BREXIT, THE PREROGATIVE, THE COURTS AND ARTICLE 9 OF THE BILL OF RIGHTS
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Introduction

The Brexit controversy in the United Kingdom has drawn attention to the sometimes difficult relationship between the executive and Parliament, and the role the courts may play in adjudicating upon it. In particular it has raised issues concerning:

- the appointment and removal of a Prime Minister in the context of the *Fixed-term Parliaments Act 2011* (UK);
- the operation of conventions concerning loss of confidence in circumstances where a dissolution may not be possible;
- whether a caretaker government could take positive steps to prevent a no-deal Brexit in order to avoid the binding application on a future government of a serious constitutional change occurring during the caretaker period; and
- whether, if the *Fixed-term Parliaments Act* were repealed, the Queen's reserve powers in relation to the dissolution of Parliament would revive.

But the two issues I will address here are the power to prorogue Parliament and the grant of royal assent, as both raise issues concerning the extent of prerogative powers, the justiciability of their exercise and whether the courts are limited in their power to adjudicate upon such exercises by article 9 of the *Bill of Rights 1688*.

Prorogation – the context in which it arose

To understand the context of the Johnson Government's advice to prorogue Parliament and the judicial responses to the two legal challenges to it, one must first appreciate how the issue of prorogation first arose in the public debate.

The referendum on whether the United Kingdom should leave the European Union ('EU') was passed on 23 June 2016. The UK Supreme Court, in the first *Miller* case,[1] held that parliamentary approval was required before the Executive Government could trigger article 50 of the Treaty on European Union, in order to commence the process of leaving the EU. Such legislation was passed[2] and article 50 was invoked on 29 March 2017. This gave a period of two years during which an agreement on the terms of the UK's exit from the EU could be negotiated. If no such agreement was reached by 29 March 2019, the UK would automatically cease to be a member of the EU – otherwise known as a 'no deal Brexit'.

In January and March 2019, Prime Minister May put an agreement with the EU to Parliament for its approval, but it was defeated on a number of occasions. Members took control of the House of Commons away from the Government to vote on a number of Brexit options, but all failed. An extension was granted by the EU until 12 April 2019.

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[1] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.
[2] *European Union (Notification of Withdrawal) Act 2017* (UK).

It was in this context that prorogation was first raised as a way of by-passing the parliamentary paralysis. Professor John Finnis of Oxford University wrote an opinion piece in the *Daily Telegraph* on 1 April 2019 arguing that Parliament should be prorogued for two or three weeks until after 12 April, so that the United Kingdom would leave the EU without an agreement. He considered the conduct of a majority of the House, in taking control of its agenda against the Executive's will, to be 'illegitimate in intent and chaotic in effect.'[3]

On 10 April prorogation was described in *The Sun,* as the 'nuclear Brexit option'.[4] But on that date, the EU agreed to a further extension until 31 October 2019, causing prorogation speculation to die down for a bit.

It arose against after the Prime Minister, Theresa May, announced that she would resign and an election was held from amongst party members for the new leader of the Conservative Party. On 6 June 2019, a Tory MP Brexiteer was reported in *The Times* as stating that 'we don't want [prorogation] but it has to be kept as a nuclear option'.[5]

One of the leadership contenders, Dominic Raab, said that he was prepared to prorogue Parliament to ensure that the UK leaves the EU by 31 October. This angered some other Conservative MPs, including Amber Rudd, who responded that it was 'outrageous to consider proroguing Parliament' and 'we are not Stuart Kings'. Another Conservative leadership contender, Rory Stewart, argued that prorogation in such circumstances would be 'unlawful' and 'undemocratic'.[6]

On 28 June, when asked whether he would prorogue Parliament if he became Prime Minister, Boris Johnson said it would be 'folly' to rule it out, but that he did not 'envisage the circumstances in which it will be necessary to prorogue Parliament, nor am I attracted to that expedient'.[7]

MPs were so concerned that prorogation would be used to shut down Parliament when it was supposed to return from the summer recess on 3 September, that on 18 July 2019, they amended the *Northern Ireland (Executive Formation) Act 2019* (UK). The amendment provided that at certain dates reports had to be made to Parliament and if Parliament was prorogued, then it had to be summoned to meet within 5 calendar days, and sit for the following five days. The first trigger date was 4 September, and a second was 9 October, and every 14 days thereafter.

Once Boris Johnson won the leadership of the Conservative Party and became Prime Minister, speculation grew about whether he would use the nuclear option of prorogation. On 30 July, a cross-party group of 75 MPs, Members of the House of Lords and one QC, commenced proceedings in the Scottish Court of Session (which was the only court operating at that time,

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[3] John Finnis, 'Only one option remains – prorogue Parliament and allow ministers to take us out of the EU with no deal on April 12' *Daily Telegraph* (London), 1 April 2019, p 4.
[4] Steve Hawkes, 'Nuclear Brexit: Ministers are plotting a 'nuclear' Brexit option to force through Theresa May's deal', *The Sun* (London), 10 April 2019.
[5] Francis Elliott, Henry Zeffman, Kate Devlin, 'Gove stokes MPs' fears over Johnson', 6 June 2019, *The Times* (London), p 1.
[6] 'We're not Stuart kings: MPs blast Raab ploy to prorogue commons', *Evening Standard* (London), 6 June 2019, p 1.
[7] Rowena Mason, 'Boris Johnson refuses to rule out forcing through no-deal Brexit', *The Guardian* (London), 28 June 2019, p 8.

due to the summer recess for English courts), seeking a declaration that prorogation would be unlawful and an injunction to prevent it. This was the *Cherry* proceedings.[8]

On 13 August the *Daily Telegraph* ran a front page headline that a majority of the public supported proroguing Parliament to secure Brexit.[9] But it was criticised on the ground that it was only a majority, once you remove the sizeable group of don't knows.[10]

Two days later, on 15 August, Nikki da Costa, the Prime Minister's Director of Legislative Affairs, sought the Prime Minister's agreement to prorogue Parliament, suggesting it was just a housekeeping matter to end a long session and start a new session with a Queen's speech on 14 October. She proposed that prorogation commence within the period of 9 September to 12 September and end with a Queen's speech on 14 October. The Prime Minister agreed.

On 23 and 27 August, the UK Government, in the *Cherry* proceedings, claimed that the case was hypothetical and premature as there was no reasonable or even hypothetical apprehension that the Government intended to advise the Queen to prorogue. This was said, even though the Prime Minister had already decided to advise the Queen to prorogue Parliament, although this was not yet public knowledge.

The same day that the prospect of prorogation was being denied in the judicial proceedings – 27 August – the Queen was advised in a phone call by the Prime Minister about the proposed prorogation. A Privy Council meeting was held the next day, 28 August, at Balmoral, at which an Order in Council was made ordering that Parliament be prorogued for the relevant period and that a commission be prepared and issued. The Cabinet was only told afterwards. The prorogation provoked further litigation, this time commenced in England by Gina Miller – the *Miller (No 2)* action.[11]

The period of prorogation was unusually long. In the UK it normally takes place over four or five days. It takes time to arrange the seating in the House of Lords for the Opening of Parliament. Five weeks is very unusual. To suggest that this length of prorogation was necessary to have a Queen's speech and had nothing to do with stopping Parliament from acting in relation to Brexit was patently absurd, given the political context in which prorogation had been discussed.

The timing of the prorogation was very precisely calculated to minimise the period of time that Parliament could sit. Because of the *Northern Ireland (Formation of Government) Act*, if Parliament had been prorogued for the whole of the period from 3 September to Brexit day, the House would have been brought back for periods of 5 sitting days in early September and around 14 October. By permitting prorogation on 9 September, the sitting period could be reduced to four days (or effectively three days if prorogation had occurred early on the morning of 9 September), which, based on previous experience and the timing requirements of the Standing Orders in both Houses, would not be enough time to get a bill passed through both Houses to prevent a no-deal Brexit.

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[8] *Cherry v Advocate General for Scotland* [2019] CSOH 70; and [2019] CSIH 49.
[9] Christopher Hope, Camilla Tominey, Harry Yorke, 'Public backs Johnson to shut down Parliament for Brexit', *The Daily Telegraph* (London), 13 August 2019, p 1.
[10] 'The Telegraph's poll figures on suspending parliament are misleading', *Full Fact*, 13 August 2019: https://fullfact.org/europe/telegraph-suspending-parliament/.
[11] *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB).

Further, it was unlikely that the House would vote no confidence in the Government, triggering an election, because the House was aware that the Prime Minister controlled advice to the Queen on the election date[12] and could ensure that Parliament was dissolved until after the Brexit date, resulting in a no-deal Brexit.

As is now known, a Bill was passed in record time to prevent a no-deal Brexit[13] – but it was a close-run thing.

On 24 September the UK Supreme Court held in *R (Miller) v The Prime Minister* and *Cherry v Advocate General for Scotland*[14] that the prorogation was founded on unlawful advice and was itself unlawful, null and of no effect.

Justiciability and the Scottish/English courts

At the lower level, the Scottish and English courts disagreed about the issue of the justiciability of the prerogative to prorogue. Historically, the view had been taken that decisions by the Sovereign could not be challenged in the Sovereign's own courts. Later, that view changed following recognition that such decisions were ordinarily taken on ministerial advice and that many ministerial decisions could appropriately be the subject of judicial review. The focus switched from the status of the decision-maker to the nature of the subject of the decision.[15]

The courts continued to accept that some subject matters, being the high political ones, were not capable of judicial review. Lord Roskill in the 1985 *CCSU* case said that prerogative powers, such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers could not properly be made the subject of judicial review.[16]

The focus today has shifted from subject matter to the nature of the claim for review and whether it can be determined by the application of judicial standards (rather than policy choices). For example, while a court could not make a decision on the merits of whether a person should be awarded an honour, as this is not capable of determination by judicial standards, it could determine that a decision to award an honour in exchange for a bribe was unlawful. This was reflected by Sedley LJ in *R (Bancoult) v Foreign Secretary (No 2)*[17] where he suggested that a number of Lord Roskill's examples might today not be completely immune from judicial review, such as the grant of honours for reward or a refusal to dissolve Parliament at all. A similar approach has been adopted in Australia.[18]

While prorogation would traditionally have stood in the category of subjects which were non-justiciable, because of the political nature of the subject-matter, it is arguable today that it

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[12] *Fixed-term Parliaments Act 2011* (UK), s 2(7).
[13] *European Union (Withdrawal) (No 2) Act 2019* (UK), known as the Benn Act. This was achieved through the suspension of Standing Orders and the passage of a resolution dictating specific procedures and a timetable for proceedings on the passage of the Bill. See, eg, UK, House of Commons, *Hansard*, 3 September 2019, Vol 664, col 81.
[14] [2019] UKSC 41.
[15] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. For its origins, see *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864.
[16] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418.
[17] [2008] QB 365, 399 [46].
[18] See eg: *Eastman v Attorney-General (ACT)* (2007) 210 FLR 440, [79]; and *Ogawa v Attorney-General (No 2)* [2019] FCA 1003 [39] (Logan J), regarding the prerogative of mercy.

would be justiciable in limited circumstances, where judicial standards of decision-making could appropriately be applied.

This was essentially the difference between the English High Court and the Scottish Inner House of the Court of Session in the *Miller (No 2)* and *Cherry* cases. The High Court of England and Wales took the traditional view that prorogation fell into a non-justiciable subject matter. The Court observed that the decision to prorogue and the duration chosen for prorogation were 'inherently political in nature' and considered that there were no legal standards against which their legitimacy could be judged.[19]

The Inner House of the Scottish Court of Session took the more modern view, with Lord Brodie observing that a question is 'justiciable if it is capable of practical determination by reference to legal principles in a court of law'.[20] The Court focussed upon administrative law grounds that are commonly applied in the judicial review of ministerial decisions, such as irrationality and improper purpose. These fall within the legal standards that might properly be applied by a court.

The Supreme Court's decision

The UK Supreme Court, in its unanimous judgment upon the appeals in the *Miller (No 2)* and *Cherry* cases, managed to avoid addressing the controversial issue of 'improper purpose' and the justiciability of prerogative powers that fall into the area of high politics. It instead resorted to a very long-standing proposition, that the courts may determine the existence and scope of prerogative powers. This is the role of the common law and has been recognised as such from at least the *Case of Proclamations* in the 15th century.[21]

The UK Supreme Court noted in the *Miller (No 2)/Cherry* appeals that as the limits of the prerogative are determined by the common law, they must be compatible with fundamental principles of constitutional law. In this regard, its approach is similar to that of the High Court of Australia in *Lange v Australian Broadcasting Corporation*,[22] where the Court held that the common law must be interpreted consistently with constitutional imperatives. Although the UK Supreme Court received some flack for giving legal effect to constitutional principles, it would make little sense for the courts to apply the common law in a manner that was inconsistent with those principles.

The Court identified two relevant fundamental constitutional principles, being parliamentary sovereignty (which does not apply in the same way in Australia due to Australia's federal system and entrenched Constitution) and parliamentary accountability (which in Australia would be described as the principle of responsible government). Their Lordships observed that the 'sovereignty of Parliament would… 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.'[23] They concluded that an unlimited power of prorogation would be incompatible with the principle of parliamentary sovereignty.

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[19] *R (Miller) v Prime Minister* [2019] EWHC 2381, [51] (Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Dame Victoria Sharp P).
[20] *Cherry v Advocate-General* [2019] CSIH 49, [83] (Lord Brodie).
[21] *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352, 1354.
[22] (1997) 189 CLR 520, 566.
[23] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [42].

Equally, the principle that the government must be accountable to Parliament is undermined if Parliament is prorogued and cannot scrutinise the government. Their Lordships noted that '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.'[24]

Taking these two fundamental constitutional principles into account, and applying them as common law limits on the power to prorogue, the Court set out the following test:

> 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 an exceptional course.[25]

Their Lordships pointed out that the extent to which prorogation frustrates or prevents Parliament's ability to perform its functions is a 'question of fact', which the courts are capable of determining.[26] It is not a policy question which falls outside the exercise of judicial power to determine.

Whether or not there is a reasonable justification entails a greater degree of judgement, and would therefore be more contentious. But in this case the Court concluded that the evidence placed before it did not provide 'any reason at all – let alone a good reason' – for this prorogation. The evidence failed to explain why a prorogation of five weeks was needed in the circumstances, and failed to assess the competing merits of prorogation and parliamentary recess.

To Australian ears, this sounds very similar to the approach of the High Court of Australia in *Unions NSW v New South Wales (No 2)*,[27] where it held that the NSW Government had failed to provide evidence sufficient to justify the burden of its law upon the implied freedom of political communication with respect to third-party campaigners. It is a further lesson to governments that when they act in a way which burdens a fundamental constitutional principle or implication, and claim to do so for another legitimate reason, they must be able to present the court with evidence to establish this claim.

The UK Supreme Court stressed that the ordinary prorogation of Parliament for a few days to allow a new session to commence would be valid. It also expressed a degree of deference towards the Prime Minister's assessment of whether the prorogation of Parliament was warranted in the circumstances. However, it concluded that it was ultimately the responsibility of the courts 'to determine whether the Prime Minister has remained within the limits of the power'.[28] In Australia, this would be regarded as a matter of 'jurisdictional error', which a court may determine in the exercise of its judicial power. The fundamental principle of the rule of law requires that ministers act within the scope of the powers conferred upon them by statute or the common law.

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[24] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [48].
[25] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [50].
[26] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [51].
[27] [2019] HCA 1.
[28] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [51].

The Court held that this was 'not a normal prorogation'[29] given its length and the exceptional circumstances in which it arose. It had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account. The Court stressed that it was not concerned with the motive or purpose of the Prime Minister (unlike the Scottish court). Its assessment was instead of whether the evidence before it provided a reasonable justification for the prorogation of Parliament for five weeks. It found that no such evidence was provided to it.

As a consequence, it held that the advice to the Queen was unlawful, that the Order in Council that commanded the royal commissioners to formalise the prorogation in Parliament was also unlawful, and that the act of the commissioners was null and void and of no effect. It was as if they had walked into the chamber with 'a blank piece of paper'.[30]

Parliamentary issues

Two issues that are of particular interest to a parliamentary audience arise out of this case. The first is the question of why Parliament didn't just legislate to prevent its prorogation (as has happened in NSW in relation to prorogation in the period before its dissolution[31]). The answer is that as prorogation is a prerogative of the Queen, any legislation affecting the power to prorogue in the UK would require 'Queen's consent' before it can be debated, and ministers control advice to the Queen on the giving of that consent. Hence, a majority in Parliament cannot legislate to prevent prorogation without the support of the government. All it could do would be to legislate to impose a statutory requirement to summon Parliament's return upon particular events happening when it is prorogued, which is what was done in the *Northern Ireland (Executive Formation) Act.*

Secondly, there is the issue of parliamentary privilege. The UK Government had strenuously argued that prorogation is a proceeding in Parliament and therefore art 9 of the *Bill of Rights 1688* prohibits it from being impeached or questioned in any court. Unlike in Australia, in the UK prorogation is announced before members of both Houses gathered in the House of Lords, by a number of its members who are commanded by a royal commission to do so.[32] In Australia, the Governor-General has not attended Parliament to prorogue it since 1906 and prorogation usually happens in a small ceremony outside Parliament.[33]

The UK Supreme Court rejected the application of art 9 to prorogation. It noted that although prorogation took place in the presence of Members of both Houses, the Members had no power to speak or vote on it.[34] They had no freedom of speech and this was not part of the core or essential business of Parliament. It was an executive act which was 'imposed upon them from the outside'. The Houses had no capacity themselves to exercise the prerogative to prorogue or to prevent it by the passage of a resolution. Prorogation was not a power of Parliament.

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[29] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [56].
[30] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [69].
[31] *Constitution Amendment (Prorogation of Parliament) Act 2011* (NSW).
[32] The Lords Commissioners who purported to give effect to the prorogation were Baroness Evans of Bowes Park, Lord Fowler and Lord Hope of Craighead. The Labour Commissioner, Baroness Smith of Basildon, and the Liberal Democrat Commissioner, Lord Newby, declined to attend.
[33] B C Wright, *House of Representatives Practice* (6th ed, 2012) p 229.
[34] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [68].

The purpose of article 9 is to protect freedom of speech and debate in the Houses and their committees. It ensures that MPs are not subjected to any penalty, civil or criminal, for what they say in parliamentary proceedings and that they can discuss what they choose.[35] Its purpose is not to protect any executive decision announced in Parliament from judicial review. Otherwise, governments would constantly announce controversial decisions in Parliament to prevent them from being the subject of judicial review proceedings.

This point was made by the UK Joint Committee on Parliamentary Privilege in 1999. It recognised that both parliamentary scrutiny and judicial review have important, separate, roles. Parliament makes the laws but only the courts can set aside unlawful ministerial decisions. It concluded that art 9 is intended 'to protect the integrity of the legislature from the executive and the courts' and that it would be an ironic consequence if it were to 'become a source of protection of the executive from the courts'.[36]

The courts in the UK have also previously held that ministerial decisions announced in Parliament and the validity of subordinate legislation tabled and approved in Parliament can still be the subject of judicial review. As Lord Reed observed in *Bank Mellat*, setting aside a ministerial decision and quashing the resulting order does not review anything done by Parliament.[37] Hence, the article 9 argument in the *Miller (No 2)/Cherry* appeals was misconceived and dismissed.

How might the High Court of Australia decide a similar challenge?

The High Court of Australia could take a similar view to the UK Supreme Court in terms of the scope of the power to prorogue. Although prorogation in Australia generally finds its source in statute, rather than the prerogative,[38] the term 'prorogue' is likely to be interpreted by reference to the meaning and context of the term at the time the Constitution was enacted.[39] Hence, to give the term meaning, reference needs to be made to the prerogative and the common law determination of its scope. Accordingly, the reasoning of an Australian court could well be very similar to that of the UK Supreme Court.

In Australia too, the common law must be developed in a manner that is consistent with constitutional principles. Here, the relevant principles would be representative and responsible government. For example, in *Egan v Willis* the High Court held that the functions of the Houses of the NSW Parliament are not just legislative but include securing the accountability of the executive to Parliament, and drew upon the principle of responsible government to determine, at common law, what is 'reasonably necessary' for the proper exercise of the functions of the Legislative Council.[40] In Australia the courts have also previously been prepared to address the application and effect of prorogation.[41]

Alternatively, depending upon how the case was argued, an Australian court could find an implication derived from the principle of responsible government, to the extent that it is rooted

[35] *Pepper v Hart* [1993] AC 593, 638 (Lord Browne-Wilkinson).
[36] UK, Joint Committee on Parliamentary Privilege, 'Parliamentary Privilege – First Report' (1999), [51].
[37] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [54] (Lord Reed).
[38] See, eg, s 5 of the Commonwealth Constitution.
[39] *Cole v Whitfield* (1988) 165 CLR 360, 385.
[40] *Egan v Willis* (1998) 195 CLR 424.
[41] *Attorney General (WA) v Marquet* (2003) 217 CLR 545, 574-6 [81]-[85] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

in the text and structure of the Constitution, that the Parliament must be able to fulfil its constitutional functions of legislating and holding the government to account.

Where prorogation had the effect of frustrating the ability of Parliament to fulfil its functions, then a question would arise as to whether or not this was for a legitimate purpose which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. For example, the 2016 prorogation of the Commonwealth Parliament was for the legitimate purpose of causing the Senate to sit to consider particular bills.

If so, the Court would then ask whether the law is reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[42]

It seems that that type of reasoning would be very similar to the UK Supreme Court's approach in the *Miller (No 2)/Cherry* appeals of requiring an 'effect' of frustrating or preventing the Parliament from fulfilling its functions, and a need for a reasonable justification – which encompasses the idea of both purpose and some level of reasonableness, which might be tested by a proportionality test.

Royal assent

Another Brexit controversy in the UK was whether the Executive Government could advise the Queen to refuse royal assent to bills passed against its wishes, and whether the Queen would be obliged to act upon such advice.

It is often said that the Queen has no discretion in relation to the grant of royal assent. Certainly, she has no personal discretion (other than a reserve power to uphold the Constitution[43]), but does this mean that she acts upon the advice of both Houses and must give assent to any bill validly passed by the Houses (or in certain circumstances, only one House), or must she give or refuse assent as advised by her responsible Ministers? The disagreement on this question reflects the clash of the constitutional principles involved, being responsible and representative government. Ordinarily, the two principles work in harmony, because the government commands the confidence of the lower House. Hence, if the government advises the Queen to defer assent or not give assent to a bill that has passed both Houses due to an error being identified in the bill after its passage, it can be assumed that the will of a majority of the House of Commons is in accord with that of the government, and there is no clash of principles.

But if a bill has been passed by both Houses against the will of the government and ministers advise the Queen to refuse assent to it, there is a strong argument that those ministers have ceased to be responsible. If the bill is so important that the government would take the drastic step of advising the Queen to refuse assent, the passage or defeat of the bill is clearly a matter of confidence. Hence, by the giving of such advice to the Queen, ministers would signify their loss of responsibility and the fact that the Queen is not obliged to act upon their advice, at least

[42] The above reasoning is based upon the approach taken by the High Court in relation to the implied freedom of political communication and implications concerning the franchise, drawn from Chapter I of the Constitution. See, eg, the High Court's approach in *Brown v Tasmania* (2017) 261 CLR 328, 363 [104] (Kiefel CJ, Bell and Keane JJ).

[43] See further: Anne Twomey, *The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (CUP, 2018), Ch 9.

with respect to the bill in question. When this occurred in New Zealand in 1877, the Governor, Lord Normanby, concluded that ministers should not be able to defeat a bill at the assent stage if they could not do so in either House. The British Secretary of State supported the Governor's refusal of royal assent in these circumstances.[44]

One argument made in the UK was that it would be legitimate for the government to advise the refusal of assent because the process by which the bill was passed was unlawful. Here, anger was directed at the Speaker for allowing MPs to take control of the parliamentary agenda against the will of the government. If a bill was not validly passed, for example because an entrenched manner and form requirement was breached, then it may be legitimate to refuse assent to it (although it would be preferable to leave the legal issue of a breach of manner and form to the courts to determine). But if, as in this case, it was a matter of parliamentary procedure, and a majority of the House agreed upon how that procedure should be altered, then this is no ground to refuse assent to a bill. A House, through a majority of its Members, should always have control over its procedure.[45] Alterations in procedures should not be regarded as justifying the refusal of royal assent.

The recent *Miller (No 2)/Cherry* litigation would now add the argument that advice to the Queen to refuse assent to a bill would have the effect of frustrating the ability of Parliament to fulfil its legislative function. Unless a reasonable justification could be established by the government (such as the identification of a serious error in the bill after its passage), such advice would be unlawful and the principle of the rule of law would require that it not be accepted. While it might well be argued that the grant of royal assent is a legislative act of the Queen in Parliament, performed on the advice of her Houses, and hence falls within the scope of a parliamentary proceeding that cannot be impeached in a court,[46] it is another matter to argue that parliamentary privilege protects from judicial review the advice of ministers to act in a manner that defeats the will of Parliament.

In any event, neither the UK Government nor the Australian Government in relation to the *Medevac Bill*[47] was so foolish as to advise the refusal of royal assent and provoke the controversy and litigation that would likely have resulted. The *Miller (No 2)/Cherry* case is a good warning of what may happen at the judicial level when a government chooses to act provocatively in pushing at constitutional boundaries.

Conclusion

There has long been an assumption in the United Kingdom that the reserve powers of the Crown will not ever be exercised. This is because it has been assumed that all politicians will behave appropriately and never put the Sovereign into the awkward position of even having to contemplate exercising his or her reserve powers. Recent events in the United Kingdom have shown that assumption no longer holds true.

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[44] See Anne Twomey, *The Veiled Sceptre – Reserve Powers of Heads of State in Westminster Systems* (CUP, 2018), 647.

[45] See further: Anne Twomey, 'Minority Government and the Validity of Standing Order Requirements for Absolute Majority Votes' (2019) 30 *Public Law Review* 142.

[46] *R (Barclay) v Secretary of State for Justice* [2015] AC 276, [48].

[47] See the discussion in: Anne Twomey, 'Why a government would be mad to advise the refusal of royal assent to a bill passed against its will', *The Conversation*, 29 January 2019.

What is interesting, however, is that if the politicians are not prepared to protect the Queen from controversy, the courts appear to have taken up this role. By turning a controversial prorogation into a question of the lawfulness of ministerial advice and the legal extent of prerogative powers, the courts have shifted responsibility to the judicial sphere (as the determination of legal questions is involved) away from the Sovereign's reserve powers (which are more likely to be exercised when there is no other institution or person with the power to uphold the Constitution).

Thus although the focus of discussion about the Brexit prorogation litigation has been upon the relationship between Parliament and the executive, and the ability of the courts to adjudicate upon it, the real constitutional shift that has occurred in the UK involves the courts assuming a role that had previously been reserved to the Queen in dealing with the advice from her Prime Minister. Whether or not the Queen appreciates this assumption of her role by the courts remains unknown.