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Prerogative powers, soberania parlamentar e poder judicial[1]

(Reflexões a propósito do Acórdão do Supremo Tribunal do Reino Unido, *Miller vs The Prime Minister e Cherry vs Advocate General for Scotland* – UKSC 41)[2]

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Sumário:

1. Introdução

São por de mais conhecidas as vicissitudes que se desenvolveram ao longo do período que medeou entre o referendo sobre a permanência do Reino Unido da União Europeia (vulgarmente conhecido como *Brexit*)[3], que teve lugar em 23 de Junho de 2016[4] e a efectiva saída, ocorrida em 31 de Janeiro de 2020.

Tais vicissitudes fizeram-se sentir, naturalmente, e de modo muito efectivo, nas negociações entre o Reino Unido e os restantes membros da União, a propósito dos termos e condições a que a saída devia obedecer, dada a diversidade dos pontos de partida e a dificuldade de aproximação de posições, o que contribuiu para um significativo arrastamento temporal das mesmas.

Mas também ao nível interno as repercussões foram marcantes, tanto no plano político, quanto no domínio jurídico. No primeiro caso, porque este processo esteve na base da demissão de dois primeiros-ministros: David Cameron, proponente do referendo e adepto do sim, na sequência do resultado da consulta (em 13 de Julho de 2016) e a sua sucessora, Theresa May, como corolário da sua incapacidade para fazer aprovar, no Parlamento, o acordo de retirada da União Europeia (em 24 de Julho de 2019). No segundo caso, por ter trazido para as luzes da ribalta o Supremo Tribunal do Reino Unido[5], por força de duas decisões – uma proferida em 24 de Janeiro de 2017[6] e outra em 24 de Setembro de 2019 – que deram lugar a acesos debates e, até, a acusações de invasão, por aquele, da esfera política.

Daí que, não obstante o propósito do presente texto ser, apenas, o de formular algumas reflexões a propósito do segundo dos arestos, julguemos útil deixar também uma brevíssima nota acerca da decisão de 2017, até porque a linha de raciocínio seguida pelo Supremo Tribunal é, em larga medida, concordante com aquela que se encontra presente no acórdão de 2019 (com especial destaque para quanto se refere à relevância dada ao princípio da soberania parlamentar).

Nele, chamado a pronunciar-se sobre se o Governo, no exercício dos *prerogative powers (*isto é, aqueles que integram a *royal prerogative*), estava habilitado, face às pertinentes normas constitucionais do Reino Unido, a accionar o artigo 50.º do Tratado da União Euro-

1 O autor não escreve de acordo com as regras do Acordo Ortográfico.
2 O texto do Acórdão é reproduzido integralmente no final deste comentário.
3 A realização do referendo consubstanciou o cumprimento de uma promessa do Primeiro-Ministro David Cameron, constante do manifesto eleitoral do Partido Conservador (2015) e teve por base o *European Union Referendum Act 2015*. Não se tratou, porém, da primeira vez que a presença do Reino Unido na União Europeia foi objecto de consulta pública. De facto, em 1975 outro refendo sobre o tema teve lugar, culminando com uma votação de 67% pelo sim.
4 O resultado foi de 51,89% pela saída e 48,11% pela permanência.
5 Enquanto tal, o Supremo Tribunal do Reino Unido só foi instituído em 1 de Outubro de 2009 (por força do *Constitutional Reform Act 2005*). Até lá, os poderes para ele então transferidos cabiam, tradicionalmente, à Câmara dos Lordes, através do *Appelatte Committee*.
6 *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) - REFERENCE by the Attorney General for Northern Ireland from the High Court of Justice in Northern Ireland: In the matter of an application for leave to apply for judicial review by Agnew and others – REFERENCE of a devolution issue by the Court of Appeal of Northern Ireland: in the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5*.

peia[7], procedendo à notificação a que alude o seu n.º 2, o Supremo Tribunal decidiu, por ampla maioria[8], que tal não poderia ocorrer sem uma autorização através de um acto legislativo (*Act of Parliament)*.

Considerou, assim, o Supremo Tribunal, que os termos do *European Communities Act 1972,* que tornaram efectiva a adesão do Reino Unido à União Europeia[9], não eram consistentes com o exercício, pelos ministros, de qualquer poder de retirar o país dos tratados europeus, sem autorização prévia concedida através de uma lei do Parlamento. E fundou esse seu entendimento em cinco argumentos essenciais:

- Enquanto o *European Communities Act* permanecesse em vigor, tinha como efeito erigir o direito da União Europeia em fonte independente de direito nacional, com a possibilidade de revogar este. Tal lei operava, assim, uma transferência parcial de poderes legislativos, uma atribuição de competências legislativas, pelo Parlamento, às instituições europeias, excepto se, e até ao momento em que, o Parlamento decidisse de forma diferente;
- A retirada dos tratados da União Europeia produziria mudanças fundamentais na arquitectura constitucional do Reino Unido, eliminando o papel das normas europeias enquanto fonte de direito. Tal mudança fundamental seria uma consequência inevitável da notificação de retirada. A Constituição do Reino Unido impunha que tais mudanças fossem feitas através de legislação do Parlamento;
- O facto de a saída da União Europeia retirar, aos residentes provenientes da União Europeia, alguns direitos internos no Reino Unido, tornava igualmente impossível que o Governo operasse a retirada dos Tratados da União Europeia sem autorização prévia parlamentar;
- Encontrava-se na disponibilidade do Parlamento, ao aprovar o *European Communities Act,* autorizar os ministros a retirar o país dos Tratados da União Europeia. Mas, para que isso fosse possível, seria necessário tê-lo dito em termos claros; ora, não só tais termos claros se encontravam ausentes daquele acto, como as suas disposições indicavam que os ministros não gozavam de tal poder;
- O referendo de 2016 tem grande significado político. Contudo, o seu significado legal é determinado por aquilo que o Parlamento inseriu na lei que o autorizou. E essa lei estabeleceu que o referendo fosse realizado, mas sem especificar as suas consequências. Assim, a modificação da ordem jurídica exigível para implementar o resultado do referendo teria de ocorrer da única forma autorizada pela Constituição do Reino Unido, isto é, por lei[10].

2. O caminho até ao acórdão

Como se disse, a incapacidade de fazer aprovar o acordo de saída da União Europeia, que foi por três vezes reprovado na Câmara dos Comuns, conduziu à demissão de Theresa May e à sua substituição por Boris Johnson. E este, no âmbito da sua campanha eleitoral para líder do Partido Conservador, sempre se recusou a pôr de parte a possibilidade de, face às sucessivas recusas do Parlamento, optar por um *Brexit* sem acordo.

Sucede que o Parlamento, através do *European Union (Withdrawal) (N.º 2) Act 2019*, já havia decidido que, na prática, o *Brexit* só poderia ocorrer, ou com a aprovação, por ele próprio, de um acordo de retirada ou pela autorização, também por ele dada, para uma retirada sem acordo. Destarte, a única possibilidade de ultrapassar os obstáculos assim colocados e de conseguir aquele desiderato, passava pelo encerramento da sessão legislativa – a chamada *prorogation* –, criando condições para uma espécie de facto consumado, a que o Parlamento já não pudesse atalhar em tempo útil.

Na verdade, por força do encerramento, impossibilitado ficaria o escrutínio da acção do Governo (bem como a aprovação das leis necessárias para operacionalizar o *Brexit*), quer no decurso do período pelo qual se prolongasse, quer, até, nos escassos dias que sobrariam entre a retoma da actividade do Parlamento e o dia 31 de Outubro, data para que a União Europeia tinha aceitado adiar a aprovação do acordo de retirada. E, assim, garantir-se-ia que esta pudesse ocorrer de qualquer modo.

A propósito da questão da *prorogation* e das suas consequências, antes de prosseguir com a análise da evolução dos factos que conduziram à prolacção do acórdão, vale a pena deixar aqui um conjunto de elementos que tornem mais fácil a sua percepção.

A *prorogation* equivale, *grosso modo,* àquilo que entre nós se designa por final do período normal de funcionamento da Assembleia, que ocorre no dia 15 de Junho (n.º 2 do artigo 174.º da Constituição), embora seja passível de extensão por decisão da própria Assembleia (n.º 3 do mesmo artigo).

No Reino Unido, distintamente, não só o termo do período normal de funcionamento não se encontra expressamente estabelecido,

7 O n.º 1 do artigo estabelece que "qualquer Estado-Membro pode decidir, em conformidade com as respetivas normas constitucionais, retirar-se da União". O n.º 2 estatui que "qualquer Estado-Membro que decida retirar-se da União notifica a sua intenção ao Conselho Europeu. Em função das orientações do Conselho Europeu, a União negocia e celebra com esse Estado um acordo que estabeleça as condições da sua saída, tendo em conta o quadro das suas futuras relações com a União. Esse acordo é negociado nos termos do n.º 3 do artigo 218.º do Tratado sobre o Funcionamento da União Europeia. O acordo é celebrado em nome da União pelo Conselho, deliberando por maioria qualificada, após aprovação do Parlamento Europeu". E o n.º 3 dispõe que "os Tratados deixam de ser aplicáveis ao Estado em causa a partir da data de entrada em vigor do acordo de saída ou, na falta deste, dois anos após a notificação referida no n.º 2, a menos que o Conselho Europeu, com o acordo do Estado-Membro em causa, decida, por unanimidade, prorrogar esse prazo".

8 8 contra 3.

9 Em obediência a uma concepção dualista no que respeita às relações entre direito internacional e direito interno – que decorre, precisamente, do princípio da soberania do Parlamento -, no Reino Unido as normas constantes de convenções internacionais só adquirem efeito através da adopção de um acto legislativo.

10 Sobre esta decisão, pode ver-se, entre muitos outros, Nicholas Aroney, "R (Miller) v Secretary of State for Exiting European Union: Three Competing Syllogisms", *Modern Law Review*, n.º 80 (4), 2017, pp. 685-745 e Patrick Earton e Lisa Burton Crawford, "Parliament, the people and interpreting the law: R (Miller) v Secretary of State for Exiting European Union", *University of Queensland Law Journal*, 2016, pp. 331-342.

como decorre do exercício da *royal prerogative,* resultando de uma proposta do *Privy Council* e de uma decisão do monarca, adoptada após parecer do Primeiro-Ministro. E note-se, a este propósito, que o *Fixed-term Parliaments Act 2011*, que veio excluir da *royal prerogative* o direito de dissolução da Câmara dos Comuns, estabelece, no n.º 1 do artigo 6.º, que quanto nele se dispõe não afecta o poder do monarca de decidir a *prorogation*.

No decurso do período da *prorogation,* nenhum actividade parlamentar pode ocorrer. De resto, é isso que distingue esta figura do instituto da suspensão (*recess)*, esse sim da responsabilidade do próprio Parlamento e no decurso da qual, inexistindo trabalhos do Plenário, as demais estruturas, nomeadamente as comissões, podem permanecer em funcionamento[11].

Embora estranho à primeira vista, o facto de a decisão de *prorogation* provir do monarca tem de ser encarado à luz das particularidades do constitucionalismo local. Com efeito, o Parlamento de Westminster não resulta, apenas, da agregação da Câmara dos Lordes e da Câmara dos Comuns. Integra-o, também, a Coroa, algo que se encontra espelhado em expressões como *Crown-in-Parliament*, *King-in-Parliament* ou *Queen-in-Parliament*.

"Pretende-se, dessa forma, dar corpo a duas ideias fundamentais: em primeiro lugar, que à Coroa cabe um papel próprio no domínio legislativo, ainda que com o necessário consentimento das duas câmaras; em segundo lugar, que a Coroa tem uma intervenção directa na organização e funcionamento do Parlamento (se bem que, hoje, de natureza fundamentalmente formal), patente na prática de actos como a respectiva convocação, a nomeação de lordes ou a marcação de eleições para a Câmara dos Comuns"[12].

Por outro lado, a *royal prerogative* (em cujo âmbito, como se notou, a decisão de *prorogation* se inclui), é constituída por um conjunto amplíssimo de poderes que "se alojam na Coroa apenas simbolicamente, uma vez que o seu exercício fica dependente do aconselhamento do Primeiro-Ministro (que é, de facto, uma imposição), em obediência à convenção constitucional segundo a qual "the King cannot act alone". Por força disso, a responsabilidade dos actos que cabe ao monarca legalmente praticar é assumida pelo Governo, através do instituto da referenda ministerial, concretizando o princípio segundo o qual "the King can do no wrong"[13].

Acresce que a circunstância de, no caso da *prorogation,* a decisão ser tomada sob proposta do *Privy Council*, não muda materialmente nada. É que, não só "a responsabilidade executiva pelo funcionamento deste conselho cabe ao *Lord President of the Council*, que integra o *Cabinet* e acumula essas funções com as de *Leader of the House of Lords* ou de *Leader of the House of Commons*"[14], como os documentos que aprova (denominados *Orders in Council*) são "elaborados pelo Governo (e, dentro deste, pelo *Cabinet*) e objecto de aprovação, sem discussão, em reuniões que demoram escassos minutos e que têm um *quorum* mínimo de três membros"[15]. Acresce que, também neste caso, como é óbvio, a decisão do monarca tem de ser tomada com base no aconselhamento do Primeiro-Ministro, o que transfere para este a integral responsabilidade pela mesma.

O Governo negou que a *prorogation* visasse evitar o escrutínio do Parlamento sobre o *Brexit*, destinando-se, antes, a preparar adequadamente o programa legislativo a ser apresentado no *Queens's Speech*. Mas a verdade é que, em 28 de Agosto de 2019, propôs ao *Privy Council* a edição de uma *Order in Council*, estabelecendo que o final da sessão legislativa deveria ter lugar entre os dias 9 e 12 de Setembro, retomando o Parlamento os seus trabalhos em 14 de Outubro – uma duração muitíssimo mais longa do que o habitual. A proposta mereceu o assentimento do monarca, após aconselhamento nesse sentido do Primeiro-Ministro e, em concreto, os trabalhos parlamentares foram encerrados no dia 10 de Setembro.

Para além da ampla contestação política que mereceu, a decisão de *prorogation* foi objecto, também, de duas impugnações judiciais.

Assim, ainda antes da sua adopção, em finais de Julho de 2019, Joanna Cherry, liderando um grupo que envolvia, entre outros, mais de setenta deputados, intentou uma acção numa das câmaras do Tribunal Superior da Escócia (*The Court of Session*), visando obter, antecipadamente, uma decisão que declarasse inconstitucional uma *prorogation* cujo desiderato fosse eludir o escrutínio parlamentar sobre o *Brexit*. Num primeiro momento, aquele considerou que a matéria escapava à competência dos tribunais. Mas, interposto recurso, um painel de quatro juízes do mesmo tribunal declarou ilegal a *prorogation*.

Por outro lado, no final de Agosto, em momento já posterior à edição da *Order in Council,* Gina Miller apresentou, no Tribunal Superior da Inglaterra e de Gales (*High Court of England and Wales*), um pedido urgente para apreciação do exercício dos poderes que a *prorogation* traduziu. Em 6 de Setembro, o tribunal considerou tratar-se de matéria não passível de apreciação judicial.

Quer a decisão do tribunal escocês, quer a do tribunal de Londres, foram objecto de recurso para o Supremo Tribunal de Justiça do Reino Unido, que os apreciou conjuntamente e que, em 24 de Setembro, por unanimidade dos onze juízes, decidiu, não só que a questão podia ser apreciada pelos tribunais, como declarou a *prorogation* ilegal, nula e sem qualquer efeito.

3. O conteúdo essencial do aresto

No âmbito dos recursos em apreciação, duas questões fundamentais

11 Entre nós, a figura da suspensão também existe, desde que resulte de deliberação da própria Assembleia da República, por maioria de dois terços dos Deputados presentes (n.º 2 do artigo 174.º, da Constituição, *in fine*).

12 Repetimos aqui quanto se escreveu em José de Matos Correia e Ricardo Leite Pinto, *Lições de Ciência Política e Direito Constitucional (Eleições, Referendo, Partidos Políticos e Sistemas Constitucionais Comparados)*, Lisboa, Univeridade Lusíada Editora, 2018, pp. 193/4.

13 José de Matos Correia e Ricardo Leite Pinto, *Op. cit.*, p. 175.

14 *Op. cit.*, p. 178.

15 *Idem*. Note-se que a decisão de *prorogation* aqui em análise foi tomada, precisamente, com a presença de apenas três membros do *Privy Council*, todos membros do *Cabinet*: o *Lord President of the Privy Council and Leader of the House of Commons*, a *Leader of the House of Lords* e o *Chief Whip*.

se colocavam: a admissibilidade da apreciação jurisdicional do aconselhamento do Primeiro-Ministro (ou, como se diria entre nós, a sua sindicabilidade) e a legalidade do mesmo. E, como resulta do texto do próprio aresto, o Supremo Tribunal identificou, nesse contexto, a necessidade de dar resposta sequencial a quatro perguntas (ponto 27):

a) O conselho dado à Rainha pelo Primeiro-Ministro é matéria que pode ser objecto de conhecimento pelos tribunais?
b) Em caso de resposta afirmativa à questão anterior, com base em que critério pode a sua legalidade ser apreciada?
c) Por aplicação desse critério, tal aconselhamento foi legal?
d) Se o aconselhamento não foi legal, que solução deve o tribunal estabelecer?

No que toca à primeira questão, a resposta do Supremo Tribunal foi afirmativa. Com efeito, no seu entendimento há séculos que os tribunais têm exercido a sua jurisdição em matéria de supervisão sobre a legalidade de actos do Governo. Nas suas palavras, "pelo menos desde 1611[16], que o tribunal sustentou que o Rei (que era, então, o Governo) só tem a *prerogative* que o direito do reino lhe permita".

Não obstante, o Supremo Tribunal reconheceu a necessidade de, ao considerar os poderes integrantes da *royal prerogative*, fazer a distinção entre duas questões: saber se um poder em concreto existe e que extensão apresenta; avaliar se o exercício desse poder, no âmbito dos seus limites, pode ser legalmente contestado. E concluiu, em termos gerais, que "não há qualquer dúvida de que os tribunais têm jurisdição para decidir sobre a existência e os limites de um poder integrante da *royal prerogative"*.

Debruçando-se sobre a segunda interrogação, o Supremo Tribunal considerou que, inexistindo regras expressas sobre o exercício da *prorogation*, os limites a tal poder derivam de dois princípios constitucionais fundamentais – o princípio da soberania do Parlamento e o princípio da responsabilidade política.

Nos termos do primeiro, cabe ao Parlamento fazer leis a que todos devem obediência. E, naturalmente, tal poder seria colocado em causa se ao Executivo fosse permitido, através do uso da *prerogative*, impedir o Parlamento de o exercer, aprovando as leis que entender, quando o entender.

Já de acordo com o segundo, considerou o tribunal que a condução do Governo por um Primeiro-Ministro e um *Cabinet* colectivamente responsável (e responsabilizável) perante o Parlamento, encontra-se no centro da democracia de Westminter. Ocorre que, "quanto maior for a duração da *prorogation,* maior é o risco de que um Governo politicamente responsável seja substituído por um Governo que não preste contas: a antítese do modelo democrático".

Com base na leitura que fez das implicações dos dois princípios, o tribunal delineou uma orientação que lhe permitiu estabelecer, "in casu", um limite relevante ao *prerogative power* em causa: "a decisão de *prorogation* (ou o aconselhamento dado ao monarca nesse sentido) será ilegal se o seu efeito for o de frustar ou impedir, sem justificação razoável, a capacidade do Parlamento de exercer as suas funções constitucionais, enquanto órgão legislativo e entidade responsável pela supervisão do Executivo".

Avançando, então, para a terceira pergunta, sublinhou o tribunal que a "decisão de aconselhar Sua Majestade a decidir pela *prorogation* foi ilegal, precisamente porque teve como efeito frustrar ou impedir, sem justificação razoável, a possibilidade de o Parlamento desempenhar as suas funções constitucionais".

Tal entendimento baseou-se, no essencial, em dois argumentos. Por um lado, não se tratou de uma normal *prorogation*, que tradicionalmente dura apenas alguns dias, mas de algo que bloqueou o funcionamento do Parlamento durante cinco das oito semanas até ao dia 31 de Outubro, impedindo-o, objectivamente, de decidir acerca de uma fundamental mudança na Constituição que ocorreria naquela data – o *Brexit*. Por outro, o Governo foi incapaz de explicar a necessidade de uma paragem tão prolongada, quando o tempo normal de preparação do *Queen's Speech* varia, habitualmente, entre quatro e seis dias.

Por último, acerca do quarto tema, o Supremo Tribunal foi demolidor: se o aconselhamento dado pelo Primeiro-Ministro ao monarca foi ilegal, nulo e de nenhum efeito, a *Order in Council* a que conduziu é também ilegal, nula e de nenhum efeito, pelo que deve ser anulada.

O tribunal utiliza, de resto, uma expressão especialmente impressiva a este respeito: "Quando os *Royal Commissioners*[17] entraram na Câmara dos Lordes, foi como se tivessem entrado com uma folha de papel em branco".

Ora, se o aconselhamento ao monarca foi nulo e se a *prorogation* foi, consequentemente, nula e de nenhum efeito, o Parlamento não foi objecto de *prorogation,* pelo que caberia ao *Speaker*[18] e ao *Lord Speaker*[19], decidir como agir, tomando as medidas necessárias para permitir que cada uma das câmaras pudesse reunir-se tão cedo quanto possível.

Sumariado o aresto, e antes de passar à apreciação de alguns dos pontos centrais que suscita, não resistimos a deixar aqui duas pequenas notas que, ainda que laterais, merecem, a nosso ver, referência autónoma.

A primeira prende-se com a dimensão do texto: tendo que se pronunciar sobre questões extremamente delicadas - como a apreciação judicial de questões com relevância política e o alcance de alguns princípios constitucionais -, cujas implicações sempre seriam enormes no domínio jurídico e no plano público, o tribunal foi linear e cristalino: o texto que tornou público resumia-se a vinte e quatro páginas, das quais oito foram dedicadas a sumariar o procedimento e as razões da sua intervenção no processo. Páginas preenchidas, de resto, com uma linguagem directa e escorreita e praticamente desprovidas de qualquer referência doutrinal, ainda que aludindo, com regularidade, a anteriores decisões judiciais, como é típico do sistema jurídico britânico.

16 No *Case of Proclamations*.

17 Os *Royal Commissioners* são membros do *Privy Council* a quem compete representar o monarca em certas funções no Parlamento, como é o caso, v. g., do anúncio da *prorogation*.

18 Presidente da Câmara dos Comuns.

19 Presidente da Câmara dos Lordes.

É caso para dizer: que diferença face aos nossos tribunais superiores, cujas decisões se prolongam, com demasiada frequência, por dezenas e dezenas de páginas (quando não centenas) e são recheadas de citações, tantas vezes inúteis ou desnecessárias!
A segunda tem que ver a importância do testemunho do antigo Primeiro-Ministro conservador John Major (prestado presencialmente e depois aditado por escrito), que recorreu à sua longa experiência, no Governo e no Parlamento, para apontar, sem qualquer dúvida, a ilegalidade da *prorogation*. Um testemunho que o Supremo Tribunal valorou significativamente, em especial quanto à questão do tempo necessário para preparar o *Queen's Speech* (argumento central a que o Governo recorreu, como vimos, para justiticar a *prorogation*), ao ponto de afirmar (ponto 59) que o testemunho "de Sir John evidencia que nunca teve conhecimento de um Governo que necessitasse de cinco semanas para organizar a sua agenda legislativa".

4. Algumas reflexões sobre o teor do acórdão

Sem surpresa, para além do natural debate político, o acórdão veio suscitar também, como antes se disse, uma acesa controvérsia no plano doutrinal. E dizemos sem surpresa, não tanto pelas consequências que trouxe ao processo de saída do Reino Unido da União Europeia mas, sobretudo, pela natureza dos temas que abordou, alguns deles situados no sempre delicado contorno da fronteira entre a política e o direito.
Para uns, a decisão do Supremo Tribunal é perfeitamente ajustada e, até, expectável, reafirmando princípios constitucionais de há muito estabelecidos e contribuiu mesmo para uma melhor delimitação do seu teor e das suas implicações[20]. Para outros, nos antípodas dessa posição, o aresto constitui um grave erro, traduzindo uma inadequada interpretação do texto constitucional e uma inaceitável e infundada intromissão no domínio das questões políticas[21].
Neste breve comentário, não é nossa intenção proceder a um escrutínio alargado dos termos do acórdão, exercício que nos levaria, seguramente, muito longe, tamanha é, a nosso ver, a sua importância. Daí que tenhamos identificados dois aspectos a que restringiremos a nossa análise sequencial: o problema da competência judicial para apreciar a decisão de *prorogation* e a (re)leitura que nele se contém do princípio da soberania do Parlamento.

4.1. Royal prerogative e poder judicial

Afigura-se-nos que a adequada compreensão do alcance da decisão do Supremo Tribunal justifica que comecemos por retomar o tema da natureza e âmbito da *royal prerogative* (ou dos *prerogative powers*) Na definição clássica de Albert Dicey, trata-se "da porção remanescente da autoridade original da Coroa e, consequentemente, o nome dado ao que resta do poder discricionário deixado, num determinado momento, nas mãos da Coroa, quer tal poder seja exercido pelo próprio Rei, quer pelos seus ministros"[22]. Ou, na terminologia mais recente de John Alder, em causa está um moderno "resquício dos poderes e direitos especiais conferidos ao monarca pela *common law* medieval"[23].
Historicamente, em causa esteve, portanto, um conjunto muito amplo de competências pessoais do monarca (relevando, tanto quanto a comparação é possível, daquilo que entre nós se chamaria poder executivo), que este exercia de forma absoluta ou até arbitrária, quer por não estarem subordinadas ou serem regidas por leis parlamentares, quer por não poderem ser objecto de controlo judicial, quer ainda porque, inexistindo a figura da responsabilidade política do monarca, nenhuma consequência negativa lhe adviria da prática de actos nela fundados.
A evolução do sistema político-constitucional conduziu, como já vimos, a que o exercício da *royal prerogative* se transferisse materialmente para o Primeiro-Ministro, por via da obrigatoriedade de o monarca agir de acordo com o aconselhamento por aquele prestado. E, se bem que o progressivo reforço da *rule of law* tenha conduzido a uma crescente limitação do seu âmbito, por via de actos do Parlamento (como a *Bill of Rights* de 1689 e o *Triennal Act* de 1694 ou, mais recentemente, o já referido *Fixed- term Parliament Act* de 2011), a natureza inequivocamente política de uma vasta panóplia de *prerogative powers* continuou a constituir, para muitos, o fundamento para sustentar a insusceptibilidade de apreciação, pelos tribunais, dos actos em que se traduziam.
O tema não é, evidentemente, exclusivo do Reino Unido, configurando-se, de resto, como um dos mais sensíveis no âmbito do direito público. E é central na delimitação concreta dos contornos da separação de poderes, porquanto os actos políticos[24], ou seja, aqueles que são praticados no exercício da correspondente função estadual, tra-

20 Ver Mark 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/*, Alex Powell, "Miller/Cherry and the Justiciability of Prerogative Powers", *https://trinitycollegelawreview.org/miller-cherry-and-the-justiciability-of-prerogative-powers/*, Paul Daly, "Some Qualms about R (Miller) v Prime Minister (2019) UKSC 41", https://www.administrativelawmatters.com/blog/2019/09/24/some-qualms-about-r-miller-v-prime-minister-2019-uksc-41/, Byron Shaw, Awi Sinha e Emily Leduc-Gagne, "The New Constitution: UK Supreme Court Intervenes in Brexit Debate), https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/new-constitution-uk-supreme-court-intervenes-brexit-debate e John Stanton, "R (Miller) v The Prime Minister and the resumption of the Brexit debates", *https://blogs.lse.ac.uk/politicsandpolicy/r-miller-v-prime-minister-2019/*.

21 Ver Hayley J. Hooper, "Keeping the Lights On: Contrasting Miller v Prime Minister and Cherry v The Advocate General", *https://ukconstitutionallaw.org/2019/09/16/hayley-j-hooper-keeping-the-lights-on-contrasting-miller-v-prime-minister-and-cherry-v-the-advocate-general/*, John Finis, "The unconstitutionality of the Supreme Court's prorogation judgement", *https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf* e Richard Ekins e Stephen Laws, "The Supreme Court has done lasting damage to our constitution", *https://www.prospectmagazine.co.uk/politics/the-supreme-court-has-done-lasting-damage-to-our-constitution-prorogation-law.*

22 *Introduction to the Study of the Law of the Constitution*, Londres, 1885, p. 414.

23 *Constitutional and Administrative Law,* Palmgrave MacMillan, 8.ª edição, 2011, p. 309.

24 Sobre o tema pode ver-se, entre muitos outros, Cristina Queiroz, *Os Actos Políticos no Estado de Direito (O Problema do Controle Jurídico do Poder)*, Coimbra, Almedina, 1990 ou Marco Caldeira, *Actos Políticos, Direitos Fundamentais e Constituição*, Lisboa, AAFDL, 2014.

duzem uma "definição primária do interesse público, a interpretação axiológica dos fins do Estado, a escolha dos meios adequados para os atingir em face de determinadas conjunturas históricas, a opção, enfim, em cada momento, pelo que se considera serem os interesses prevalecentes da colectividade"[25]. Tarefas que, como é óbvio, só podem estar cometidas a órgãos de natureza política e fora da alçada de apreciação do poder judicial.

É precisamente por isso que, entre nós, a alínea a) do n.º 3 do artigo 4.º do Estatuto dos Tribunais Administrativos e Fiscais exclui do âmbito da sua jurisdição os actos praticados no exercício da função política (e também da função legislativa, enquanto expressão normativa, que são, de prévias opções políticas). E que, igualmente, o Tribunal Constitucional tem sustentado, de modo sistemático, não estarem tais actos sujeitos a controlo jurisdicional da constitucionalidade"[26].

Fácil de enunciar em termos conceptuais gerais, o tema é bem mais complexo quando se trata da categorização concreta de cada acto "de per se". Uma coisa se nos afigura, contudo, indiscutível neste contexto: está fora – ou melhor dizendo, tem de estar fora - da órbita do poder judicial a avaliação do acerto, da adequação ou da motivação de um acto político.

Existe, portanto, um irredutível núcleo de discricionariedade política, que não pode ser objecto de avaliação, ou sequer, de conhecimento, por parte dos tribunais. E, sublinhe-se, é apenas a essa natureza política que o explica, pois que a discricionariedade administrativa já não foge a tal apreciação, nomeadamente quando em causa está compreender se um determinado acto se encontra ferido de desvio de poder, isto é, se se regista uma discordância entre o fim a cuja prossecução a Administração se encontra legalmente vinculada e o fim especificamente prosseguido pelo mesmo.

Se tais aspectos estão fora da órbita de decisão do poder judicial, já não elude a sua competência – independentemente da questão de saber qual ou quais os tribunais que o podem fazer – a apreciação da sua validade jurídico-legal, seja por comparação com as regras a que a sua prolação há-de obedecer, seja pela compreensão dos limites à sua prática que decorrem dos princípios, "maxime" os constitucionais.

Exemplificando, com recurso a exemplos da nossa ordem constitucional: se a motivação ou o acerto do acto presidencial de dissolução da Asembleia da República não pode ser avaliado judicialmente, o mesmo já não se poderá dizer da prática de tal acto em desconformidade com o n.º 1 do artigo 172.º da Constituição, por ocorrer nos seis meses posteriores à eleição daquela, no último semestre do mandato do Presidente da República ou na vigência do Estado de Sítio ou do Estado de Emergência; se a decisão parlamentar de demissão do Governo por via da aprovação de uma moção de censura não pode, em si mesma, ser contenciosamente contestada, tal interdição não deve valer se os Deputados dela proponentes já tinham visto iniciativa similar sido rejeitada no decurso da mesma sessão legislativa (n.º 3 do artigo 194.º da Constituição).

Diferentemente, porém, não poderão os tribunais, por exemplo, apreciar a adequação do acto do Presidente da República de nomeação do Primeiro-Ministro à orientação jusfundamental que lhe impõe que tenha em conta os resultados eleitorais (n.º 1 do artigo 187.º da Constituição) ou avaliar se se encontra preenchido o requisito da necessidade de assegurar o regular funcionamento das instituições democráticas como pressuposto para a demissão do Governo (n.º 2 do artigo 195.º da Constituição).

Mas se, como se disse, pelas implicações que suscita o tema é sempre complexo, no âmbito do constitucionalismo britânico a questão revestiu-se, tradicionalmente, de ainda maior sensibilidade, fruto do peso do legado histórico. Por força disso, inicialmente, e durante largo tempo, os tribunais locais entenderam que lhes cabia decidir da existência de um *prerogative power*, mas não dos termos e condições do seu exercício, isto é, que lhes não competia apurar dos limites a tal poder, precisamente por força da sua natureza política.

Progressivamente, porém, essa leitura foi evoluindo. E, mais recentemente, essa atitude mudou, como o demonstra bem, aliás, o acórdão em análise. Na verdade, como antes se referiu também, o Supremo Tribunal não hesitou em afirmar a sua competência (e a dos demais tribunais), não só para decidir da existência de um *prerogative power*, como igualmente dos limites do mesmo, o que fez nos seguintes termos: "Encontra-se bem estabelecido (…), que os tribunais podem decidir acerca da extensão dos *prerogative powers*. E é isso que o tribunal fará no presente caso, aplicando o padrão legal de apreciação que enunciou. Tal padrão não se interessa com o modo de exercício do *prerogative power* dentro dos seus limites legais. Pelo contrário, é um padrão que determina os limites desse poder, traçando a fronteira entre esse poder, por um lado, e a operacionalização dos princípios constitucionais da soberania do Parlamento e da responsabilidade governamental, por outro lado. E uma questão que pode ser resolvida por aplicação desse padrão é, por definição, algo que respeita à extensão do poder de *prorogation* e, consequentemente, passível de apreciação pelos tribunais".

O tribunal não fugiu, porém – nem poderia fazê-lo, porque foi um dos principais argumentos invocados pelo Governo –, à questão da insusceptibilidade de apreciação de questões políticas, clarificando, nos seguintes termos, o seu entendimento: "Embora os tribunais não possam decidir questões políticas, o facto de uma disputa legal respeitar à conduta de políticos ou derivar de uma questão politicamente controversa, não tem sido razão suficiente para que os tribunais recusem considerá-la. (…) Quase todas as decisões importantes tomadas pelo Executivo têm um matiz político. Contudo, os tribunais têm exercido, ao longo dos séculos, uma jurisdição de supervisão sobre elas. Muitas, senão a maioria das decisões constitucionais da nossa história legal, respeitaram à política nesse sentido".

Partindo daí, o Supremo Tribunal chega rapidamente a uma conclusão central: os *prerrogative powers* – no caso concreto, o poder de *prorogation* e o aconselhamento do Primeiro-Ministro que a ele conduziu – não são absolutos nem discricionários, mas são balizados por

25 José de Matos Correia e Ricardo Leite Pinto, *Lições de Ciência Política e Direito Constitucional (Teoria Geral do Estado e Formas de Governo)*, Lisboa, Universidade Lusíada Editora, 2020, p. 204.

26 Ver, por exemplo, o Acórdão n.º 145/94.

limites, que decorrem da obrigatoriedade do seu exercício em concordância com a *common law*, as leis e os princípios constitucionais com os quais não podem entrar em contradição.

Note-se, no entanto, que a orientação interpretativa traçada não é aplicável ao exercício de todo e qualquer *prerogative power*. Com efeito, ainda que sem entrar em detalhes, que a natureza da causa sob escrutínio não exigia, o acórdão não deixa de notar "que alguns poderes podem ser submetidos a apreciação judicial, enquanto outros não", em obediência à ideia, largamente firmada no Reino Unido, que não têm os tribunais competência para se intrometer nas chamadas questões de *high politics*.

Consciente, igualmente, da sensibilidade do tema que tinha em mãos, o tribunal fez questão de deixar bem claro que a sua decisão não se baseava numa apreciação das razões subjectivas que conduziram à *prorogation*, não curando de averiguar, portanto, se eram ilegais os propósitos ou a motivação do aconselhamento do Primeiro-Ministro. O que importava, antes, era levar a cabo uma avaliação objectiva, que permitisse concluir pela existência, ou não, de justificações razoáveis para aquela *prorogation,* que apresentava contornos muito distintos das que anualmente tem lugar.

Ou seja: prudentemente, o Supremo Tribunal não coloca de parte a hipótese de a *prorogation* não ter de apresentar sempre uma duração temporal semelhante ou poder ser decidida em momentos diferentes. O que exige é que o último responsável por ela, que é o Primeiro-Ministro, fundamente adequadamente a fuga ao padrão normal (se não mesmo permanente).

Nessa medida, o tribunal transfere o ónus da prova para o Primeiro-Ministro, dele isentando aqueles que intentaram as acções que conduziram à intervenção do Supremo Tribunal. Assim, era a ele que cabia explicar, de forma circunstanciada e coerente, os motivos para uma *prorogation* "anormal", que impedia o Parlamento de exercer as suas funções por um período prolongado (muito mais extenso do que o habitual), coincidente, para além do mais, com um momento, como o do *Brexit,* que conduziria a alterações fundamentais na ordem constitucional do país.

Ora, "não tendo sido presente ao tribunal qualquer justificação para uma acção com um efeito tão extremo", o tribunal é "forçado a concluir, em consequência, que a decisão de aconselhar Sua Majestade a decidir a *prorogation* foi ilegal, porque teve o efeito de frustrar ou prevenir, sem justificação razoável, a capacidade do Parlamento de levar a cabo as suas funções constitucionais".

Como sublinha Mark Elliott, "a questão não é se o tema releva de circunstâncias que são políticas por natureza – se esse fosse o teste, poucas, se alguma, decisão política, poderia ser submetida a apreciação judicial. Em vez disso, o problema é saber se o assunto se reconduz a uma questão *legal*, quaisquer que sejam as implicações *políticas* que possa ter. Tendo estabelecido estes pressupostos básicos, o tribunal concluiu que o assunto era, de facto, de índole legal e, como tal, não poderia deixar de ser apreciado, uma vez que as questões legais são, *por excelência,* assuntos para os tribunais"[27].

Afigura-se-nos, assim, que, no essencial, o entendimento do tribunal sobre a sua competência para apreciar a questão colocada não foge à orientação tradicional, embora apresente, aqui e ali, alguns aspectos inovadores, como no que toca à referida dimensão da necessidade de justificação densificada do exercício do poder de *prorogation,* no contexto das regras e princípios constitucionais que o limitam.

Nessa medida, revemo-nos na leitura de Alex Powell, quando afirma que "a aproximação do tribunal à questão da apreciação judicial, longe de representar uma invasão do domínio político, constitui um poder adequado do tribunal. Tal apreciação é permitida, porque a adopção, pelos tribunais, desse papel, é uma característica necessária de uma sociedade governada pela *rule of law*. Em linha com os oito princípios de Tom Bingham, "questões de direito legal devem normalmente ser resolvidas por aplicação da lei e não pelo exercício da discricionariedade. Daí que, quando os tribunais definem se um determinado *prerogative power* existe, ou não, e que extensão apresenta, estão a agir de acordo com a *rule of law*"[28].

4.2. A (re)leitura do princípio da soberania do Parlamento

Como se notou acima, o primeiro argumento utilizado pelo Supremo Tribunal para decidir pela ilegalidade do aconselhamento do Primeiro-Ministro que conduziu à *prorogation,* foi a violação do princípio da soberania do Parlamento[29], o qual seria posto em causa se ao poder executivo fosse autorizado, através da utilização daquele instituto, impedir que o Parlamento pudesse, nas circunstâncias em que o entenda, fazer leis. E a posição que assumiu, bem como as razões em que assentou, contribuem, a nosso ver, como adiante se irá referir, para o reforço da posição do Parlamento e da sua centralidade no âmbito do sistema político britânico. Por isso utilizamos a expressão (re)leitura do princípio.

Justifica-se, nessa medida, começar por deixar aqui algumas notas sobre o conteúdo daquele princípio. Ora, se[30] fosse possível reduzir a dois conceitos as características do modelo constitucional do Reino Unido, eles seriam, por um lado, o princípio do *rule of law* e, por outro, precisamente o princípio da soberania do Parlamento. Em 1771, numa obra denominada *Constitution de l'Angleterre,* Jean-Louis de Lolme, um filósofo e pensador político, nascido suíço e mais tarde naturalizado inglês, descreve esta segunda dimensão, de resto criticamente, através de uma frase que se tornou célebre: "in England, Parliament can do everything but make a woman a man and a man a woman".

A soberania do Parlamento traduz-se, antes do mais, na ideia de que

27 "The Supreme Court's judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?", p. 5.

28 "Miller/Cherry and the Justiciability of Prerogative Powers", p. 9. A referência a Tom Bingham respeita à obra *The Rule of Law*, Londres, Penguin Books, 2011.

29 Autores há, como John Alder, que privilegiam a expressão "princípio da supremacia do Parlamento" (*Op. cit.*, p. 160 e seguintes).

30 Neste parágrafo, e no seguinte, retomamos quanto se escreveu em José de Matos Correia e Ricardo Leite Pinto, *Lições de Ciência Política e Direito Constitucional (Eleições, Referendo, Partidos Políticos e Sistemas Constitucionais Comparados)*, pp. 190-191.

lhe cabe a autoridade legal suprema do Reino Unido, o que significa que não está vinculado ao respeito pela permanência das leis vigentes, "maxime" as de nível constitucional, pela simples razão de que as pode a todo o momento alterar, sem que se encontre condicionado por quaisquer especiais exigências, nem sequer por qualquer prévia decisão sua. Mas revela-se, ainda, no facto de as decisões legislativas dele emanadas se imporem aos restantes ramos do poder público, incluindo aos tribunais, que as não podem questionar. Como indicam Richard Clemens e Philip Jones, "é virtualmente impossível imaginar qualquer circunstância em que os tribunais do Reino Unido se recusassem a aceitar a validade de um *Act of Parliament* adequadamente aprovado e redigido"[31].

De resto, muito recentemente, no n.º 1 do artigo 38.º do *European Union (Withdrawal Agreement Act)* foi incluída uma norma estatuindo que "fica reconhecido que o Parlamento do Reino Unido é soberano". E, embora tal atitude não possa, na nossa perspectiva, deixar de ser encarada à luz das circunstâncias atribuladas a que o *Brexit* obedeceu, ela não é – longe disso – juridicamente irrelevante.

Na tentativa de densificação do conteúdo deste princípio, a jurisprudência e a doutrina têm sistematicamente entendido que ele envolve, assim, uma tripla dimensão:

- O Parlamento pode aprovar ou revogar qualquer lei sobre qualquer matéria;
- Os *Acts of Parliament* têm de ser respeitados pelos tribunais, que os não podem desaplicar (embora lhes caiba a tarefa de interpretar e aplicar as normas deles constantes);
- Uma lei aprovada por um determinado Parlamento não vincula os seguintes Parlamentos, que a podem modificar ou alterar a todo o momento[32].

Como é sabido, o período compreendido entre o início do século XVII e a *Glorious Revolution* (1688-89) foi marcado, precisamente, pelo conflito entre os defensores do absolutismo (isto é, do princípio da soberania do monarca) e os adeptos da supremacia do Parlamento, culminando com o triunfo dos segundos, simbolizado numa série de importantes *Acts of Parliament*, como a *Bill of Rights* (1689), o *Tolerance Act* (1689), o *Triennal Act* (1694) e o *Act of Settlement* (1701), que, em conjunto, determinaram mudanças constitucionais de primeira grandeza, habitualmente designadas por *Revolutionary Settlement*.

Ora, como o Supremo Tribunal faz questão de sublinhar, desde essa época que "os tribunais protegeram a soberania do Parlamento face a ameaças com que se confrontou, decorrentes da utilização dos *prerogative powers* e, ao fazê-lo, demonstraram que os *prerogative powers* são limitados pelo princípio da soberania parlamentar".

Na sua decisão, o tribunal não pôs em causa, evidentemente, a existência do poder de *prorogation*. Nem poderia tê-lo feito, uma vez que, nascido da *common law,* a figura consta hoje, como já se notou, do n.º 1 do artigo 6.º do *Fixed-term Parliament Act 2011*.

E reconheceu, até, "que a vontade do Primeiro-Ministro de por fim a uma sessão legislativa e de recomeçar normalmente outra, será normalmente razão suficiente para, só por si, justificar o curto período de *prorogation* que tem sido normal na prática moderna".

Além disso, recordou que "tinha de ter em conta que a decisão de aconselhar o monarca a decidir a *prorogation* está situada na área de responsabilidade do Primeiro-Ministro e pode, em certas circunstâncias, envolver um espectro de considerações, incluindo matérias de juízo político". Mas, ainda assim, reconheceu ser "sua responsabilidade determinar se o Primeiro-Ministro se manteve dentro dos limites legais desse poder".

Há uma passagem do acórdão (ponto 60), que é especialmente impressiva: "em nenhum dos documentos juntos ao processo existe qualquer sugestão de que o Primeiro-Ministro, ao aconselhar Sua Majestade, foi mais do que simplesmente o líder de um Governo que procura promover as suas próprias políticas". Só que, ao recorrer à *prorogation,* sobre ele recai "uma responsabilidade constitucional - por ser o único que o pode fazer -, de ter em conta todos os interesses relevantes, incluindo os interesses do Parlamento".

E daí que – já o dissemos antes, também –, ao concluir pela inexistência de qualquer razão fundada para aconselhar uma *prorogation* com características abissalmente diversas de quanto normalmente ocorre, o acto do Primeiro-Ministro tem de ser considerado ilegal, por afectar, objectivamente, as condições de o Parlamento desepenhar as suas responsabilidades constitucionais.

Aqui chegados, importa então elencar os motivos pelos quais se nos afigura que este acórdão trás (alguma) nova luz à leitura do princípio da soberania do Parlamento.

O primeiro aspecto que, quanto a nós, merece ser sublinhado, tem que ver com o reconhecimento da necessidade de estabelecer limites sólidos ao exercício do poder de *prorogation*. E, também aqui, a linha de raciocínio do Supremo Tribunal é muito sólida: se o Primeiro-Ministro pudesse livremente decidir por termo a uma sessão legislativa, o princípio da soberania parlamentar seria colocado em crise[33]. Com efeito, por essa via o poder executivo estaria habilitado, sempre que isso lhe fosse conveniente, a obstaculizar o exercício dos poderes do Parlamento, quer em termos das suas funções legislativas, quer também no que respeita às suas competências de controlo político. De facto, não podemos esquecer que, no Reino Unido, os Deputados não são ouvidos, sequer, a propósito da decisão de *prorogation*, pelo que a impossibilidade de levar a cabo as suas tarefas constitucionais fica sempre nas mãos daquele que pode ser o principal interessado

31 *Public Law,* Oxford, Oxford University Press, 2012, p. 85. Sobre o tema pode ver-se, ainda, Mark Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention", in *Legal Studies*, volume 22, n.º 3 (Setembro 2002), pp. 340-375 e Anthony Bradley, "The Sovereignty of Parliament – form or substance?", in J. Jowell e D. Oliver (editores), *The Changing Constitution*, Oxford, Oxford University Press, 6.ª edição, 2007, pp. 25-58.

32 É importante referir, contudo, que, como é, aliás, natural, a concepção da soberania parlamentar tem vindo, cada vez mais, a ser objecto de crítica de alguma doutrina (e até no debate político), invocando, v. g., as consequências da pertença à União Europeia (argumento que agora cai, evidentemente), o respeito pela *rule of law* ou a insusceptibilidade de revogar certas leis de valor constitucional. Trata-se, ainda assim, de uma tendência largamente minoritária.

33 No mesmo sentido, ver Mark Elliott, "The Supreme Court's judgment in Cherry/Miller (No 2): A new approach to constitutional adjudication?", p. 11.

nesse "status quo" – o Governo. E, insistimos, está fora da autoridade do Parlamento impedir essa situação ou por-lhe fim.
No limite do absurdo, o Parlamento poderia estar em actividade, apenas, quando isso não fosse inconveniente para o Governo. É que, se a este fosse permitido recorrer à *prorogation*, não pelo período normal que a prática moderna consolidou, mas com a duração temporal que entendesse, fosse ela de cinco, doze, quinze, vinte semanas, ou até mais, não haveria como não concluir que a soberania parlamentar seria – ou poderia ser –, gravemente questionada. E o mesmo sucederia se o recurso à *prorogation* fosse usado pelo Governo cirurgicamente, sempre que lhe fosse politicamente conveniente.
Dir-se-á: estando em presença da mais antiga e mais sólida democracia do mundo, esse risco é absurdo. O ponto não é, porém, esse. A questão não pode ser colocada numa lógica de practicidade, mas antes no domínio dos princípios, em ordem a prevenir o recurso arbitrário, ou politicamente selectivo, à *prorogation*.
Dito de outra forma: a situação no Reino Unido é paradoxal. A soberania é do Parlamento. Mas, na inexistência de limites, expressos ou implícitos, ao poder de *prorogation,* aquele correria o risco de ficar nas mãos do Executivo, impedido de assumir as suas responsabilidades constitucionais, contradizendo, precisamente, aquela posição de supremacia.
Julgamos ser possível inferir, do teor de algumas passagens do acórdão, que os termos em que habitualmente a *prorogation* ocorre – cerca de uma semana ou menos – podem ser considerados como uma *constitutional convention*. E que o afastamento dessa linha, não estando, evidentemente, vedado ao poder executivo – até por força da natureza daquela fonte –, é motivo suficiente para obrigar este a avançar com uma justificação razoável que explique, adequadamente, o porquê de tal desvio, sempre e quando este possa afectar o princípio da soberania parlamentar.
E isto permite-nos, precisamente, passar para aquela que nos parece ser a segunda dimensão inovatória da decisão: o facto de, como também se relatou anteriormente, o tribunal ter imposto uma inversão do ónus da prova – não cabe a quem impugna o exercício do *prerogative power* que se afaste dos termos da sua prática habitual e, por essa razão, contradite princípios constitucionais, demonstrá-lo, mas a quem é responsável pelo acto – ou seja, o Primeiro-Ministro – explicitar os motivos da sua decisão.
Consideramos que, também aqui, assiste razão ao Supremo Tribunal. É que, como refere Paul Daly, "a decisão de impor um ónus de justificação ao Primeiro-Ministro (..) é consistente com as mais vastas tendências do direito público do Reino Unido de eliminação progressiva da *prerogative* e com o crescimento de uma cultura de justificação no direito público da Commonwealth"[34]. E, a esse propósito, convém não esquecer que, em 2011, a *royal prerogative* foi, pura e simplesmente, amputada do seu poder mais relevante – o de livremente decidir o momento da dissolução da Câmara dos Comuns.
Aliás, não seria, sequer, surpreendente, nessa lógica, que a *prorogation* tivesse sido suprimida, reconduzindo o Parlamento local ao princípio geral da auto-organização das assembleias legislativas, que é timbre da generalidade dos constitucionalismos modernos. Mas já que, legitimamente, se não optou por essa solução, tem plena justificação que se submeta o exercício desse poder, ao menos em certas circunstâncias, a um dever especial de fundamentação.
Por último – e esse pode vir a ser, até, o contributo mais marcante da decisão -, o Supremo Tribunal parece apontar para uma leitura mais lata do âmbito do princípio da soberania parlamentar que vai, precisamente, no sentido que acabámos de apontar - uma contracção crescente do instituto da *prorogation* e, consequentemente, um reforço da autonomia do Parlamento face ao poder executivo.
É que, como sublinha Alex Powell, "o tribunal endossa uma visão sobre a soberania que titula o Parlamento a reunir, para exercer as suas funções legislativas, sem ser impedido pelo Executivo. (…) Com efeito, a soberania parlamentar é convertida, de reflexo do seu poder legislativo, num princípio geral, que implica que o Parlamento tem o direito de se reunir"[35].
Em suma: o acórdão em análise, não só é consistente com a evolução que a ordem jurídica do Reino Unido tem vindo a registar, como traz, até, novos e importantes contributos a essa evolução, ao mesmo tempo que reforça o papel dos tribunais na interpretação e aplicação da sua Constituição.E, consequentemente, andou bem o Supremo Tribunal ao prolatá-lo.

34 "Some Qualms about R (Miller) v Prime Minister (2019) UKSC 41", p. 3.

35 "Miller/Cherry and the Justiciability of Prerogative Powers", p. 13.

Texto integral do Acórdão

LADY HALE AND LORD REED giving the judgment of the court:

1. It is important to emphasise that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union. The issue is whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful. It arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a "one off". But our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution.

What is prorogation?

2. Parliamentary sittings are normally divided into sessions, usually lasting for about a year, but sometimes less and sometimes, as with the current session, much longer. Prorogation of Parliament brings the current session to an end. The next session begins, usually a short time later, with the Queen's Speech. While Parliament is prorogued, neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers. They may not meet and take evidence in committees. In general, Bills which have not yet completed all their stages are lost and will have to start again from scratch in the next session of Parliament. In certain circumstances, individual Bills may be "carried over" into the next session and pick up where they left off. The Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits. It cannot procure the passing of Acts of Parliament or obtain Parliamentary approval for further spending.

3. Parliament does not decide when it should be prorogued. This is a prerogative power exercised by the Crown on the advice of the Privy Council. In practice, as noted in the House of Commons Library Briefing Paper (No 8589, 11th June 2019), "this process has been a formality in the UK for more than a century: the Government of the day advises the Crown to prorogue and that request is acquiesced to". In theory the monarch could attend Parliament and make the proclamation proroguing it in person, but the last monarch to do this was Queen Victoria in 1854. Under current practice, a proclamation is made by Order in Council a few days before the actual prorogation, specifying a range of days within which Parliament may be prorogued and the date on which the prorogation would end. The Lord Chancellor prepares a commission under the great seal instructing the Commissioners accordingly. On the day chosen for the prorogation, the Commissioners enter the House of Lords; the House of Commons is summoned; the command of the monarch appointing the Commission is read; and Parliament is formally prorogued.

4. Prorogation must be distinguished from the dissolution of Parliament. The dissolution of Parliament brings the current Parliament to an end. Members of the House of Commons cease to be Members of Parliament. A general election is then held to elect a new House of Commons. The Government remains in office but there are conventional constraints on what it can do during that period. These days, dissolution is usually preceded by a short period of prorogation.

5. Dissolution used also to be a prerogative power of the Crown but is now governed by the Fixed-term Parliaments Act 2011. This provides for general elections to be held every five years and for an earlier election to be held in only two circumstances: either the House of Commons votes, by a majority of at least two-thirds of the number of seats (including vacant seats) in the House, to hold an early election; or the House of Commons votes that it has no confidence in Her Majesty's Government and no-one is able to form a Government in which the House does have confidence within 14 days. Parliament is dissolved 25 days before polling day and cannot otherwise be dissolved. The Act expressly provides that it does not affect Her Majesty's power to prorogue Parliament (section 6(1)).

6. Prorogation must also be distinguished from the House adjourning or going into recess. This is decided, not by the Crown acting on the advice of the Prime Minister, but by each House passing a motion to that effect. The Houses might go into recess at different times from one another. In the House of Commons, the motion is moved by the Prime Minister. In the House of Lords, it is moved by the Lord Speaker. During a recess, the House does not sit but Parliamentary business can otherwise continue as usual. Committees may meet, written Parliamentary questions can be asked and must be answered.

The run-up to this prorogation

7. As everyone knows, a referendum was held (pursuant to the European Union Referendum Act 2015) on 23rd June 2016. The majority of those voting voted to leave the European Union. Technically, the result was not legally binding. But the Government had pledged to honour the result and it has since been treated as politically and democratically binding. Successive Governments and Parliament have acted on that basis. Immediately after the referendum, Mr David Cameron resigned as Prime Minister. Mrs Theresa May was chosen as leader

of the Conservative party and took his place.

8. The machinery for leaving the European Union is contained in article 50 of the Treaty on European Union. This provides that any member state may decide to withdraw from the Union "in accordance with its own constitutional requirements". That member state is to notify the European Council of its intention. The Union must then negotiate and conclude an agreement with that member state, "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The European Union treaties will cease to apply to that state when the withdrawal agreement comes into force or, failing that, two years after the notification unless the European Council, in agreement with the member state, unanimously decides to extend this period.

9. On 2nd October 2016, Mrs May announced her intention to give notice under article 50 before the end of March 2017. Mrs Gina Miller and others challenged her power to do so without the authority of an Act of Parliament. That challenge succeeded: R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61. Parliament responded by passing the European Union (Notification of Withdrawal) Act 2017, which received royal assent on 16th March 2017 and authorised the Prime Minister to give the notification. Mrs May did so on 29th March 2017.

10. That Parliament was dissolved on 3rd May 2017 and a general election was held on 8th June 2017. The result was that Mrs May no longer had an overall majority in the House of Commons, but she was able to form a Government because of a "confidence and supply" agreement with the Democratic Unionist Party of Northern Ireland. Negotiations for a withdrawal agreement with the European Council proceeded.

11. Meanwhile, Parliament proceeded with some of the legislative steps needed to prepare United Kingdom law for leaving the Union. The European Union (Withdrawal) Act 2018 came into force on 26th June 2018. In brief, it defined "exit day" as 29th March 2019, but this could be extended by statutory instrument (section 20). From that day, it repealed the European Communities Act 1972, the Act which had provided for our entry into what became the European Union, but it preserved much of the existing EU law as the law of the United Kingdom, with provision for exceptions and modifications to be made by delegated legislation. Crucially, section 13 requires Parliamentary approval of any withdrawal agreement reached by the Government. In summary it provides that a withdrawal agreement may only be ratified if (a) a Minister of the Crown has laid before Parliament a statement that political agreement has been reached, a copy of the negotiated withdrawal agreement and a copy of the framework for the future relationship; (b) the House of Commons has approved the withdrawal agreement and future framework; (c) the House of Lords has, in effect, taken note of them both; and (d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

12. A withdrawal agreement, setting out terms for a "smooth and orderly exit from the European Union" and a political declaration, setting out a framework for the future relationship, to be negotiated by the end of 2020, were concluded on 25th November 2018. However, the agreement was rejected three times by the House of Commons, on 15th January 2019 (by 432 to 202 votes), on 12th March 2019 (by 391 to 242 votes) and on 29th March 2019 (by 344 to 286 votes).

13. On 20th March 2019, the Prime Minister had asked the European Council to extend the notification period. This was granted only until 12th April 2019. However, on 8th April 2019, the European Union (Withdrawal) Act 2019 was passed. This required a Minister of the Crown to move a motion, that day or the next, that the House of Commons agrees to the Prime Minister seeking an extension to a specified date and, if the motion was passed, required the Prime Minister to seek that extension. Pursuant to that Act, the Prime Minister sought an extension, which on 10th April 2019 was granted until 31st October 2019. The regulation changing the "exit day" was made the next day (European Union (Withdrawal) Act 2018 (Exit Day) (Amendment No 2) Regulations 2019 (SI 2019/859)). Thus the current position, under both article 50 of the Treaty on European Union and the European Union (Withdrawal) Act 2018 is that the United Kingdom will leave the Union on 31st October 2019 whether or not there is a withdrawal agreement (but this is now subject to the European Union (Withdrawal) (No 2) Act 2019: see para 22 below).

14. Mrs May resigned as leader of the Conservative party on 7th June 2019 and stood down as Prime Minister on 24th July, after the Conservative party had chosen Mr Boris Johnson as its leader. Mr Johnson has on many occasions made it clear that he believes that the European Council will only agree to changes in the withdrawal agreement if they think

that there is a genuine risk that the United Kingdom will leave without any such agreement. He appointed Mr Michael Gove Cabinet Office Minister with a view to preparing for a "no deal" exit. Yet it was also clear that a majority of the House of Commons would not support withdrawal without an agreement.

This prorogation

15. On 28th August 2019, Mr Jacob Rees-Mogg, Lord Presi-

dent of the (Privy) Council and Leader of the House of Commons, Baroness Evans of Bowes Park, Leader of the House of Lords, and Mr Mark Spencer, Chief Whip, attended a meeting of the Privy Council held by the Queen at Balmoral Castle. An Order in Council was made ordering that "the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019" and that the Lord Chancellor "do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly". We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it.

16. We do know the contents of three documents leading up to that advice, annexed to a witness statement from Jonathan Jones, Treasury Solicitor and Head of the Government Legal Department. His evidence is that his department had made clear to all relevant departments, including the Prime Minister's Office, the requirement to make thorough searches for and to produce all information relevant to Mrs Miller's claim.

17. The first document is a Memorandum dated 15th August 2019 from Nikki da Costa, Director of Legislative Affairs in the Prime Minister's Office, to the Prime Minister and copied to seven other people, including Sir Mark Sedwill, Cabinet Secretary, and Dominic Cummings, Special Adviser. The key points made in the Memorandum are:

- This had been the longest session since records began. Because of this, they were at the very end of the legislative programme of the previous administration. Commons and Lords business managers were asking for new Bills to ensure that Parliament was using its time gainfully. But if new Bills were introduced, the session would have to continue for another four to six months, or the Bills would fall at the end of the session.
- Choosing when to end the session - ie prorogue - was a balance between "wash up" - completing the Bills which were close to Royal Assent - and "not wasting time that could be used for new measures in a fresh session". There were very few Bills suitable for "wash-up", so this pointed to bringing the session to a close in September. Asking for prorogation to commence within the period 9th to 12th September was recommended.
- To start the new session with a Queen's Speech would be achievable in the week beginning 14th October but any earlier "is extremely pressured".
- Politically, it was essential that Parliament was sitting before and after the EU Council meeting (which is scheduled for 17th - 18th October). If the Queen's Speech were on 14th October, the usual six-day debate would culminate in key votes on 21st and 22nd October. Parliament would have the opportunity to debate the Government's overall approach to Brexit in the run up to the EU Council and then vote on it once the outcome of the Council was known.
- It must be recognised that "prorogation, on its own and separate of a Queen's Speech, has been portrayed as a potential tool to prevent MPs intervening prior to the UK's departure from the EU on 31st October". The dates proposed sought to provide reassurance by ensuring that Parliament would sit for three weeks before exit and that a maximum of seven days were lost apart from the time usually set aside for the conference recess.
- The usual length of a prorogation was under ten days, though there had been longer ones. The present proposal would mean that Parliament stood prorogued for up to 34 calendar days but, given the conference recess, the number of sitting days lost would be far less than that.
- The Prime Minister ticked "Yes" to the recommendation that his PPS approach the Palace with a request for prorogation to begin within the period Monday 9th September to Thursday 12th September and for a Queen's Speech on Monday 14th October.

18. The second document is the Prime Minister's handwritten comments on the Memorandum, dated 16th August. They read:
"(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust.
(2) So I don't see anything especially shocking about this prorogation.
(3) As Nikki nots [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few."

19. The third document is another Memorandum from Nikki da Costa, dated 23rd August, again to the Prime Minister and copied to five people, including Sir Mark Sedwill and Dominic Cummings. This sets out the proposed arrangements, including a telephone call between the Prime Minister and Her Majesty at 6.00 pm on Tuesday 27th August, formally to advise prorogation, the Privy Council meeting the next day, a cabinet meeting by conference call after that, and a press notice after that. Draft remarks for the Cabinet meeting and a draft letter to MPs (approved by the Chief Whip) were annexed.

20. We also have the Minutes of the Cabinet meeting held by

conference call at 10.05 am on Wednesday 28th August, after the advice had been given. The Prime Minister explained that it was important that they were "brought up to speed" on the decisions which had been taken. It was also "important to emphasise that this decision to prorogue Parliament for a Queen's Speech was not driven by Brexit considerations: it was about pursuing an exciting and dynamic legislative programme to take forward the Government's agenda". He also explained that the timetable did not conflict with the statutory responsibilities under the Northern Ireland (Executive Formation etc) Act 2019 (as it happens, the timetable for Parliamentary sittings laid down in section 3 of that Act requires that Parliament sit on 9th September and, on one interpretation, no later than 14th October). He acknowledged that the new timetable would impact on the sitting days available to pass the Northern Ireland Budget Bill and "potentially put at risk the ability to pass the necessary legislation relating to decision-making powers in a no deal scenario". In discussion at the Cabinet meeting, among the points made was that "any messaging should emphasise that the plan for a Queen's Speech was not intended to reduce parliamentary scrutiny or minimise Parliament's opportunity to make clear its views on Brexit. … Any suggestion that the Government

was using this as a tactic to frustrate Parliament should be rebutted." In conclusion, the Prime Minister said that "there were no plans for an early General Election. This would not be right for the British people: they had faced an awful lot of electoral events in recent years".

21. That same day, the Prime Minister sent a letter to all MPs updating them on the Government's plans for its business in Parliament, stressing his intention to "bring forward a new bold and ambitious domestic legislative agenda for the renewal of our country after Brexit".

22. On 3rd September Parliament returned from its summer recess. The House of Commons passed a motion that MPs should take control of the order paper - in other words decide for themselves what business they would transact. On 4th September what became the European Union (Withdrawal) (No 2) Act 2019 passed all its stages in the House of Commons. On 6th September the House of Lords suspended its usual rules so that the Bill could be passed. It received Royal Assent on Monday 9th September. The import of the Act is to require the Prime Minister on 19th October to seek, by a letter in the form scheduled to the Act, an extension of three months from the European Council, unless by then Parliament has either approved a withdrawal agreement or approved leaving without one.

These proceedings

23. Meanwhile, on 30th July 2019, prompted by the suggestion made in academic writings in April and also by some backbench MPs, and not denied by members of the Government, that Parliament might be prorogued so as to avoid further debate in the run-up to exit day, a cross party group of 75 MPs and members of the House of Lords, together with one QC, had launched a petition in the Court of Session in Scotland claiming that such a prorogation would be unlawful and seeking a declaration to that effect and an interdict to prevent it. This was met by averments that the petition was hypothetical and premature and that there was no reasonable or even hypothetical apprehension that the UK Government intended to advise the Queen to prorogue the Westminster Parliament with the intention of denying before Exit Day any further Parliamentary consideration of withdrawal from the Union. This denial was repeated in revised Answers dated 23rd and 27th August. On 27th August the Petition was amended to claim that it would be unlawful to prorogue Parliament with the intention to deny "sufficient time for proper consideration" of withdrawal. On 2nd September, the Answers were amended to deny that there was any reasonable apprehension of that.

24. On 30th August, the Lord Ordinary, Lord Doherty, refused an application for an interim interdict to prevent the now very far from hypothetical prorogation and set the date of 3rd September for the substantive hearing: [2019] CSOH 68. On 4th September, he refused the petition, on the ground that the issue was not justiciable in a court of law: [2019] CSOH 70. The Inner House (Lord Carloway, Lord President, Lord Brodie and Lord Drummond Young) heard the appeal later that week, delivered their decision with a summary of their reasons on 11th September, and their full judgments were published on Friday, 13th September: [2019] CSIH 49. They allowed the appeal, holding that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the executive, and that it and the prorogation which followed it were unlawful and thus null and of no effect. They gave permission to appeal to this court.

25. Meanwhile, as soon as the prorogation was announced, Mrs Gina Miller launched proceedings in the High Court in England and Wales, seeking a declaration that the Prime Minister's advice to her Majesty was unlawful. Those proceedings were heard by a Divisional Court (Lord Burnett of Maldon, Lord Chief Justice of England and Wales, Sir Terence Etherton, Master of the Rolls, and Dame Victoria Sharp, President of the Queen's Bench Division) on 5th September and their judgment was delivered on 11th September: [2019] EWHC 2381 (QB). They dismissed the claim on the ground that the issue was not justiciable. They granted a "leap-frog" certificate so

that the case could come directly to this court.

26. This Court heard the appeals in Cherry and in Miller over 17th to 19th September. In addition to the written and oral submissions of the principal parties, we had written and oral submissions from the Lord Advocate, for the Scottish Government; from the Counsel General for Wales, for the Welsh Government; from Mr Raymond McCord, who has brought proceedings in Northern Ireland raising various issues relating to Brexit, but has not been permitted to proceed to challenge the lawfulness of the prorogation given that the Scottish and English challenges were already well-advanced; and from Sir John Major, a former Prime Minister with first-hand experience of prorogation. We have also received written submissions from Baroness Chakrabarti, shadow Attorney General, for Her Majesty's Opposition, and from the Public Law Project. We are grateful to everyone for the speed with which they have produced their submissions and all the other documents in the case. In view of the grave constitutional importance of the matter, and the disagreement between the courts in England and Wales and Scotland, we convened a panel of 11 Justices, the maximum number of serving Justices who are permitted to sit.

27. Both cases raise the same four issues, although there is some overlap between the issues:
(1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?
(2) If it is, by what standard is its lawfulness to be judged?
(3) By that standard, was it lawful?
(4) If it was not, what remedy should the court grant?

Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?

28. Counsel for the Prime Minister in the Miller proceedings, and the Advocate General as representing the United Kingdom Government in the Cherry proceedings, have argued that the court should decline to consider the challenges with which these appeals are concerned, on the basis that they do not raise any legal question on which the courts can properly adjudicate: that is to say, that the matters raised are not justiciable. Instead of the Prime Minister's advice to Her Majesty being reviewable by the courts, they argue that he is accountable only to Parliament. They conclude that the courts should not enter the political arena but should respect the separation of powers.

29. As we have explained, that argument was rejected by the Inner House in the Cherry proceedings, but was accepted by the Divisional Court in the Miller proceedings. In the view of the Divisional Court, the Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen, and his advice to Her Majesty to that effect, were inherently political in nature, and there were no legal standards against which to judge their legitimacy.

30. Before considering the question of justiciability, there are four points that we should make clear at the outset. First, the power to order the prorogation of Parliament is a prerogative power: that is to say, a power recognised by the common law and exercised by the Crown, in this instance by the sovereign in person, acting on advice, in accordance with modern constitutional practice. It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice. In the circumstances, we express no view on that matter. That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.

31. Secondly, although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in para 47 of its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.

32. Two examples will suffice to illustrate the point. The 17th century was a period of turmoil over the relationship between the Stuart kings and Parliament, which culminated in civil war. That political controversy did not deter the courts from holding, in the Case of Proclamations (1611) 12 Co Rep 74, that an attempt to alter the law of the land by the use of the Crown's prerogative powers was unlawful. The court concluded at p 76 that "the King hath no prerogative, but that which the law of the land allows him", indicating that the limits of prerogative powers were set by law and were determined by the courts. The later 18th century was another troubled period in our political history, when the Government was greatly concerned about seditious publications. That did not deter the courts from holding, in Entick v Carrington (1765) 19 State Tr 1029; 2 Wils KB 275, 95 ER 807, that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.

33. Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. That is so for two reasons. The first is that the effect of prorogation is to prevent the operation

of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing the stable door after the horse had bolted. The second reason is that the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts. As Lord Lloyd of Berwick stated in the Fire Brigades Union case (R v Secretary of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513, 572-573):
"No court would ever depreciate or call in question ministerial responsibility to Parliament. But as Professor Sir William Wade points out in Wade and Forsyth, Administrative Law, 7th ed (1994), p 34, ministerial responsibility is no substitute for judicial review. In R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 644 Lord Diplock said: 'It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.'"

34. Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

35. Having made those introductory points, we turn to the question whether the issue raised by these appeals is justiciable. How is that question to be answered? In the case of prerogative powers, it is necessary to distinguish between two different issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The first of these issues undoubtedly lies within the jurisdiction of the courts and is justiciable, as all the parties to these proceedings accept. If authority is required, it can be found in the decision of the House of Lords in the case of Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374. The second of these issues, on the other hand, may raise questions of justiciability. The question then is not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In the Council of Civil Service Unions case, the House of Lords concluded that the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised. In that regard, Lord Roskill mentioned at p 418 the dissolution of Parliament as one of a number of powers whose exercise was in his view non-justiciable.

36. Counsel for the Prime Minister rely on that dictum in the present case, since the dissolution of Parliament under the prerogative, as was possible until the enactment of the Fixed-term Parliaments Act 2011, is in their submission analogous to prorogation. They submit that prorogation is in any event another example of what Lord Roskill described as "excluded categories", and refer to later authority which treated questions of "high policy" as forming another such category (R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett [1989] QB 811, 820). The court has heard careful and detailed submissions on this area of the law, and has been referred to many authorities. It is, however, important to understand that this argument only arises if the issue in these proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits, rather than as one concerning the lawful limits of the power and whether they have been exceeded. As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them.

37. Before reaching a conclusion as to justiciability, the court therefore has to determine whether the present case requires it to determine where a legal limit lies in relation to the power to prorogue Parliament, and whether the Prime Minister's advice trespassed beyond that limit, or whether the present case concerns the lawfulness of a particular exercise of the power within its legal limits. That question is closely related to the identification of the standard by reference to which the lawfulness of the Prime Minister's advice is to be judged. It is to that matter that we turn next.
By what standard is the lawfulness of the advice to be judged?

38. In principle, if not always in practice, it is relatively straightforward to determine the limits of a statutory power, since the power is defined by the text of the statute. Since a prerogative power is not constituted by any document, determining its limits is less straightforward. Nevertheless, every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie. Since the power is recognised by the common law, and has to be compatible with common law principles, those principles may illuminate where its boundaries lie. In particular, the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law.

39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the 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. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.

40. The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. We have already given two examples of such principles, namely that the law of the land cannot be altered except by or in accordance with an Act of Parliament, and that the Government cannot search private premises without lawful authority. Many more examples could be given. Such principles are not confined to the protection of individual rights, but include principles concerning the conduct of public bodies and the relationships between them. For example, they include the principle that justice must be administered in public (Scott v Scott [1913] AC 417), and the principle of the separation of powers between the executive, Parliament and the courts (Ex p Fire Brigades Union, pp 567-568). In their application to the exercise of governmental powers, constitutional principles do not apply only to powers conferred by statute, but also extend to prerogative powers. For example, they include the principle that the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation (Burmah Oil Co Ltd v Lord Advocate [1965] AC 75).

41. Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty. To give only a few examples, in the Case of Proclamations the court protected Parliamentary sovereignty directly, by holding that prerogative powers could not be used to alter the law of the land. Three centuries later, in the case of Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508, the court prevented the Government of the day from seeking by indirect means to bypass Parliament, in circumventing a statute through the use of the prerogative. More recently, in the Fire Brigades Union case, the court again prevented the Government from rendering a statute nugatory through recourse to the prerogative, and was not deflected by the fact that the Government had failed to bring the statute into effect. As Lord Browne-Wilkinson observed in that case at p 552, "the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body".

42. The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.

43. In our view, it is no answer to these points to say, as counsel for the Prime Minister argued, that the court should decline to consider extreme hypothetical examples. The court has to address the argument of counsel for the Prime Minister that there are no circumstances whatsoever in which it would be entitled to review a decision that Parliament should be prorogued (or ministerial advice to that effect). In addressing that argument, it is perfectly appropriate, and necessary, to consider its implications. Nor is it any answer to say that there are practical constraints on the length of time for which Par-

liament might stand prorogued, since the Government would eventually need to raise money in order to fund public services, and would for that purpose require Parliamentary authority, and would also require annual legislation to maintain a standing army. Those practical constraints offer scant reassurance.

44. It must therefore follow, as a concomitant of Parliamentary sovereignty, that the power to prorogue cannot be unlimited. Statutory requirements as to sittings of Parliament have indeed been enacted from time to time, for example by the Statute of 1362 (36 Edward III c 10), the Triennial Acts of 1640 and 1664, the Bill of Rights 1688, the Scottish Claim of Right 1689, the Meeting of Parliament Act 1694, and most recently the Northern Ireland (Executive Formation etc) Act 2019, section 3. Their existence confirms the necessity of a legal limit on the power to prorogue, but they do not address the situation with which the present appeals are concerned.

45. On the other hand, Parliament does not remain permanently in session, and it is undoubtedly lawful to prorogue Parliament notwithstanding the fact that, so long as it stands prorogued, Parliament cannot enact laws. In modern practice, Parliament is normally prorogued for only a short time. There can be no question of such a prorogation being incompatible with Parliamentary sovereignty: its effect on Parliament's ability to exercise its legislative powers is relatively minor and uncontroversial. How, then, is the limit upon the power to prorogue to be defined, so as to make it compatible with the principle of Parliamentary sovereignty?

46. The same question arises in relation to a second constitutional principle, that of Parliamentary accountability, described by Lord Carnwath in his judgment in the first Miller case as no less fundamental to our constitution than Parliamentary sovereignty (R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61, para 249). As Lord Bingham of Cornhill said in the case of Bobb v Manning [2006] UKPC 22, para 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy". Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.

47. The principle of Parliamentary accountability has been invoked time and again throughout the development of our constitutional and administrative law, as a justification for judicial restraint as part of a constitutional separation of powers (see, for example, R v Secretary of State for the Environment, Ex p Nottinghamshire County Council [1986] AC 240, 250), and as an explanation for non-justiciability (Mohammed (Serdar) v Ministry of Defence [2017] UKSC 1; [2017] AC 649, para 57). It was also an animating principle of some of the statutes mentioned in para 44, as appears from their references to the redress of grievances. As we have mentioned, its importance as a fundamental constitutional principle has also been recognised by the courts.

48. That principle is not placed in jeopardy if Parliament stands prorogued for the short period which is customary, and as we have explained, Parliament does not in any event expect to be in permanent session. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model. So the same question arises as in relation to Parliamentary sovereignty: what is the legal limit upon the power to prorogue which makes it compatible with the ability of Parliament to carry out its constitutional functions?

49. In answering that question, it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification. That approach can be seen, for example, in R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409, paras 80-82 and 88-89, where earlier authorities were discussed. A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation. However, a prerogative power is only effective to the extent that it is recognised by the common law: as was said in the Case of Proclamations, "the King hath no prerogative, but that which the law of the land allows him". A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.

50. For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the

monarch to prorogue Parliament) will be unlawful if the prorogation has 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 body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.

51. That standard is one that can be applied in practice. The extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts. The court then has to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having those effects. The Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary. Even in such a case, when considering the justification put forward, the court would have to bear in mind that the decision whether to advise the monarch to prorogue Parliament falls within the area of responsibility of the Prime Minister, and that it may in some circumstances involve a range of considerations, including matters of political judgment. The court would therefore have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution. Nevertheless, it is the court's responsibility to determine whether the Prime Minster has remained within the legal limits of the power. If not, the final question will be whether the consequences are sufficiently serious to call for the court's intervention.

Conclusions on justiciability

52. Returning, then, to the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.

The alternative ground of challenge

53. In addition to challenging the Prime Minister's advice on the basis of the effect of the prorogation which he requested, Mrs Miller and Ms Cherry also seek to challenge it on the basis of the Prime Minister's motive in requesting it. As we have explained, the Prime Minister had made clear his view that it was advantageous, in his negotiations with the EU, for there to be a credible risk that the United Kingdom might withdraw without an agreement unless acceptable terms were offered. Since there was a majority in Parliament opposed to withdrawal without an agreement, there was every possibility that Parliament might legislate to prevent such an outcome. In those circumstances, it is alleged, his purpose in seeking a prorogation of such length at that juncture was to prevent Parliament from exercising its legislative functions, so far as was possible, until the negotiations had been completed.

54. That ground of challenge raises some different questions, in relation to justiciability, from the ground based on the effects of prorogation on Parliament's ability to legislate and to scrutinise governmental action. But it is appropriate first to decide whether the Prime Minister's advice was lawful, considering the effects of the prorogation requested and applying the standard which we have set out. It is only if it was, that the justiciability of the alternative ground of challenge will need to be considered.

Was the advice lawful?

55. Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts. The first question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.

56. The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer

recess and exit day on the 31st October. Parliament might have decided to go into recess for the party conferences during some of that period but, given the extraordinary situation in which the United Kingdom finds itself, its members might have thought that parliamentary scrutiny of government activity in the run-up to exit day was more important and declined to do so, or at least they might have curtailed the normal conference season recess because of that. Even if they had agreed to go into recess for the usual three-week period, they would still have been able to perform their function of holding the government to account. Prorogation means that they cannot do that.

57. Such an interruption in the process of responsible government might not matter in some circumstances. But the circumstances here were, as already explained, quite exceptional. A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019. Whether or not this is a good thing is not for this or any other court to judge. The people have decided that. But that Parliament, and in particular the House of Commons as the democratically elected representatives of the people, has a right to have a voice in how that change comes about is indisputable. And the House of Commons has already demonstrated, by its motions against leaving without an agreement and by the European Union (Withdrawal) (No 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government at this time and that it is especially important that he be ready to face the House of Commons.

58. The next question is whether there is a reasonable justification for taking action which had such an extreme effect upon the fundamentals of our democracy. Of course, the Government must be accorded a great deal of latitude in making decisions of this nature. We are not concerned with the Prime Minister's motive in doing what he did. We are concerned with whether there was a reason for him to do it. It will be apparent from the documents quoted earlier that no reason was given for closing down Parliament for five weeks. Everything was focussed on the need for a new Queen's Speech and the reasons for holding that in the week beginning the 14th October rather than the previous week. But why did that need a prorogation of five weeks?

59. The unchallenged evidence of Sir John Major is clear. The work on the Queen's Speech varies according to the size of the programme. But a typical time is four to six days. Departments bid for the Bills they would like to have in the next session. Government business managers meet to select the Bills to be included, usually after discussion with the Prime Minister, and Cabinet is asked to endorse the decisions. Drafting the speech itself does not take much time once the substance is clear. Sir John's evidence is that he has never known a Government to need as much as five weeks to put together its legislative agenda.

60. Nor does the Memorandum from Nikki da Costa outlined in para 17 above suggest that the Government needed five weeks to put together its legislative agenda. The memorandum has much to say about a new session and Queen's Speech but nothing about why so long was needed to prepare for it. The only reason given for starting so soon was that "wash up" could be concluded within a few days. But that was totally to ignore whatever else Parliament might have wanted to do during the four weeks it might normally have had before a prorogation. The proposal was careful to ensure that there would be some Parliamentary time both before and after the European Council meeting on 17th - 18th October. But it does not explain why it was necessary to curtail what time there would therwise have been for Brexit related business. It does not discuss what Parliamentary time would be needed to approve any new withdrawal agreement under section 13 of the European Union (Withdrawal) Act 2018 and enact the necessary primary and delegated legislation. It does not discuss the impact of prorogation on the special procedures for scrutinising the delegated legislation necessary to make UK law ready for exit day and achieve an orderly withdrawal with or without a withdrawal agreement, which are laid down in the European Union (Withdrawal) Act 2018. Scrutiny committees in both the House of Commons and the House of Lords play a vital role in this. There is also consultation with the Scottish Parliament and the Welsh Assembly. Perhaps most tellingly of all, the memorandum does not address the competing merits of going into recess and prorogation. It wrongly gives the impression that they are much the same. The Prime Minister's reaction was to describe the September sitting as a "rigmarole". Nowhere is there a hint that the Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies; he has a constitutional responsibility, as we have explained in para 30 above.

61. It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful.

Remedy

62. Mrs Miller asks us to make a declaration that the advice given to Her Majesty was unlawful and we can certainly do that. The question is whether we should do more than that, in order to make it crystal clear what the legal consequences of

that holding are. The Inner House did go further and declared, not only that the advice was unlawful, but that "any prorogation which followed thereon, is unlawful and thus null and of no effect". The essential question is: is Parliament prorogued or is it not?

63. The Government argues that we cannot answer that question, or declare the prorogation null and of no effect, because to do so would be contrary to article 9 of the Bill of Rights of 1688, an Act of the Parliament of England and Wales, or the wider privileges of Parliament, relating to matters within its "exclusive cognisance". The prorogation itself, it is said, was "a proceeding in Parliament" which cannot be impugned or questioned in any court. And reasoning back from that, neither can the Order in Council which led to it.

64. Article 9 provides:
"That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."
The equivalent provision in the Claim of Right of 1689, an Act of the Parliament of Scotland, is this:
"That for redress of all greivances and for the amending strenthneing and preserveing of the lawes Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members."

65. The first point to note is that these are Acts of Parliament. It is one of the principal roles of the courts to interpret Acts of Parliament. A recent example of this Court interpreting article 9 is R v Chaytor [2010] UKSC 52; [2011] 1 AC 684. The case concerned the prosecution of several Members of Parliament for allegedly making false expenses claims. They resisted this on the ground that those claims were "proceedings in Parliament" which ought not to be "impeached or questioned" in any court outside Parliament. An enlarged panel of nine Justices held unanimously that MPs' expenses claims were not "proceedings in Parliament" nor were they in the exclusive cognisance of Parliament. There is a very full discussion of the authorities in the judgments of Lord Phillips of Worth Matravers and Lord Rodger of Earlsferry which need not be repeated here.

66. That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament"; (2) that the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place" (para 47). In considering whether actions outside the Houses and committees are also covered, it is necessary to consider the nature of their connection to those and whether denying the actions privilege is likely to impact adversely on the core or essential business of Parliament; (3) that "exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament" (para 63); it was enjoyed by Parliament itself and not by individual members and could be waived or relinquished; and extensive inroads had been made into areas previously within exclusive cognisance.

67. Erskine May, Parliamentary Practice (25th ed 2019, para 13.12) is to similar effect:
"The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

68. The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

69. This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed, R (UNISON) v Lord Chancellor [2017] UKSC 51, para 119. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

70. It follows that Parliament has not been prorogued and that this court should make declarations to that effect. We have been told by counsel for the Prime Minister that he will "take all necessary steps to comply with the terms of any declaration made by the court" and we expect him to do so. However, it appears to us that, as Parliament is not prorogued, it is for Parliament to decide what to do next. There is no need for Parliament to be recalled under the Meeting of Parliament Act 1797. Nor has Parliament voted to adjourn or go into recess. Unless there is some Parliamentary rule to the contrary of which we are unaware, the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. That would, of course, be a proceeding in Parliament which could not be called in question in this or any other court.

71. Thus the Advocate General's appeal in the case of Cherry is dismissed and Mrs Miller's appeal is allowed. The same declarations and orders should be made in each case.