Seet Eng v Attorney-General*,[44] the appellant was arrested for allegedly being involved in global football match-fixing activities. The Minister for Home Affairs issued an order for detention under the Criminal Law (Temporary Provisions) Act to detain the appellant for a period of 12 months. The appellant sought judicial review of the detention order. The Court of Appeal ("**CA**") held that the CL(TP)A required the detention order to justify why the appellant's alleged actions had a bearing on public

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40 *Attorney General v. Fulham Corporation* [1921] 1 Ch. 440.
41 *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 410.
42 Mark Elliott, The Supreme Court's Judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication? (Public Law for Everyone, 24 September 2019) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> (accessed 9 October 2019).
43 *Miller (UKSC)*, *supra* n 8, at [58].
44 [2014] SGCA 39.

safety, peace and good order *within* Singapore. However, because the Minister's detention order failed to justify why the appellant's activities (which took place beyond Singapore) would have such an impact, he did not have the power to detain the appellant. Accordingly, the appellant's detention was unlawful.

41. The court first observed that it could inquire into whether administrative decisions were made within the scope of the relevant legal power and arrived at in a legal manner, even in cases falling within the category of "high policy".[45] The similarity between the UKSC and the CA's approaches rests in the technique of isolating the relevant legal core from the political penumbra. This approach is principled because it prevents questions of law from being obscured by the political context, while preventing improper judicial overreach by questioning the substantive merits of the executive's decisions.

42. Finally, this approach is also consistent with the CA's "green-light" view of administrative adjudication in *Jeyaretnam Kenneth Andrew v Attorney-General*.[46] Briefly, the green-light approach views the court's role as constructively encouraging good administrative practices, as opposed to the red-light approach which conceives of the courts being locked in an adversarial relationship with the executive.[47] In *Tan Seet Eng*, the green-light approach's facilitative effect is evident by how the court focused only on how the Minister's detention order was legally deficient. Subsequently, the Minister succeeded in lawfully issuing a new detention order after correcting those deficiencies.

43. Likewise, in the aftermath of *Miller*, the UK government succeeded in its second prorogation attempt on 8 October 2019 after reducing the duration of prorogation from the original five weeks to only six days. Yet, while the UKSC appears to have succeeded in facilitating good administrative practices, one may observe that the UK government's response to *Miller* has been disconcerting. The Prime Minister has said that the court was "wrong to pronounce on what is essentially a political question at a time of great national controversy."[48] The Prime Minister has blamed his political opponents for undertaking legal manoeuvres to frustrate Brexit and the will of the people. In Parliament, the Prime Minister has further accused his opponents of political cowardice: "Instead of deciding to let the voters decide, they ran to the courts."[49] These

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45 *Tan Seet Eng v Attorney-General* [2014] SGCA 39 at [106].

46 [2014] 1 SLR 345; Eugene K B Tan, "Curial Deference in Singapore Public Law: Autochthonous Evolution to Buttress Good Governance and the Rule of Law" (2017) 29 SAcLJ 800 at [17].

47 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [48]–[49]; see also Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 29.

48 United Kingdom, House of Commons, Parliamentary Debates (25 September 2019) vol 664 at col 776 (The Prime Minister Boris Johnson).

49 United Kingdom, House of Commons, Parliamentary Debates (25 September 2019) vol 664 at col 775 (The Prime Minister Boris Johnson).

comments reflect the unfortunate straining of the relationship between the judiciary and the executive.

44. This is unfortunate. Ideally, the branches of government should aspire towards a paradigm of mutual cooperation and respect for the rule of law. There is no conflict between the branches of government when a court strikes down executive action. The government should not see it as a threat or an attack upon its authority, but to embrace it as part of a common project to promote good governance by ensuring that executive action is lawful.[50]

## V. Conclusion

45. *Miller* is an affirmation of how courts of law can uphold their constitutional responsibilities even in politically extraordinary circumstances. Although the lines between legal and political issues are undoubtedly fine, the court should nonetheless be vigilant in identifying and answering any questions of law while calibrating an appropriate level of scrutiny. From Singapore's perspective, the broad parallels between *Miller* and our courts' approaches is reassuring that we are on the right path.

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[50] Chief Justice Sundaresh Menon, "Executive Power: Rethinking The Modalities Of Control", Annual Bernstein Lecture in Comparative Law at Duke University School of Law, at [43], <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/(bernstein-lecture-2018)-lecture-(final)-(amended-16-november-2018).pdf> (accessed 10 October 2019).