

# POPULISM, EXECUTIVE POWER, AND “CONSTITUTIONAL IMPATIENCE”: COURTS AS INSTITUTIONAL STABILISERS IN THE UNITED KINGDOM

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## ABSTRACT

Populists are typically impatient with intermediaries, institutions (including legislatures and courts) and liberal-democratic procedures, which are seen as illegitimately thwarting the direct expression of the authentic “will of the people.” Taking advantage of the spatio-temporal contours of liberal democracy, populism puts forward an alternative conception of democratic representation, one that not only aims to reduce the distance between *gouvernants* and *gouvernés* but also is, as populists would indirectly claim, better suited to the contemporary imperatives of temporal efficiency and rapidity. Yet, it is precisely in this context—which I call “constitutional impatience”—that courts can provide a judicial response to populism. In this article, I argue that courts have shown that they can, in certain circumstances, act as institutional stabilisers by slowing down the populist tempo and counteracting the populist tendency to avoid or bypass institutional intermediaries such as

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Parliament and the courts. I do so by reference, mainly, to two high-profile UK Supreme Court cases, *Miller (no. 1)* and *Miller (no. 2)/Cherry*.

KEYWORDS: *populism, constitutional impatience, courts, institutional stabilisation, judicial deceleration, executive aggrandisement, Miller, United Kingdom*

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## INTRODUCTION

Contemporary populism emerges and functions in the context of what political and social theorists have called “social acceleration” (Rosa 2013; Scheurman 2004).<sup>2</sup> While liberal institutions—particularly legislatures and courts—appear ill-equipped to adapt to this trend, populism manifests itself as a powerful critique of liberal democracy: it depicts the latter as distant, lethargic, opaque, and elite-driven. Taking advantage of the spatio-temporal contours of liberal democracy, populism puts forward an alternative conception of democratic representation, one that not only aims to reduce the distance between *gouvernants* and *gouvernés* but also is, as populists would indirectly claim, better suited to the contemporary imperatives of temporal efficiency and rapidity. Indeed, populists are typically impatient with intermediaries, institutions (including legislatures and courts) and liberal-democratic procedures, which are seen as illegitimately thwarting the direct expression of the authentic “will of the people.”

To achieve their objectives as quickly as possible, populists are often eager to invoke executive powers, including prerogative powers. As William E. Scheurman notes, this is sometimes done through a “perversion of the traditional temporal justification for executive-centered emergency government” (Scheurman 2019). Initially designed to be used in truly extraordinary situations of emergency, Lockean-type emergency powers have in fact been used in less-than-extraordinary situations. For example, then-president Donald Trump, after declaring a national emergency in 2019 in the context of the “border crisis” between the United States and Mexico, quickly conceded that it was not temporally justified: “I didn’t need to do this, but I’d rather do it much faster. I just want to get it done faster, that’s all” (Scheurman 2019). In the United Kingdom, while no emergency powers were invoked in the context of Brexit, prominent politicians from Nigel Farage to Boris

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2. Rosa identifies three different components of the social acceleration of contemporary life: technical acceleration, the acceleration of social change, and the acceleration of the pace of life (Rosa 2013, 71–80).

Johnson have nonetheless invoked on multiple occasions the urgency of “getting Brexit done,” notably “in the face of [an] unrelenting parliamentary obstructionism” and of an “endless refusal,” by Parliament, “to deliver on the mandate of the people.”<sup>3</sup> In fact, it was arguably the key element of the 2019 Conservative manifesto. In these politicians’ view, “artificial” delays to the implementation of the “will of the people,” provoked either by Parliament or the courts, were democratically unjustified.

Through its distrust of and impatience with liberal institutions and other intermediaries, populism can serve as a catalyst (or, as some would say, a pretext) for the acceleration of political time and democratic processes—and for the shrinking of the distance between rulers and the ruled. In so doing, it favours proximity, simultaneity, and immediacy—the result of which is a form of what I call “constitutional impatience.” By this, I refer to the way in which populists take advantage of the existing social acceleration in order to put forward an alternative conception of democratic representation based on spatial proximity as well as temporal efficiency and rapidity. Yet, it is precisely in this context that courts can arguably provide a judicial response to populism, notably by playing the role of institutional decelerators and (or) stabilisers. As Ming-Sung Kuo remarks, judicial proceedings have been noted—and sometimes criticised—for their slow pace, which, perhaps counterintuitively, “can be a structural asset of the multistage process of constitutional governance in its pushback against new populism” (Kuo 2019, 571).

In this article, which focuses on the UK in the period that followed the Brexit referendum, I argue, building on Kuo, that courts can act—and have indeed, in at least two recent high-profile cases, successfully acted—as institutional decelerators *and* stabilisers in the face of an impatient executive. More specifically, courts have reacted and responded to the executive-led acceleration of time: in so doing, they have calmed populist impatience, while acting in defence of the constitutional order. I make this argument by reference to the *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (hereinafter “*Miller [no. 1]*”) and *R (Miller) v The Prime Minister / Cherry v Advocate General for Scotland* [2019] UKSC 41 (hereinafter “*Miller [no. 2] / Cherry*”) UK Supreme Court rulings. Nevertheless, as I assert in the last part of this article, the effects of institutional deceleration and stabilisation are subject to important factors and constraints; furthermore, the more substantive virtues of judicial (or institutional) deceleration praised by its proponents—including its alleged contributions to democratic learning as part of the multistage process of

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3. Johnson in *Hansard*, HC vol. 667, col. 236 [29 October 2019].

constitutional-democratic governance (Kuo 2019, 564)—are grounded in empirical claims that remain, ultimately, difficult to verify.

This article proceeds in two parts. In the first, I examine how UK courts have managed to respond to constitutional impatience and stabilise the constitutional system of governance. I do so by reference to the political and legal context of each case, analysing the Brexit referendum and the Royal Prerogative (*Miller [no. 1]*), as well as the prorogation of Parliament (*Miller [no. 2]/Cherry*). In the second part, I discuss the limits of institutional deceleration and stabilisation in the UK context, notably by reference to the public reception of judgments, the forces of politics or political pressure, institutional independence, and the alleged role of courts as “democratic educators.”

## I. UK COURTS AS INSTITUTIONAL STABILISERS

The main claim of this article is that in the UK, courts have shown—in at least two recent high-profile Supreme Court cases, *Miller (no. 1)* and *Miller (no. 2)/Cherry*—that they have the power and willingness to act as institutional stabilisers and to respond to constitutional impatience by slowing down the populist tempo and acceleration of political time and by counteracting the populist tendency to avoid and bypass institutional intermediaries such as Parliament and the courts. But before discussing these two judgments in more depth, it is important to provide some conceptual clarifications.

In this article, I mainly use the term “institutional stabiliser”—rather than Kuo’s preferred term “judicial deceleration”—for two reasons. First, the adjective “institutional” is, in my view, more precise than “judicial,” because the reference point of deceleration is actually the proper constitutional decision-making process, which involves different institutions, rather than the judicial process per se. Second, instead of using the word “deceleration,” I employ the concept of “stabilisation,” understood as “the process of becoming or being made unlikely to change, fail or decline” (*Cambridge Dictionary*). This is so because I believe the term “institutional stabiliser” more accurately reflects or describes the role of courts, particularly UK courts, in the face of the executive-led constitutional impatience briefly described earlier. Indeed, in my view, what courts are trying to do in response to populist constitutional impatience is not necessarily just to slow down (as such) the constitutional decision-making process. One may even point out, in the UK context, that the two *Miller* decisions—to be discussed in more detail later in this article—were handed down very fast, even possibly in record time. Rather, what courts are actually attempting, in my view, is more accurately described as endeavouring to *stabilise*

the constitutional decision-making process, in the sense that their aim is to ensure that the institutional mechanics of the system of constitutional governance are followed and, in so doing, they contribute to preventing this system from changing, failing, or declining, particularly in the face of populist constitutional impatience.

This is not to say, of course, that this stabilising function is necessarily, in and of itself, democracy-enhancing. There certainly are circumstances in which courts can become institutional *obstructors* (rather than stabilisers or decelerators)—for instance, by blocking and/or impeding the reforms of a democratic, newly elected government replacing a semi-authoritarian regime. In such an instance, this “stabilising” (or more accurately, in this case, “obstructing”) function could become a major hurdle in the transition towards consolidated democracy. Nevertheless, in the right circumstances, courts can arguably play the role of democracy-enhancing institutional stabilisers by re-establishing democratic channels and ensuring that the proper constitutional-institutional procedures and processes are duly followed. This is precisely what they have done in the UK context, as I will argue in the following two sections. Far from being a panacea, however, the stabilising and democracy-enhancing function of courts remains subject to important constraints and (or) limitations, which will be the subject of the second and final part of this article.

It is perhaps worth adding a final clarification, this time on the concept of “populism.” Acknowledging that populism is a matter of degree (Barber 2019, 134) and may take several different forms (Tushnet 2019; Bugarcic 2019; Fontana 2018; Canovan 1981), my understanding of the concept is based on a broad, “minimalist” definition, comprising mainly two key elements: (1) a framing of the political world divided into two opposing groups—between “them” and “us,” between *gouvernants* and *gouvernés*, more precisely between the ruling elite and the “real,” “ordinary” or “silent” people—and (2) an emphasis on plebiscitary instruments and popular sovereignty (as the unitary articulation of public power) accompanied with a partial or complete rejection of mediated politics and institutional intermediaries (Girard 2021a, 712–13).

## A. The Brexit Referendum, the Royal Prerogative, and the Miller (no. 1) Case

### 1. *The Brexit Referendum, Populism, and “Constitutional Impatience”*

On 23 June 2016, a majority of British voters cast their vote in favour of the UK leaving the European Union in a countrywide referendum (the “Brexit referendum”). The outcome of the referendum, irrespective of its consultative nature, was

immediately translated by politicians and tabloid newspapers into a clear, formal and untouchable expression of the “will of the people”—namely, the unassailable *decision* of the British people to leave the EU. But the implementation of the outcome of the referendum had to follow existing (and sometimes lengthy) constitutional-institutional rules and processes, which were often depicted by populist politicians and tabloids as obstacles or impediments to the seemingly clear political decision of the British electorate. There was also some sense of hesitation on the part of Members of Parliament (MPs), as illustrated by the internal strife within the Labour Party or the decision of the Liberal Democrats to oppose Brexit despite the outcome of the referendum. Yet, it is precisely in that context of uncertainty, of apparent (or depicted) unresponsiveness by MPs to what was seen as a clear expression of the People-as-One that populism comes into play, notably with regard to discourse and action—namely, what I have earlier called the “constitutional impatience” of populism.

First, many key actors amongst the ruling Conservative Party followed the ideal-typical populist discourse by repeatedly making references to the so-called will of the people, which is itself based on a Schmittian conception of the people as unity, when speaking about the outcome of the Brexit referendum. For instance, Prime Minister Theresa May equated the will of the majority of the electorate at the time of the referendum with the “will of the people,” even claiming to have “[t]he strength and support of 65 million people” willing to make Brexit happen (Girard 2021b, 80–81). From a temporal perspective, this characterisation of the Brexit vote as the pure and simple expression of the “one and indivisible” “will of the people” illustrates populism’s tendency to aggregate the revolutionary, mystical, and eternal “sovereign people,” understood as the unified People-as-One, with transient, temporal, and inherently ephemeral electoral majorities at a given point in time, thereby imbuing the latter with the characteristics of timeless unity, permanence, and immutability (Girard 2021b, 80–81).

Second, through appeals to authenticity and similarity-based identification, populists amplified this feeling of alienation voters have against Parliament, notably by depicting the latter as an illegitimate and undemocratic impediment to the expression of the will of the people, with MPs being portrayed as slow-paced, disconnected “*ex post facto* yes or nay-sayers.” This, in turn, contributed to the feeling of “de-synchronization between democratic politics through parliamentary legislation,” resulting in a “state of affairs where citizens have lost faith in political self-efficacy; for them, political institutions no longer respond to their needs and aspirations,” as Harmut Rosa put it in another context (Rosa 2018, 83). A good example of this rhetoric is the way in which Boris Johnson, replacing May as prime

minister in July 2019, expressed strong distrust of intermediaries such as Parliament, accusing MPs, for instance, of “thwarting the will of the British people” over Brexit (*Hansard*, HC vol. 664, col. 620 [9 September 2019]). This was in a context in which MPs had three times voted down a proposed withdrawal agreement and twice refused to dissolve Parliament.

Third, and perhaps more important for the purposes of this article, the populist impatience of the British executive was made apparent not only through its distrust regarding intermediaries such as Parliament but also through its willingness to ignore or bypass the existing political processes and legal procedures. In the face of Parliament’s apparent hesitation or “unwillingness” to implement the outcome of the Brexit referendum and to trigger Article 50 of the Treaty on European Union (TEU), many high-profile Conservative members (including the prime minister) expressed strong impatience, if not frustration, with Parliament, given the latter’s reticence or disinclination to immediately and unreservedly initiate the formal process leading to the withdrawal of the UK from the EU.

Eager to implement the outcome of the 2016 Brexit vote, the UK executive thus decided to go down another route, that of the Royal Prerogative: ministers impatiently chose to immediately issue a formal notice of withdrawal—as required under Article 50 TEU—through prerogative powers and, as such, without the prior approval of Parliament. Article 50 TEU leaves member states full discretion as to the internal procedures leading to the notice of withdrawal. Yet, the decision to invoke the Royal Prerogative (without parliamentary approval) was significant because it was the only way, under UK domestic law, in which the UK government could have triggered Article 50 TEU without obtaining prior parliamentary authority.

## 2. *The Royal Prerogative and the Miller (no. 1) Case: Institutional Stabilisation in Effect*

However, it is precisely against the backdrop of an impatient executive galvanised by the result of the 2016 Brexit referendum that the intervention of UK courts arguably slowed down the executive’s pace of action and stabilised the constitutional system of governance. Indeed, the decision to trigger Article 50 TEU without parliamentary approval was challenged by Gina Miller, a pro-EU activist, and Deirdre Santos (the “applicants”). After the Divisional Court of England and Wales ruled in favour of the applicants on 3 November 2016 in a decision (*R [Miller] v The Secretary of State for Exiting the European Union* [2016] EWHC 2768) that sparked populist outrage, notably in British tabloid newspapers, the secretary of state for exiting the European Union appealed the judgment, and the matter was sent to the UK Supreme Court.

The Supreme Court ruled that the Royal Prerogative could not be used by ministers to trigger Article 50 TEU and that the prior authority of an Act of Parliament was required. Its reasoning was not based on the soundness or desirability of the decision to withdraw from the EU, a “political issue” that is a matter for ministers and Parliament to resolve (*Miller [no. 1]*, at 3); rather, it was based on its effects on the constitutional arrangements of the UK (*Miller [no. 1]*, at 4). For the Court, the use of the Royal Prerogative to trigger Article 50 TEU raised legal issues pertaining to the constitutional arrangements of the UK, notably because they concerned “(i) the extent of ministers’ power to effect changes in domestic law through exercise of their prerogative powers at the international level,” as well as “(ii) the relationship between the UK government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other” (*Miller [no. 1]*, at 4). The Court ruled, “We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation” (*Miller [no. 1]*, at 82).

On that account, it could be said that the Court acted as an institutional stabiliser by both slowing down the populist acceleration of political time *and* ensuring that the institutional mechanics of constitutional governance (including the constitutional decision-making process) are duly followed. It could indeed be argued, as Michael Freedman did, that the “urgency of haste”—that is to say, “the fundamental preoccupation of populists with speed in implementing the ‘will of the people’”—was in this case “thwarted by the rule of law’s insistence on the unavoidable ‘slowness’ of due process and public scrutiny” (Freedman 2017, 7–8). Of course, following legal and institutional procedures does not, per se, necessarily slow down official actions. Nevertheless, this idea that institutions and intermediaries can “impede,” “slow down,” or even “block” the immediate expression of the “will of the people” is an important feature of the ideal-typical populist discourse and imaginary.

In any event, it should be noted that the Supreme Court decision in *Miller (no. 1)* did not, in effect, block or prevent the executive from launching the process of withdrawal from the European Union, as Parliament ultimately voted on 1 February 2017 in support of a bill that gave the then prime minister, Theresa May, the power to invoke Article 50 TEU. All the Court did, in that case, was slow down the executive’s course of action and make sure that the proper (albeit seemingly slow and time-consuming) democratic procedures and processes were followed. The Court thus in this case played a democracy-enhancing role as an institutional stabiliser by re-establishing democratic channels and ensuring that the proper constitutional-institutional procedures, channels, and processes are observed.



From a temporal perspective, it could be argued that this stabilising function is, in fact, closely tied to the judiciary’s engrained “slowness.” Some authors have praised this slowness for its alleged virtues, notably by granting the various constitutional decision-makers more time to assess the changes that are both feasible and, in the long term, desirable (van Klink 2018). The “slow” nature of judicial activity also goes hand in hand with law’s inherent temporal inertia and the nature of legal systems in general, which seem to reject the social acceleration noted and described by Rosa (Francot 2018, 101; Rosa 2013, 26). It is in this context, and for similar reasons, that some liberal-oriented thinkers have defended temporal inertia as a core attribute of law. For instance, Liaquat Ali Khan argues that a fundamental feature of law is this form of temporal inertia: “[i]t ensures the systemic stability of law because one primary purpose of law is to provide stable rules that do not change over a period of time.” For Khan, “[w]ithout temporal inertia, law is an arbitrary and fickle order that can change without timely notice” (Khan 2009, 81). Lyana Francot builds on this analysis to assert that “law’s inertia does not only secure its own stability but is also constitutive of the societal stability as such” (Francot 2018, 101).

This is not to say that law is inherently (or should be) opposed to societal changes, nor that judges are necessarily conservative or reactionary. The emphasis here is more procedural: the role of courts is to ensure that the constitutional decision-making process, which involves different institutions, has been followed—a process which by its very nature takes time. This is, in my view, exactly what the Court did, not only in *Miller (no. 1)* but also, as will be argued the next section, in the *Miller (no. 2)/Cherry* case a few years later.

## B. The Prorogation of Parliament and the *Miller (no. 2)/Cherry* Case

### 1. *Executive Impatience and Prorogation*

The impatience of populism—and its distrust of institutional mediators like Parliament—was also made apparent less than three years later, this time in the context of Prime Minister Boris Johnson’s attempt to prorogue Parliament in autumn 2019. In a nutshell, Parliament attempted to outlaw a no-deal Brexit, and the executive responded by proroguing Parliament, thereby putting an immediate end to parliamentary debates surrounding Brexit. But it is worth discussing the context in more length.

In November 2018, Prime Minister Theresa May and her government had negotiated and concluded a Brexit withdrawal agreement with the EU. However,

the withdrawal agreement was rejected three times by the House of Commons between January and March 2019. Pursuant to section 13 of the European Union (Withdrawal) Act 2018, any withdrawal agreement reached by the government had to be approved by Parliament. In July 2019, Boris Johnson replaced Theresa May as prime minister. He vowed to make changes to the withdrawal agreement, while highlighting on multiple occasions that he believed that the European Council would agree to changes to the withdrawal agreement only, and if only, there was a “genuine risk” that the UK would leave the EU without such an agreement. As a result of an extension to the notification period (previously sought and obtained by Theresa May) and of the governing legal framework (under both EU law and UK law),<sup>4</sup> the situation as of September 2019 was that the United Kingdom was going to leave the European Union on 31 October 2019 whether or not there was a withdrawal agreement.<sup>5</sup> Amidst concerns that leaving the EU without an agreement would be damaging to the UK economy, MPs voted on several occasions to reject a “no-deal” Brexit. In fact, they even passed legislation—the European Union (Withdrawal) (No 2) Act 2019, also known as the “Benn Act”—that would outlaw such an exit on 31 October 2019 without an agreement. Yet, Johnson suggested that he would not comply with the latter Act, saying he would rather be “dead in a ditch” than request an additional delay to Brexit negotiations.

It is in that context of fierce tension between Parliament and an impatient executive that an Order in Council was made in late August 2019 ordering the prorogation of Parliament. Her Majesty the Queen, acting on the advice of the prime minister, gave her consent to a prorogation that would begin sometime between 9 and 12 September 2019 and end with the State Opening of Parliament on 14 October 2019. The prorogation ceremony took place on 10 September 2019. The government was seemingly convinced that the prorogation was legal. For instance, in a memorandum dated 15 August 2019 and prepared by the director of legislative affairs in the prime minister’s office, the decision to prorogue was said to be not only perfectly legal but also the most time-efficient decision, as it set the “right balance” between “wash up” (i.e., ensuring that the bills close to Royal Assent could obtain it) and “not wasting time that could be used for new measures in a fresh session” (*Miller [no. 2]/Cherry*, at 17).

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4. Treaty on European Union, Art. 50; European Union (Withdrawal) Act 2018; European Union (Withdrawal) Act 2019; European Union (Withdrawal) Act 2018 (Exit Day) (Amendment No 2) Regulations 2019 (SI 2019/859).

5. Subject to the European Union (Withdrawal) (No 2) Act 2019. See also *Miller (no. 2)/Cherry*, at 13, 22.

## 2. *The Miller (no. 2)/Cherry Ruling*

Yet, the UK government’s decision to use the Royal Prerogative (another prerogative power vested in the Queen and exercisable by her on the advice of the prime minister) to prorogue Parliament was quickly challenged, both in England and Wales and in Scotland. In London, the Divisional Court dismissed the claim on 11 September 2019 on the basis that the issue was “inherently political in nature” and thus not justiciable in a court of law, but nevertheless it allowed the case to come directly to the Supreme Court (*R [Miller] v Prime Minister* [2019] EWHC 2381 [QB]). In Edinburgh, an application for an interim interdict to prevent prorogation was refused by a Lord Ordinary of the Outer House of the Court of Session on 30 August 2019 (*Cherry v Advocate General for Scotland* [2019] CSOH 68) and, five days later, was also turned down on its merits by the same judge, on the ground that the issue was non-justiciable (*Cherry v Advocate General for Scotland* [2019] CSOH 70). However, the decision was appealed, and just a week later, three judges of the Inner House of the Court of Session (the supreme civil court of Scotland) allowed the appeal: they held that the matter was justiciable and, invoking considerations of time (and, indirectly, a response to the “constitutional impatience” of the measure), ruled that “circumstances demonstrate that the true reason for the prorogation [was] to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance, given the issues at stake” (*Cherry v Advocate General for Scotland* [2019] CSIH 49, at 53). The Court ruled that the prorogation was unlawful and, as a result, null and of no effect, and it gave permission to appeal to the Supreme Court.

Following this ruling by the Court of Session—which also sparked populist outrage, as discussed further below—the matter was sent to the UK Supreme Court. The Court issued a unanimous decision in *R (Miller) v The Prime Minister /Cherry v Advocate General for Scotland* [2019] UKSC 41 (“*Miller [no. 2]/Cherry*”): the eleven judges who sat to hear the appeal ruled that the prime minister had exceeded his power to prorogue Parliament. The Court first acknowledged that the power to order the prorogation of Parliament is, indeed, a prerogative power recognised by the common law and exercised by the Crown—namely, by Her Majesty the Queen herself, acting on advice of the prime minister (*Miller [no. 2]/Cherry*, at 21). However, the fact that Her Majesty is obliged by constitutional convention to accept that advice “place[s] on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all interests, including the interests of Parliament” (*Miller [no. 2]/Cherry*, at 21). In the same vein, the Court reiterated its role as a supervisory jurisdiction over the decisions of the executive, even those

that “have a political hue to them” (*Miller [no. 2]/Cherry*, at 31). Moreover, the fact that the prime minister is accountable to Parliament does not in and of itself mean that the judiciary has no legitimate role to play (*Miller [no. 2]/Cherry*, at 33). The Court added, finally and in the same vein, that deciding this case did not affect the separation of powers; on the contrary, by doing so, the court was “giving effect” to that very separation of powers (*Miller [no. 2]/Cherry*, at 34).

With regards to the question on the applicable standard of review and the limits to the power of prorogation more specifically, the Court invoked the constitutional conventions of parliamentary sovereignty and (democratic) accountability (*Miller [no. 2]/Cherry*, at 41-45 and 46-47). It invoked the famous 1611 *Case of Proclamations* and ruled that “a prerogative power is only effective to the extent that it is recognised by the common law.” (*Miller [no. 2]/Cherry*, at 49). For the purposes of the case at hand, in what is perhaps the most important paragraph of the judgment, the Supreme Court held that the limit upon the power of prorogation is the following: “a decision 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.” It added, “In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course” (*Miller [no. 2]/Cherry*, at 50).

As for the applicable remedy, the Court made a declaration that Parliament had, in effect, not been prorogued. It allowed the respective Speakers of the House of Commons and of the House of Lords to take immediate steps to enable each House of Parliament to “meet as soon as possible” (*Miller [no. 2]/Cherry*, at 70). And as a matter of fact, Parliament reconvened, at John Bercow’s request, the morning after the Supreme Court ruling.

### 3. *The Supreme Court’s “Effects-Based Test” and the Re-establishment of the Empty Place of Power*

Thus, in *Miller (no. 2)/Cherry*, I contend, the Supreme Court once again acted as an institutional stabiliser. It first contributed to slowing down the populist acceleration of political time by responding to the executive-led constitutional impatience. But it also played an additional, related role: it contributed to the (at least partial) re-establishment of the deliberative-democratic channels and what Claude Lefort calls the “empty place of power” (Lefort 1986, 279–80, 303–4). It could indeed be argued, from a liberal-constitutionalist perspective, that the populist focus on speed, spatial proximity, and authenticity can sometimes transform into an attempt

at occupying (or re-occupying) the “empty place of power”—namely, the specific constitutive gap between the ideal of popular sovereignty (i.e., the view that political power emanates from the people and that the legitimacy of power is ultimately based on them), on the one hand, and the distribution of power at any given point in time, on the other (Lefort 1986, 279).

Indeed, and as Mark Knights puts it, “[o]ne of the problems with the Brexit vote is the idea that the winner takes all, and appeals to *the* voice of the people—as though it has only one—are used to close down debate” (Knights 2017, 89–90). In that sense, it could be argued that the reliance on—and depiction of—the Brexit vote as the single, immutable, and permanent expression of the mystical and eternal “sovereign people,” combined with the impatient decision from the executive to bypass Parliament in triggering Article 50 TEU, and perhaps more important, the subsequent decision to prorogue Parliament had in effect closed down the institutional-democratic spaces and channels, thereby preventing the further (post-referendum) engagement and participation of a wide range of citizens and actors who had different viewpoints. In other words, this form of populist impatience had attacked the very openness, open-endedness, and “unresolvability” (Bomhoff 2018) inherent in public law’s functioning and logic.

Yet, in this instance the Supreme Court contributed, I would argue, to the re-establishment of not just the liberal-democratic temporality, but also its very own institutional-democratic spaces and channels. The contested policy—in this case, the negotiation of an agreement with the EU—was sent back to Parliament “for a new debate or further investigation, suggesting a re-articulation of political power” (Kuo 2019, 572).<sup>6</sup> In this specific case, the Court did so by effectively creating what Tarunabh Khaitan calls an “effects-based” (proportionality) test. The latter is defined as follows: “[g]overnmental action that has the effect of frustrating, preventing, or substantially undermining the ability of constitutional actors to discharge their constitutional powers, duties, or functions shall be unlawful, unless the government can show that such action was a proportionate means of achieving a legitimate objective” (Khaitan 2019b).

It is important to point out, however, as Kuo does, that “what the court is expected to do under the guidance of judicial deceleration is not to set aside the contested policy or law.” Rather, it is “to make room for the learning function of constitutional democracy to play out and the rearticulation of politics by putting

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6. Kuo was referring here to the *Miller (no. 1)* Supreme Court judgment, but the same principle arguably applies to *Miller (no. 2)/Cherry* as well.

brakes on the populist feeling-driven decision” (Kuo 2019, 573–74). In both the *Miller (no. 1)* and *Miller (no. 2)/Cherry* judgments, the Court did not go as far as to second-guess the desirability, “wisdom,” or “appropriateness” of the government’s policy, nor of the outcome of the 2016 Brexit referendum. The Court, in a sense, was concerned with process rather than substance (Gearty 2019). All it did, in the end, was slow down political time in the face of “constitutional impatience” and populist pressures, as well as “restore the disrupted political temporality of constitutional governance” (Kuo 2019, 571) through the re-establishment, notably, of constitutional-democratic channels and processes, particularly in the *Miller (no. 2)/Cherry* case.

#### 4. *Executive Impatience and Aggrandisement: A Crisis of Accountability?*

In a sense, therefore, the approach taken by the judiciary in the context of prorogation was relatively similar to the context of *Miller (no. 1)*, insofar as it counteracted, at least to a certain extent, the constitutional impatience of populism. In both cases, the executive had used the prerogative to circumvent Parliament and (or) prevent the latter from exercising its constitutional role. However, in the specific context of the 2019 prorogation of Parliament, the executive’s plan was not simply to accelerate the implementation of the “will of the people” by bypassing existing institutions and procedures; there was also an additional element of what Nancy Bermeo, Tarunabh Khaitan, and others call “executive aggrandisement” (Bermeo 2016; Khaitan 2019a), which raises important questions about the accountability of the executive.

In the UK executive’s view, the decision to bypass (in *Miller [no. 1]*) or to sideline (in *Miller [no. 2]/Cherry*) Parliament was entirely justified. Because it claims to derive its legitimacy directly from the people, the government, in its view, can under certain circumstances bypass the people’s elected representatives, particularly when it sees it fit or urgent to achieve a certain policy outcome. Yet, as Lord Sumption has recently pointed out, “[s]ince the people have no institutional mechanism for holding governments to account, other than Parliament, the effect is that ministers are accountable to no one, except once in five years at general elections” (Lord Sumption 2020). This is precisely why accountability is fundamental in a constitutional democracy—and why the Supreme Court reiterated, in *Miller (no. 2)/Cherry*, the importance of making sure that “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.” (*Miller [no. 2]/Cherry*, at 46).

Yet, what the Supreme Court did, especially in the *Miller (no. 2)/Cherry* case, was not only confirm its ability to slow down the pace of executive action; it was also able to consolidate its role as a bulwark against executive aggrandisement—and against a certain “executivisation” of political power more broadly. Indeed, for some, the *Miller (no. 2)/Cherry* Supreme Court decision was a powerful assertion of judicial authority and an illustration of the Court’s willingness to embrace a more enhanced role in the UK constitutional order (Tew 2020). This willingness was evident in the following sentence of the judgment: in giving effect to judicially enforceable principles of law, “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” (*Miller [no. 2]/Cherry*, 39).

## II. THE LIMITS OF INSTITUTIONAL STABILISATION (IN THE UK CONTEXT)

However, courts do not necessarily offer a panacea for “constitutional impatience,” at least not in the UK context. Their role and influence as institutional decelerators and stabilisers are, in my view, dependent on at least three main factors: (1) the public (and political) reception of their judgments; (2) the (overwhelming) forces of politics; and (3) their institutional independence. Moreover, and perhaps more importantly, the more substantive virtues of judicial (or institutional) deceleration praised by its proponents—including its alleged contributions to democratic learning as part of the multistage process of constitutional-democratic governance—are grounded in empirical claims that remain, ultimately, difficult to verify. These elements—namely, the aforementioned three factors that influence the role of courts as institutional stabilisers and the question of the alleged judicial contribution to democratic learning—are discussed in the four following sections.

### A. The Public (and Political) Reception of Judgments

First, as is well known, the rendering of the *Miller (no. 1)* judgment sparked populist outrage in the UK tabloids, with the *Daily Mail* going as far as to label the High Court judges who sided against the UK government as “enemies of the people” (Slack 2016). In general, judges were depicted as “out-of-touch” (and disconnected), following the populist, similarity-based identification between the rulers and the ruled (Rosanvallon 2020, 153–55; Corrias 2016, 23–24). It is interesting



that the government responded very weakly, if at all, to these attacks on the UK judiciary. For example, the Lord Chancellor, Liz Truss, remained silent for several days with regard to these headlines and, when pressed, did not condemn the newspapers (Rozenberg 2020, 33).

Less than three years later, the *Miller (no. 2)/Cherry* decision was also received with indirect personal attacks on judges, particularly against those of the Scottish Court of Session before the decision reached the Supreme Court. One minister even raised questions about the perception of partiality of judges, before the Lord Chancellor came to their defence (Rozenberg 2020, 43). In general, however, the reception of the judgment was divided: while it was met with dubious analyses of the Scottish judges’ backgrounds by the *Daily Mail*, it was also received more favourably in Scottish newspapers—with the headline of *The Scotsman* depicting the Court of Session judges as “Heroes of the People,” as a nod to the *Daily Mail*’s headline “Enemies of the People” three years earlier. The reaction to the Supreme Court’s judgment was similarly polarised. In the media, Lady Hale was both praised and subject to personal abuse, including *ad hominem* attacks, with a *Sun* columnist referring to her as a “beady-eyed old nanny goat” (Rozenberg 2020, 43). In the academic sphere, the judgment was lauded by scholars such as Paul Craig (Craig 2020), Conor Gearty (Gearty 2019) and Thomas Poole—who described the ruling as “the most significant judicial statement on the constitution in over 200 years” (Poole 2019)—but was also criticised in strong terms by others, including Martin Loughlin, who questioned the cogency of the judgment and denounced the Court for having “convert[ed] political practices into constitutional practices, investing them with normative (and legal?) authority so as to assert the power to determine their meaning” (Loughlin 2019; 2020, 280), and John Finnis, the latter referring to the judgment as a “well-intentioned but constitutionally unauthorised law making,” a ruling that “undermines the rule of law and constitutional settlement” (Finnis 2019a, 2019b).

Perhaps more importantly, the *Miller (no. 2)/Cherry* case—and in particular, the Supreme Court ruling—also led to attacks against the institutional role and influence of courts. Jacob Rees-Mogg openly branded the decision a “constitutional coup” by the Supreme Court. A Conservative MP even went as far as to call for the Supreme Court to be abolished entirely. In a speech to the Bruges Group in September 2019, Martin Howe QC, the chairman of Lawyers for Britain—a group of lawyers who supported the secretary of state in the *Miller (no. 1)* case—also criticised the Supreme Court ruling and called for the replacement of the Supreme Court with a “newer low key and less activist court of final appeal.” In November 2020, Lord Chancellor Robert Buckland suggested renaming the



Supreme Court “to downgrade its status,” as well as cutting the number of permanent justices on its bench.

## B. The Forces of Politics or Political Pressure

Second, and in relation to the previous point, the role and influence of courts as institutional stabilisers is also dependent on the (sometimes overwhelming) forces of politics. As Yaniz Roznai has written:

[i]n an environment of democratic erosion, courts are under political pressure. Populist projects of constitutional change modify the rules for appointment and jurisdiction of bodies like constitutional courts in an attempt to weaken their independence, pack them and even capture them. Often, courts are threatened in ways that makes it difficult for them to “do their job” without being worried about possible overrides and political backlash. (Roznai 2019)

Of course, there is currently no clear and (or) known project to pack or capture the UK Supreme Court. The United Kingdom is not at the brink of descending into authoritarianism or “autocratic legalism” (Scheppele 2018). Britain is a consolidated constitutional democracy and is likely to remain so. And UK judges remain relatively popular and trusted, with a recent survey revealing that 81 percent of Britons trust judges to tell the truth, compared to just 19 percent of the population trusting politicians (Ipsos MORI Veracity Index 2021).

Nevertheless, it is hard to deny that the UK executive has recently put significant political pressure on the institutional role of the courts. For instance, amidst the frustrations caused by Parliament’s inability (or unwillingness) to pass the UK government’s Brexit deal in the period leading up to the 2019 general election, the Conservative Party vowed, in its 2019 Election Manifesto, “to look at the broader aspects of our constitution: the relationship between the government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people.” It also promised to “set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates” (The Conservative and Unionist Party Manifesto 2019, 48). It remains to be seen what the findings and proposals of the Commission will be, and what the government will choose to do in that regard. There are signs, at the time of writing, that the government has instead chosen to conduct a series of smaller, independent reviews. These include the Independent Review of

Administrative Law (established in July 2020 to ensure that “judicial review is not abused to conduct politics by another means or to create needless delays”; it submitted its report in January 2021 and has now been disbanded), as well as the Independent Human Rights Review (launched on 7 December 2020; it submitted a full report in October 2021). At the time of writing, it appears that the government has indeed chosen to repeal the Human Rights Act 1998 and “restore the balance of power between the legislature and the courts by introducing a Bill of Rights,” with a view to “[e]nd the abuse of the human rights framework and restore some common sense to [the UK] justice system” (Prime Minister’s Office 2022, 118). One of the overt aims of the government is to “[ensure] that UK courts can no longer alter legislation contrary to its ordinary meaning and [constrain] the ability of the UK courts to impose ‘positive obligations’ on [the UK’s] public services without proper democratic oversight by restricting the scope for judicial legislation” (Prime Minister’s Office 2022, 118).

Regardless of the outcome of these reviews (and legislative changes), it is hard to see these efforts as something other than an attempt to “halt the current direction of constitutional travel and reinstate the executive at the centre of the Constitution” (Young 2019). The appointment of Suella Braverman as attorney general, on 13 February 2020, clearly hinted in the direction that the government was serious in its intentions. Indeed, just two weeks before her appointment, Braverman criticised the “chronic and steady encroachment by the judges” and accused “a small number of unelected, unaccountable judges” of having too much influence in the determination of wider public policy. Claiming that British democracy cannot be said to be “representative” anymore, Braverman added that “Parliament’s legitimacy is unrivalled and the reason why we must take back control, not just from the EU, but from the judiciary” (Braverman 2020). Less than two years later, in a keynote speech delivered at the 2021 Public Law Project conference, Attorney General Braverman hinted in a similar direction, mentioning that judicial decisions such as the two *Miller* cases, but also *R v Adams (Northern Ireland)* [2020] UKSC 19, *R (Evans) v Attorney General* [2015] UKSC 21, *R (UNISON) v Lord Chancellor* [2017] UKSC 51 and *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 “have strained the principle of Parliamentary sovereignty and introduced uncertainty into the constitutional balance between Parliament, the government and the Courts.” Mentioning that judges are increasingly asked to “decide essentially political matters on applications for judicial review,” she went as far as to say that “[t]he legitimacy and reputation of [the UK] judiciary, which is inextricably linked to its political neutrality, is at stake.”

While it remains too early to draw definitive conclusions on this apparent standoff between the judiciary and the executive, there are some early signs that the UK judiciary may have been at least partly responsive to these political claims (and questions on its legitimacy): in fact, two very government-friendly Supreme Court rulings rendered in 2021<sup>7</sup> appear to make up at least some of the ground “conceded” in some of the aforementioned cases (Gearty 2022).

### C. Institutional Independence

Third, and in relation to the previous two points, the mid- and long-term capacity of UK courts to respond to constitutional impatience and stabilise the constitutional system of governance is contingent on their institutional independence. Besieged or captured courts are obviously in a much more difficult position to act as institutional stabilisers; on the contrary, they can become *destabilisers* by transforming themselves into allies or even into instruments of legitimation for the populist regime, helping the latter to consolidate power while maintaining a façade of democracy, as the recent examples of Turkey since 2010 (Christofis 2019; Varol 2015, 2018), Hungary since 2010 (Halmai 2018), Poland since 2015 (Sadurski 2019), Ecuador between 2007 and 2017 (Landau and Dixon 2020; Conaghan, 2008, 2016; de la Torre and Lemos 2016), and others illustrate.

Different elements can explain why the UK courts were able to counteract populist impatience and re-establish the more deliberative political tempo of constitutional governance (including parliamentary debates and scrutiny of executive action). Of course, the United Kingdom is a consolidated constitutional democracy, with old and established democratic institutions. But the venerableness of its institutions does not, in and of itself, explain everything. For example, the UK Supreme Court is still a relatively recent institution: it was established in 2009 to replace the appellate jurisdiction of the House of Lords and to achieve a more complete separation between executive, legislative and judicial powers. It is, however and crucially, a resolutely independent institution. As the foregoing examples have shown, a robust and durable judicial independence is an essential element for courts to be able to properly exercise—and to continue to exercise—their role as institutional stabilisers.

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7. Namely, *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; *Reference by the Attorney General and the Advocate General for Scotland—United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*; *Reference by the Attorney General and the Advocate General for Scotland—European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42.

### D. Courts as “Democratic Educators”?

Lastly, some scholars have praised judicial deceleration, and courts more generally, for their role as “democratic educators.” For instance, Irwin P. Stotzky argued a few decades ago that the process of constitutional adjudication in the United States has established “a tradition that ultimately protects individuals against the arbitrary action of government,” notably by contributing to the creation of “a moral consciousness in the citizenry through the process of rational discourse” (Stotzky 1993, 348–49; also mentioned in Daly 2017a, 107). Similarly, Joseph Goldstein opined that courts have “an important part to play in widening the base of informed people,” particularly in a context of democratic transition (Goldstein 1993, 301; also mentioned in Daly 2017b, 291).

In a somewhat similar fashion, Kuo has recently argued that courts can act as “democratic learners” through their contribution to the “democratic learning embedded in the multistage process of constitutional governance” (Kuo 2019, 564). This multistage process, Kuo suggests (drawing on Rosanvallon, Scheuerman, and others), is anchored in a specific political temporality—namely, that of courts operating at a slow pace—which is in sharp contrast, in particular, to the executive’s high pace of action (Kuo 2019, 571). In that sense, and based on an understanding of democracy as a “reflexive process of governance with the function of political learning” (Kuo 2019, 570), courts can contribute, it is argued, to the regeneration of democratic education and articulated governance through their embedded slowness and their decelerating function, as well as their relative detachment from populist pressures.

While normatively appealing, this alleged contribution to democratic education or learning is nevertheless grounded in empirical claims that remain, ultimately, difficult to verify (Daly 2017b, 291). More studies—notably empirical or socio-legal research—are needed to assess the true contribution of courts in that regard. Even the precise nature of the judicial contribution to parliamentary debates and deliberation remains relatively unclear. For instance, Kuo claims that through the judicial intervention following the post-Brexit vote, UK courts made a “difference in the face of populist forces” (Kuo 2019, 572), notably by allowing subsequent parliamentary debate and scrutiny. This is in line with this article’s argument that courts, in the two *Miller* cases, slowed down the populist course of action and contributed to the (at least temporary) re-establishment of deliberative-democratic channels. This can be seen in the countless parliamentary debates on Brexit that followed the two court decisions. Nevertheless, the true extent to which courts have effectively contributed to democratic and political learning—and even deliberation and debate—remains unclear, particularly considering that the outcome of the Brexit

referendum continued to be depicted, even after the two *Miller* cases, as the immediate, acute, decisive, and unassailable expression of the immanent and immutable People-as-One.

In the same vein, the medium-to-long-term “effects” and “effectiveness” of judicial deceleration or stabilisation on democratic learning remain to be seen, particularly in a context in which very little scholarly attention has been paid to the effects (or consequences, or what Frederick Schauer calls the “non-legal end-states”) of laws, judicial decisions, and legal doctrine (Schauer 2012). In fact, the question of the relevant timescale of analysis also further complicates any search for “effectiveness,” with most analyses of the *Miller* cases focusing on the immediate aftermath of these decisions.

## CONCLUSION

In the United Kingdom, as elsewhere, the rise of populism and its inherent “constitutional impatience” is often accompanied by a certain “executivisation” of political power, bolstered by a form of anti-institutionalism. Indeed, the point of focus of politics in constitutional democracies, long conceived around legislative power, seems to be shifting towards executive power (Issacharoff 2018, 498–504). Populists in power view and depict core components of democratic governance—including slow-paced deliberative institutions—as illegitimate obstacles to the implementation of their electoral mandates and, as such, as barriers to be overcome or simply disregarded or ignored. Circumventing existing institutions like Parliament becomes fair game; in fact, any attempt by legislatures to prevent the executive from implementing by any means necessary what it deems to be the “will of the people” is perceived and depicted by them as a usurpation of power. In contrast to slow-paced and seemingly inefficient legislatures and Parliaments, prerogative and other executive powers allow populists in power to act quickly and expediently—and to avoid “lengthy,” “burdensome,” and “unnecessary” debate. By doing so, they show a clear tendency towards executive aggrandisement, thereby illustrating the interaction and interrelation between that propensity and what I have described as “constitutional impatience.”

Yet, it is precisely in this context that courts can play, as Kuo has argued (Kuo 2019)—and indeed have played, in the circumstances described in this article—an essential function as institutional decelerators. As the scope of executive powers is reviewable by courts, at least in the UK, judges are well positioned to slow down the populist tempo and “restrain the impulse to circumvent institutional constraints on consolidated power” (Issacharoff 2020, 1115). However, in the context of pressures

on institutional boundaries and formal divisions of governmental authority, the role of the courts goes beyond institutional defence, including parliamentary sovereignty, and the separation of powers. Courts also have a further underexamined and underappreciated role: that of an institutional *stabiliser* in response to the constitutional impatience of populism and its inherent anti-institutionalism.

Indeed, the judicial responses to executive power-grabs in the *Miller (no. 1)* and *Miller (no. 2)/Cherry* cases illustrate the above scenario—namely, that courts can, in certain circumstances, have a certain stabilising function by both slowing down the populist acceleration of political time *and* ensuring that the institutional mechanics of constitutional governance (including the sometimes lengthy and time-consuming constitutional decision-making process) are duly followed. In doing so, courts can arguably restore—at least in part—what Scheuerman views as the traditional liberal-democratic temporal separation of powers (Scheuerman 2004, 29) and act as a bulwark against populist constitutional impatience, notably in the face of the heightened use of prerogative powers by the executive. Of course, courts are no more entitled to claim to speak on behalf of “the people” and (or) the popular sovereign than the populist leader or institutions (or offices) of the state (Arato 2019, 331). Nevertheless, through their review function courts can *control* the exercise of some executive powers, at least those that are “justiciable”—that is to say, suitable for judicial review (Young 2017, 99). As such, courts can stabilise the system of constitutional governance and decision-making by slowing down the populist tempo and ensuring that constitutional, democratic, and institutional procedures are followed. Finally, these judicial responses also reveal that courts can contribute to the re-establishment of the empty place of power, through the safeguarding of institutional-democratic spaces and channels.

That said, as we have seen, courts are not necessarily a panacea for “constitutional impatience,” not even in the UK context. The public reception of the two *Miller* cases, as well as the 2019 Conservative Manifesto’s pledge “to look at the broader aspects of [the UK] constitution: the relationship between the government, Parliament and the courts; [and] the functioning of the Royal Prerogative,” is a reminder that the longer-term effects of those cases remains to be seen and that the courts’ position in the UK constitutional order (particularly their relationship with the executive) remains, at best, a fragile one. Moreover, and perhaps of greater importance, the more substantive virtues of judicial or institutional deceleration praised by some—including its alleged contributions to democratic learning as part of the multistage process of constitutional-democratic governance—are grounded in empirical claims that are normatively appealing but remain difficult to verify, particularly in the longer term.

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