A Critical Analysis of the *Case of Prorogations*

Paul Daly*

R (Miller) v Prime Minister *is a landmark case about the scope of prerogative power and judicial review in common law systems. In this article, I critically analyze the seminal decision of the UK Supreme Court in what will no doubt come to be known as the* Case of Prorogations, *focusing on its likely importance, its reasoning, its doctrinal and historical coherence. In Part II, "Prorogation", I set the scene for the Supreme Court's decision, describing the run-up to Prime Minister Boris Johnson's ill-fated prorogation of Parliament as a 'Hard Brexit' beckoned. Part III, "The UKSC Decision" is devoted to detailing the Supreme Court's analysis, setting out in a few dozen crisp and clear paragraphs penned by Lady Hale and Lord Reed. In Part IV, "The* Case of Prorogations*", I move to consider the decision in a broader historical setting, noting that it is broadly consonant with trends in relation to the prerogative and judicial review. Part V — "Critical Analysis" — contains an assessment of the Supreme Court's reasoning: tackling justiciability, doctrinal coherence, historical coherence, and remedy; in turn, I raise a number of concerns about the decision which, in a nutshell, turned doctrine and history on their heads. Although the* Case of Prorogations *will take its place in the pantheon of great common law decisions, Lady Hale and Lord Reed's analysis is problematic. Lastly, in Part VI, I conclude by offering some observations on "democratic decay", further the mission of this volume, arguing that the UK Supreme Court's decision was unnecessary and liable to provoke a political backlash.*

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I. Introduction

On the advice of Boris Johnson, whom she had appointed as Prime Minister on 24 July 2019, Queen Elizabeth II signed an Order in Council in late August of the same year, proroguing Parliament from 9th September and 12th September 2019 until 14th October 2019. A political storm immediately erupted in the United Kingdom, and three court challenges were launched or accelerated in response. These culminated in the decision of the United Kingdom Supreme Court in *R (Miller) v Prime Minister*.[1] The decision is commonly called *Miller 2*, reflecting the fact that the claimant was the same Gina Miller who succeeded in attacking the lawfulness of a previous Brexit-related use of the prerogative,[2] or "*Miller/Cherry*" in recognition of the two streams of litigation, English and Scottish, which flowed into the Supreme Court. As explained in Part IV below, I am going to call it the *Case of Prorogations*.

My primary focus is on this decision and, in particular, its likely importance, its reasoning, its doctrinal and historical coherence. In Part II, "Prorogation", I

1 [2019] UKSC 41 [*Case of Prorogations*].

2 *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 [*Miller* 2017].

set the scene for the Supreme Court's decision. Part III, "The UKSC Decision" is devoted to detailing the Supreme Court's analysis. In Part IV, "The *Case of Prorogations*", I move to consider the decision in a broader historical setting, noting that it is broadly consonant with trends in relation to the prerogative and judicial review. Part V — "Critical Analysis" — contains an assessment of the Supreme Court's reasoning: tackling justiciability, doctrinal coherence, historical coherence, and remedy; in turn, I raise a number of concerns about the decision which, in a nutshell, turned doctrine and history on their heads. I conclude by offering some general thoughts on "Democratic Decay" in keeping with the overall mission of this volume.

II. Prorogation

Prorogation is the "formal end of a [parliamentary] session".[3] In recent times, parliamentary sessions in the United Kingdom have typically lasted a year. A prorogation clears the decks for a new Queen's Speech in which the government of the day announces its legislative agenda for the next parliamentary session. Prorogation is a prerogative power: "Just as Parliament can commence its deliberations only at the time appointed by the Queen, so it cannot continue them any longer than she pleases".[4] As with most other prerogative powers, the prerogative of prorogation is exercised today on the advice of ministers.

The effect of prorogation is to shut down Parliament: "During the period of prorogation neither House, nor any committee, may meet".[5] This is because "[t]he effect of a prorogation is at once to suspend business, including committee proceedings, until Parliament shall be summoned again, and to end the sittings of Parliament", with the result that "[m]ost proceedings still pending

3 Robert Rogers & Rhodri Walters, *How Parliament Works*, 7d (Abingdon: Routledge, 2015) at 128.

4 David Natzler & Mark Hutton, eds, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25d (London: Markham, Ont.: LexisNexis, 2019) at para 8.5.

5 Rogers & Walters, *supra* note 3 at 129.

at a prorogation are quashed …".[6] Parliament cannot legislate and Members of Parliament cannot hold Ministers to account.

The Johnson Prorogation was controversial. Britain was at that point in the midst of a political crisis triggered by the 2016 referendum on membership of the European Union. A majority of voters —52% — expressed a desire to LEAVE the EU. In March 2017, after a reversal in the courts caused a delay, the then-Prime Minister, Theresa May formally notified the EU of the United Kingdom's departure.[7] This notification was made under Article 50 of the *Treaty on European Union*,[8] which provides for a two-year period — modifiable by consent of the EU and the departing member state —within which terms of departure may be negotiated and ratified.[9] If no terms are reached, the legal default is a 'No-Deal Brexit', with the departing member state immediately assuming the status of a 'third country' in the eyes of EU law; it would be as if Great Britain and Northern Ireland had dropped from the sky off the coast of Western Europe.[10]

But the Brexit process was long and arduous. Prime Minister May sought a fresh electoral mandate shortly after sending the Article 50 notification but her Conservative Party lost ground at the polls.[11] Her slim majority became a minority and she held onto her office only by virtue of a confidence and supply

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6 Natzler & Hutton, *supra* note 4 at para 8.6.

7 See "Article 50: UK set to formally trigger Brexit process", *BBC News* (29 March 2017), online: <www.bbc.com/news/uk-politics-39422353>.

8 Consolidated Version of the *Treaty on the European Union*, 26 October 2012, OJC 326/1.

9 *Ibid.*

10 See "What is a No-Deal Brexit?" (14 March 2019), online: *BBC News* <www.bbc.com/news/uk-politics-47559490>; Yuliya Kaspiarovich & Nicolas Levrat, "After a No-Deal Brexit, Would the UK Remain in the EEA by Default?"(8 October 2018), online: *Brexit Institute News* <dcubrexitinstitute.eu/2018/10/after-a-no-deal-brexit-would-the-uk-remain-in-the-eea-by-default/>.

11 See "UK election 2017: Conservatives lose majority"(9 June 2017), online: *BBC News* <www.bbc.com/news/election-2017-40209282>.

agreement with the Democratic Unionist Party.[12] From this position of weakness she was harried, hassled and harassed by enemies on all sides. Her hard-line Brexiteer Conservative Party backbenchers (and a handful of likeminded politicians on the opposition benches) urged her to set a 'No-Deal Brexit' as her course, either to terrify the EU into concessions or — for the hardest of the hard-core Brexiteers — as an end in itself. Her more moderate backbenchers were horrified at the prospect of a 'No-Deal Brexit' and allied themselves with opposition MPs who were also opposed to a 'Hard Brexit'.[13] May succeeded in negotiating a withdrawal agreement under Article 50[14] but she could not ratify it: on the three occasions it was put to the House of Commons, the agreement was rejected by a majority of MPs.[15]

In Parliament, the anti-No-Deal forces were stronger than the pro-No-Deal forces. Backbenchers seized control of the legislative agenda and succeeded in passing legislation compelling the Prime Minister to ask the EU for an extension to the two-year Article 50 period. Prime Minister May complied (perhaps, secretly, happily), asking in the end for two extensions, the second of which set a deadline of 31st October, 2019. But her compliance was seen as defiance of her hawkish backbenchers and led to her ousting as a leader. Johnson was the ultimate beneficiary — that he had resigned as Foreign Secretary when he could not countenance a compromise May crafted to chart a course between the Hard

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12 See Alex Hunt, "Theresa May and the DUP deal: What you need to know"(26 June 2017), online: *BBC News* <www.bbc.com/news/election-2017-40245514>.

13 See "Theresa May's Brexit Deal Is Rejected by U.K. Parliament" (29 March 2019), online: *New York Times* <www.nytimes.com/2019/03/29/world/europe/theresa-may-brexit.html> ["Brexit Deal Rejected"].

14 See Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (2018) online (pdf): *European Commission* <ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf>.

15 "Brexit Deal Rejected", *supra* note 13.

and Soft Brexiteers to a negotiated resolution with the EU was proof of his purity as far as the hardliners were concerned.

Prime Minister Johnson inherited, however, the same parliamentary arithmetic which had led to his predecessor's downfall. The anti-No-Deal alliance soon manifested itself against him. In the leadership campaign, Johnson's Brexiteer rival, Dominic Raab, suggested that as Prime Minister he would prorogue Parliament in order to put a stop to the march of the anti-No-Dealers. If parliamentary business ground to a halt, the clock would run down to 31st October, and Britain would crash out of the EU without a deal. The idea, first floated by Professor John Finnis earlier in the year,[16] was immediately popular. But the anti-No-Dealers soon punctured the hopes of the Hard Brexiteers. Tenacious use of parliamentary procedures — aided and abetted by a compliant Speaker[17] — allowed them to ensure that the *Northern Ireland (Executive Formation etc) Act 2019* ("*NIA*")[18] contained hard legislative limits on the power to prorogue. The effect of this innocuously titled statute was that Parliament had to be sitting — to consider ministerial reports on the situation in Northern Ireland — during the critical period in which the Johnson Government might run down the clock and achieve a 'No-Deal' Brexit.[19] The thinking was that this would allow the anti-No-Deal alliance to legislate once again to compel the Prime Minister to seek another extension to the Article 50 negotiating period.

Bloodied but unbowed, Johnson ploughed ahead with prorogation anyway. His motivation may well have been to provoke the opposition into a vote of no

16 John Finnis QC, "Only one option remains with Brexit – prorogue Parliament and allow us out of the EU with no-deal", *Daily Telegraph* (1 April 2019), online: <www.telegraph.co.uk/politics/2019/04/01/one-option-remains-brexit-prorogue-parliament-allow-us-eu/>.

17 See Asif Hameed, Proroguing Parliament (1 August 2019), online (blog): *UK Constitutional Law Association* <ukconstitutionallaw.org/2019/08/01/asif-hameed-proroguing-parliament>.

18 (UK) [*NIA*].

19 See "Brexit: MPs back bid to block Parliament suspension" (18 July 2019), online: *BBC News* <www.bbc.com/news/uk-politics-49030225>.

confidence and a general election.[20] Because of the *Fixed-term Parliaments Act 2011* ("*FTA*"),[21] Johnson could not advise the Queen to dissolve Parliament and send the country to the polls.[22] And with Johnson facing such unfriendly parliamentary arithmetic, the opposition parties had little incentive to oblige by providing the two-thirds majority the *FTA*[23] required for a general election. Even if prorogation could not trigger a 'No-Deal' Brexit perhaps it could trigger a 'No-Deal' Brexit election in which Johnson could campaign as the champion of those who had voted to LEAVE the EU.[24] This, in any event, seems to be why Johnson advised the Queen to prorogue Parliament for six weeks whilst a political storm was raging and a momentous policy decision — the terms of Britain's departure from the EU — had to be taken with the clock ticking ominously down towards October 31, 2019.

The litigation relating to Johnson's power to advise the Queen to prorogue Parliament had, in fact, begun not long after Johnson was appointed as Prime Minister. In late July, a cross-party group of MPs led by Joanna Cherry, members of the House of Lords and a lawyer launched proceedings in the Scottish Court of Session, seeking a declaration and an interdict to the effect that prorogation designed to achieve a 'No-Deal' Brexit would be unlawful. Politicians opposed to Brexit had previously had significant success in the Scottish courts[25] and presumably perceived as a result that they had a better chance of getting a prophylactic remedy in advance of any attempt to prorogue Parliament. In the

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20 See Jonathan Clark, "Can They Block Brexit? Law v Convention" (23 August 2019), online: *Briefings for Britain* <briefingsforbritain.co.uk/can-they-block-brexit-law-v-convention>.

21 (UK) [*FTA*].

22 Clark, *supra* note 20.

23 *FTA, supra* note 21.

24 See Tom Kibasi, "Ignore Boris Johnson's bluster about Brexit. He wants a general election" (12 June 2019), online: *The Guardian* <www.theguardian.com/commentisfree/2019/jun/12/boris-johnson-brexit-general-election>.

25 *Wightman v Secretary of State for Exiting the European Union,* [2018] CSIH 62 (Scot).

Outer House of the Court of Session, the petitioners' application for an interim interdict was refused[26] before their application was dismissed on the merits, on the basis that it was non-justiciable.[27] But on appeal to the Inner House — by which time the Johnson prorogation had been announced — the petitioners succeeded in persuading the court that their application was justiciable and that the prorogation was unlawful.[28] Unsurprisingly, the government appealed to the United Kingdom Supreme Court.

Parallel proceedings had been launched in England upon the announcement of the prorogation. The Divisional Court, however, took the view that the application for judicial review brought by Gina Miller was non-justiciable.[29] But the Divisional Court granted an application for a 'leapfrog' appeal enabling the matter to proceed directly to the United Kingdom Supreme Court.

Lastly, proceedings were commenced in Northern Ireland but did not proceed to a hearing. The United Kingdom Supreme Court heard the appeals (and argument from the Northern Ireland parties) over three days in September 2019.

A critically important consequence of these legal proceedings was that the government released three documents that were prepared in the lead-up to the prorogation. The first was a memorandum prepared by the Prime Minister's Director of Legislative Affairs. The "key points"[30] she made were as follows:

- This had been the longest session since records began. Because of this, they were at the very end of the legislative programme of the previous administration. Commons and Lords business managers were asking for new Bills to ensure that Parliament was using its time gainfully. But if new Bills were introduced, the session would

26 *Cherry v Advocate General for Scotland*, [2019] CSOH 68 at para 10.

27 *Cherry v Advocate General for Scotland*, [2019] CSOH 70.

28 *Cherry v Advocate General for Scotland*, [2019] CSIH 49 [*Cherry* CSIH].

29 *R (Miller) v Prime Minister*, [2019] EWHC 2381 (QB) at para 68 [*Miller* 2019].

30 *Case of Prorogations*, *supra* note 1 at para 17.

have to continue for another four to six months, or the Bills would fall at the end of the session.

- Choosing when to end the session — *i.e.* prorogue was a balance between "wash up" — completing the Bills which were close to Royal Assent - and "not wasting time that could be used for new measures in a fresh session". There were very few Bills suitable for "wash-up", so this pointed to bringing the session to a close in September. Asking for prorogation to commence within the period 9th to 12th September was recommended.
- To start the new session with a Queen's Speech would be achievable in the week beginning 14th October but any earlier "is extremely pressured".
- Politically, it was essential that Parliament was sitting before and after the EU Council meeting (which is scheduled for 17th - 18th October). If the Queen's Speech were on 14th October, the usual six-day debate would culminate in key votes on 21st and 22nd October. Parliament would have the opportunity to debate the government's overall approach to Brexit in the run-up to the EU Council and then vote on it once the outcome of the Council was known.
- It must be recognised that "prorogation, on its own and separate of a Queen's Speech, has been portrayed as a potential tool to prevent MPs intervening prior to the UK's departure from the EU on 31st October". The dates proposed sought to provide reassurance by ensuring that Parliament would sit for three weeks before exit and that a maximum of seven days was lost apart from the time usually set aside for the conference recess.
- The usual length of a prorogation was under ten days, though there had been longer ones. The present proposal would mean that Parliament stood prorogued for up to 34 calendar days but, given the conference recess, the number of sitting days lost would be far less than that.

- The Prime Minister ticked "Yes" to the recommendation that his [Parliamentary Private Secretary] approach the Palace with a request for prorogation to begin within the period Monday 9th to 12th September and for a Queen's Speech on Monday 14th October.

The second document consisted of the Prime Minister's hand-written comments on the memorandum:

> "(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust.
>
> (2) So I don't see anything especially shocking about this prorogation.
>
> (3) As Nikki nots [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few".[31]

The third document was a further memorandum from the Director of Legislative Affairs. Also, in the materials considered by the Supreme Court were the minutes of a cabinet meeting held after the advice to prorogue had been given to Her Majesty.[32] The contents of these documents, especially the first memorandum from the Director of Legislative Affairs, proved to central to the Supreme Court's decision and the outcome of the litigation.

III. The UKSC Decision

In a judgment written by Lady Hale and Lord Reed, the Court held that Prime Minister Johnson's advice to prorogue Parliament was unlawful and that the prorogation was a nullity. Lady Hale and Lord Reed relied on first principles to determine the scope of the power to prorogue Parliament. As they emphasized, "the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law".[33] They went on to identify "[t]wo fundamental principles of our constitutional law [as] relevant to the present

31 *Ibid* at paras 17–8.

32 *Ibid* at paras 19–20.

33 *Ibid* at para 38.

case", namely parliamentary sovereignty and ministerial accountability to Parliament.[34] Having regard to these fundamental constitutional principles, Lady Hale and Lord Reed set out the test for adjudicating on the lawfulness of exercises of the prorogation prerogative:

> [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.[35]

The advice to prorogue Parliament, in this case, did not meet this test for two reasons. Lady Hale and Lord Reed first noted the drastic consequences this particular prorogation would have had, given the "quite exceptional" [36] circumstances relating to Britain's departure from the EU.[37] Shutting down Parliament, including the committees which could scrutinize negotiations and preparations for October 31, was a radical step. By contrast, if Parliament had simply been put into recess, it would still have been able to exercise these critical scrutiny functions.[38] Accordingly, there was no doubt that "the Prime Minister's

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34 *Ibid* at para 41.

35 *Ibid* at para 50.

36 *Ibid* at para 57.

37 See also Paul Craig, "The Supreme Court, Prorogation and Constitutional Principle" [2020] 1:2 Public Law 248, at 257 [Craig, "Prorogation"]:

> The effect of prorogation in the instant case was more far-reaching, since it constituted a pre-emptive strike that took Parliament out of play for the crucial period during which it was prorogued. It affected not merely one piece of legislation, but its capacity to exercise the totality of its legislative authority, and authority to scrutinize government action, thereby severely curtailing the opportunity for parliamentary voice on an issue that, whatsoever one's views about Brexit, is of major importance for the UK's future.

38 As Lady Hale and Lord Reed explained in the *Case of Prorogations*, *supra* note 1 at para 56:

> This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on

action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account".[39]

Lady Hale and Lord Reed then considered whether there was a reasonable justification for "taking action which had such an extreme effect upon the fundamentals of our democracy".[40] Even granting a "great deal of latitude" to the government,[41] Lady Hale and Lord Reed were not satisfied that there was a reasonable justification underpinning the advice to prorogue Parliament. The desire for a new Queen's Speech in mid-October did not provide a justification "for closing down Parliament for five weeks".[42] Given that the "typical time" for the preparation of a Queen's Speech is "four to six days", a five-week prorogation required justification.[43] But none could be found in the materials before the Court:

> The memorandum has much to say about a new session and Queen's Speech but nothing about why so long was needed to prepare for it. The only reason given for starting so soon was that "wash up" could be concluded within a few days. But that was totally to ignore whatever else Parliament might have wanted to do during the four weeks it might normally have had before a prorogation. The proposal was careful to ensure that there would be some Parliamentary time both before and after the European Council meeting on 17th - 18th October. But it does not explain why it was necessary to curtail what time there would otherwise have been for Brexit related business. It does not discuss what

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

39 *Ibid* at para 55.

40 *Ibid* at para 58.

41 *Ibid.*

42 *Ibid.*

43 *Ibid* at para 59.

> Parliamentary time would be needed to approve any new withdrawal agreement under section 13 of the *European Union (Withdrawal) Act 2018* and enact the necessary primary and delegated legislation. It does not discuss the impact of prorogation on the special procedures for scrutinising the delegated legislation necessary to make UK law ready for exit day and achieve an orderly withdrawal with or without a withdrawal agreement, which are laid down in the *European Union (Withdrawal) Act 2018*. Scrutiny committees in both the House of Commons and the House of Lords play a vital role in this. There is also consultation with the Scottish Parliament and the Welsh Assembly. Perhaps most tellingly of all, the memorandum does not address the competing merits of going into recess and prorogation. It wrongly gives the impression that they are much the same.[44]

Accordingly, Lady Hale and Lord Reed could not identify "any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks", with the consequence that the advice was unlawful.[45]

As to the remedy, the Court concluded that because the advice given to the Queen was unlawful, everything founded on that advice fell away. In law, there was no prorogation. When the Royal Commissioners conducted the prorogation ceremony at the Queen's behest, it was as if they "had walked into Parliament with a blank piece of paper".[46] Accordingly, "as Parliament is not prorogued … the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward".[47]

IV. The Case of Prorogations

Professor Poole of the London School of Economics, one of the world's leading experts on the history of prerogative power, has described the UK Supreme

44 *Ibid* at para 60 [emphasis added].

45 *Ibid* at para 61.

46 *Ibid* at para 69.

47 *Ibid* at para 70.

Court decision in the *Case of Prorogations* as "quite possibly the most significant judicial statement on the constitution in over 200 years".[48]

Clear and concise in its use of first principles, the *Case of Prorogations* will find a prominent place in the pantheon of great constitutional decisions, along with the *Case of Proclamations*,[49] *Case of Prohibitions*,[50] *Entick v Carrington*[51] and others. That it is undoubtedly a decision of the greatest significance is evidenced by the volume of scholarly commentary it immediately provoked[52] and its reception by the judiciary. Indeed, the *Case of Prorogations* has already been cited as far and wide as Ontario[53] and Ireland.[54]

In addition, the *Case of Prorogations* fits seamlessly into two broad patterns in the development of the common law. First, it is a further example of the prerogative being limited by judicial interpretation and legislative action.[55] As to

48 Thomas Poole, "Understanding what makes 'Miller & Cherry' the Most Significant Judicial Statement on the Constitution in over 200 years" (September 25, 2019), online: *Prospect Magazine* <www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years>.

49 [1610] EWHC KB J22 [*Case of Proclamations*].

50 [1607] EWHC KB J23 [*Case of Prohibitions*].

51 [1765] EWHC KB J98.

52 See *e.g.* Craig, "Prorogation", *supra* note 37; Martin Loughlin, "A note on Craig on Miller; Cherry" [2020] 1:2 Public Law 278; Aileen McHarg, "The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?" (2020) 24:1 The Edinburgh Law Review 88; Stefan Thiel, "Unconstitutional Prorogation of Parliament" [2020] 1:3 Public Law 529; Stephen Tierney, "R v Prime Minister; Cherry v Advocate General of Scotland" (2019) 40 Scots Law Times 170.

53 *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 at para 83; *Duffy v Canada (Senate)*, 2020 ONCA 536 at para 88.

54 *O'Doherty v The Minister for Health*, [2020] IEHC 209 at para 63 (albeit that the reliance on it was "misplaced" at para 73).

55 See generally Paul Craig, "Prerogative, Precedent and Power" in Christopher Forsyth and Ivan Hare, eds, *The Golden Metwand and the Crooked Cord: Essays*

judicial interpretation, it has, of course, been clear since the *Case of Proclamations* that "the King hath no prerogative, but that which the law of the land allows him"[56] and, more recently, it has been said that there is "no reason why prerogative legislation should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety in the same way as with any other executive action".[57] And as to the prerogative's place in the constitutional firmament, as Lord Browne-Wilkinson observed in *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union*, "[t]he constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body".[58]

Second, it is an example of the increased intensity of judicial review of executive decision-making. The focus on whether the Prime Minister had provided a reasonable justification for the advice to prorogue Parliament is entirely consistent with recent trends in substantive review, where courts in England and beyond focus on whether decisions fall within a range of reasonable outcomes.[59] Consider, moreover, the remarkable level of disclosure made by the Johnson Government in response to the litigation. Cabinet minutes were produced for the court, as was highly politically sensitive advice circulated within the Prime Minister's Office. This is a consequence of an important procedural development in contemporary public law, namely the imposition of a 'duty of candour' on the respondent to a judicial review claim. Even the Prime Minister must, when faced with an arguable claim of unlawful action, put "all

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for Professor Sir William Wade QC (Oxford: Oxford University Press, 1998) [Craig, "Prerogative"].

56 *Case of Proclamations*, *supra* note 49 at para 9.

57 *R (Bancoult) v Secret of State for Foreign and Commonwealth Affairs (No. 2)*, [2008] UKHL 61 at para 35, per Lord Hoffmann [*Bancoult (No.2)*].

58 [1995] UKHL 3 at 10.

59 See generally Paul Craig, "The Nature of Reasonableness Review" (2013) 66:1 Current Legal Problems 131.

the cards face upwards on the table".[60] This procedural development has had substantive consequences: when judges are provided with written reasons for decisions, there is an irresistible temptation for them to scrutinize the record closely for any errors.[61] The *Case of Prorogations* would have been unimaginable in previous eras, partly because the procedural law of judicial review would not have compelled Prime Minister Johnson to release internal records of his deliberations about how to advise Her Majesty.

V. Critical Analysis

Notwithstanding the analytical clarity of Lady Hale and Lord Reed's approach, the immediate impact of the *Case of Prorogations* and the extent to which the Supreme Court's decision is consistent with broader trends in relation to the prerogative and judicial review of administrative action, critical analysis is entirely appropriate. For this high-profile litigation about the prorogation power is likely to have long-term consequences, both for relations between politicians and the judiciary in the United Kingdom, and for the development of the procedural and substantive law of judicial review in the common law world. In this section, I critically analyze the treatment of justiciability and the burden shift consequent on Lady Hale and Lord Reed's justiciability analysis; the doctrinal coherence of the Supreme Court's 'reasonable justification' analysis; and the historical coherence of the *Case of Prorogations*.

A. Justiciability

Justiciability is, in essence, about the appropriateness of subjecting disputes to resolution by the courts.[62] For example, Professor Sossin defines justiciability as

60 *R v Lancashire County Council, ex parte Huddleston,* [1986] 2 All ER 941 (CA) at 945, per Sir John Donaldson.

61 See *e.g.* Michael Taggart, "Deference, Proportionality, *Wednesbury*" [2008] 1:3 *New Zealand Law Review* 423 at 463–64.

62 See generally Geoffrey Marshall, "Justiciability", in Anthony Gordon Guest, ed, *Oxford Essays in Jurisprudence: A Collaborative Work*, 2d (London: Oxford University Press, 1961) at 265.

"a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life".[63] One set of rules, norms and principles relates to so-called 'political' questions thought to be inapt for judicial resolution because of their inherently sensitive nature.[64] Such considerations were, for obvious reasons, to the fore in respect of the Johnson prorogation.

In discussing justiciability and the *Case of Prorogations*, it is helpful to begin with the analysis of the Divisional Court in *Miller,* 2019.[65] On the Divisional Court's view, the decision to prorogue Parliament was not justiciable, because it was a political matter beyond the ken of judges:

> The Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case were political. They were inherently political in nature and there are no legal standards against which to judge their legitimacy… [The claimants' arguments] face the insuperable difficulty that it is impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure. There is no legal measure of the length of time between Parliamentary sessions.[66]

The approach here is analytically suspect. When does a matter become too 'political' for judicial resolution? This invites a line-drawing exercise which is inherently arbitrary. Just as courts struggle to define 'jurisdictional' questions in judicial review cases so too do they struggle with 'political' questions. Furthermore, as a matter of constitutional principle, very good reasons are required to wall executive decisions off from judicial oversight. Accordingly, it is

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63 Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d (Toronto: Carswell, 2012) at 7.

64 See generally Paul Daly, "Justiciability and the 'Political Question' Doctrine" [2010] Public Law 160.

65 *Miller* 2019*, supra* note 29.

66 *Ibid* at paras 51, 54.

necessary to identify a sound constitutional basis for non-justiciability; invoking the 'political' nature of a decision is insufficient.[67]

As to justiciability, as Professor Elliott persuasively argued in the run-up to the Supreme Court's decision, the scope of a prerogative power is pre-eminently a *legal* question, not a political one.[68] Coke CJ held long ago in the *Case of Proclamations* that "the King hath no prerogative, but that which the law of the land allows him".[69] Stating the law of the land — including the scope of the prerogative power to prorogue Parliament — is an uncontroversial part of the judicial function in the United Kingdom. Lord Drummond Young put the point forcefully in *Cherry* CSIH:

> The boundaries of any legal power are necessarily a matter for the courts, and the courts must have jurisdiction to determine what those boundaries are and whether they have been exceeded. That jurisdiction is constitutionally important, and in my opinion the courts should not shrink from exercising it.[70]

Lady Hale and Lord Reed thus properly rejected the Divisional Court's approach. Nevertheless, the approach they adopted raises its own analytical problems. Lady Hale and Lord Reed insisted that in respect of prerogative powers "it is necessary to distinguish between two different issues". One, "whether a prerogative power exists, and if it does exist, its extent" and two,

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67 Daly, *supra* note 64.

68 Mark Elliott, "Prorogation and Justiciability: Some thoughts ahead of the Miller II case in the Supreme Court" (12 September 2019), online (blog): *Public Law for Everyone* < publiclawforeveryone.com/2019/09/12/prorogation-and-justiciability-some-thoughts-ahead-of-the-cherry-miller-no-2-case-in-the-supreme-court/>. See also Craig, "Prorogation", *supra* note 37.

69 *Case of Proclamations*, *supra* note 49. See also *Elgizouli v Secretary of State for the Home Department*, [2020] UKSC 10 ("[t]his court is required by long-established law to examine the nature and extent of the prerogative power and to determine whether the respondent has transgressed its limits particularly where the prerogative power may be being used to infringe upon an individual's rights", per Lord Kerr at para 161).

70 *Cherry* CSIH, *supra* note 28 at para 102.

whether "the exercise of the power is open to legal challenge on some other basis".[71] Justiciability, the Court held, arises only in respect of the second issue, the first falling squarely within the judicial domain; matters might be non-justiciable for various reasons when it comes to the application of the grounds of review (legality, rationality and procedural propriety) but not in determining the scope of a prerogative power.

Despite the neatness of the distinction, however, it broke down in the *Case of Prorogations*. As discussed above, Lady Hale and Lord Reed's analysis of the 'extent' of the prorogation prerogative led them to impose a 'reasonable justification' standard.[72] But the language of justification is the language of rationality review. To put the point another way, the prorogation prerogative seems to *contain* a ground of review. Review for rationality — and the modern, substantive review variety, not old-fashioned *Wednesbury*[73] unreasonableness — seeps into the determination of the scope of the prerogative.[74]

There is no reference to Dicey's definition of the prerogative as the "residue of *discretionary or arbitrary* authority" held by the Crown,[75] nor of the definition offered in *Miller,* 2017: "the residue of powers which remain vested in the Crown,…exercisable by ministers, *provided that the exercise is consistent with Parliamentary legislation*". [76] Far from the prorogation prerogative being arbitrary, or existing as a broad discretionary power within fixed statutory parameters (such as the *NIA*),[77] it comes in fact with a built-in limitation of reasonable justification. That the prerogative is limited "by statute and the common law, *including, in the present context, the constitutional principles with*

71 *Case of Prorogations*, *supra* note 1 at para 35.

72 *Ibid* at para 50.

73 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223.

74 See also McHarg, *supra* note 52.

75 *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at p. 424.

76 *Miller* 2017, *supra* note 2 at para 47 [emphasis added].

77 *NIA*, *supra* note 18.

which it would otherwise conflict" is an innovation which belies the neat analytical distinction offered by the Court.[78]

Indeed, the existence/exercise distinction seems to be inherently malleable. *Anything* could be said, on Lady Hale and Lord Reed's approach to the prerogative, to go to the *existence* of a power rather than to its exercise. Why 'reasonable justification'? Why not the higher standard of 'proportionate'? Why not the lower standard of 'rational basis'? On Lady Hale and Lord Reed's approach, the *scope* of the prerogative becomes an empty vessel into which any substantive limitations on the prerogative can be poured. Just as the Divisional Court followed an analytically suspect approach in relying on an unstable distinction between 'law' and 'politics', the Supreme Court relied on an inherently malleable distinction between 'existence' and 'exercise'.[79]

There is more than a hint of the doctrine of jurisdictional error here. Pursuant to the doctrine of jurisdictional error, where a statutory provision states that a decision-maker can do Y only if X is present, then the presence of X is a pre-condition to the doing of Y. For example, where a tribunal is empowered to make findings of discrimination in respect of the letting of self-contained dwelling units, that a given premises is a self-contained dwelling unit (X) is a pre-condition to making a finding of discrimination (Y).[80] An error as to X would deprive the tribunal of jurisdiction. The analytical difficulty with the doctrine of jurisdictional error is that every statutory provision takes the form if X then the decision-maker may Y: "[t]he distinction … was impossible to draw precisely because the two matters [X and Y] were inextricably interwoven".[81] As

78 *Case of Prorogations*, *supra* note 1 at para 49 [emphasis added].

79 *Cf.* Loughlin, *supra* note 52 ("[o]ne cannot infer from the fact that prerogative power is *recognised* by common law that it must be *exercised* in accordance with (so-called) common law principles. The court should surely have explained how it managed to draw this conclusion from those premises" at 279).

80 See *Bell* v *Ontario Human Rights Commission*, [1971] SCR 756.

81 Paul Craig, "Jurisdiction, Judicial Control, and Agency Autonomy", in Ian Loveland, ed, *A Special Relationship? American Influences on Public Law in the United Kingdom* (Oxford: Clarendon Press, 1995) at 173, 177.

the Father of modern administrative law — SA de Smith — observed: "No satisfactory test has ever been formulated for distinguishing findings which go to jurisdiction from findings which go to the merits".[82] I fear the same is true of the existence/exercise distinction relied upon by Lady Hale and Lord Reed in the *Case of Prorogations*. This does not augur well. As Professor Craig has observed about the history of the doctrine of jurisdictional error in administrative law:

> There was no predictability as to how a case would be categorised before the court pronounced on the matter. There was also no *ex post facto* rationality that could be achieved by juxtaposing a series of cases and asking why one case went one way and another was decided differently.[83]

Given that any *exercise* of a prerogative power can be impugned on the basis that a prerogative to act in such a way does not *exist*, counsel will certainly attempt to manipulate the existence/exercise distinction. If courts entertain such attempts, it will be very difficult to predict in advance to what standard the use of the prerogative will be held in a given situation.

Of course, the existence/exercise distinction is so well entrenched in the law relating to judicial review of the prerogative that excising it would be difficult, if not impossible. Nonetheless, the existence/exercise distinction should thus be used with caution, to avoid issues properly addressed as exercises of a power being dealt with as going to the existence of a power; it is doubtful that Lady Hale and Lord Reed exercised appropriate caution here. Moreover, the analytical problem with Lady Hale and Lord Reed's approach leads to two other problems,

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82 SA De Smith et al, *Judicial Review of Administrative Action*, 5d (London: Sweet and Maxwell, 1995) at 255; see similarly Louis Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70:6 Harvard Law Review 953 at 959. For a more modest account of the difficulties, see David Mullan, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada – a Mitigating Plea" (1972) 10:2 Osgoode Hall Law Journal 440.

83 Paul Craig, *Administrative Law*, 6d (London: Sweet and Maxwell, 2008) at 441. See similarly William Wade, "Constitutional and Administrative Aspects of the Anisminic Case" (1969) 85 Law Quarterly Review 198 at 210–11. Thanks to David Mullan for prompting this thought.

which I will discuss in turn: a problem of doctrinal coherence and a problem of historical coherence.

B. Doctrinal Coherence

In considering doctrinal coherence, it is useful to begin with the Scottish appellate decision. The Inner House of the Court of Session ("Inner House") unanimously held in Cherry CSIH[84] that Prime Minister Johnson's advice to prorogue Parliament was unlawful.

The judges of the Inner House reasoned in slightly different ways to the conclusion that the prorogation advice was unlawful. The length of the prorogation — five weeks, much longer than prorogations in recent decades, with the clock ticking down towards a No-Deal Brexit on October 31 — was a particular concern for each of the judges. For Lord Carloway:

> The circumstances demonstrate that the true reason for the prorogation is 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. This is in the context of an anticipated no deal Brexit, in which case no further consideration of matters by Parliament is required. The Article 50 period, as extended, will have expired and withdrawal will occur automatically.[85]

In support of this conclusion, Lord Carloway pointed to the "clandestine manner" in which the prorogation was sought; that prorogation was "mooted specifically as a means to stymie any further legislation regulating Brexit"; the fact that the respondent had provided "remarkably little" justification for the prorogation in the materials before the court; and the absence of any "practical reason" for the "extraordinary length of time" of the prorogation.[86]

In Lord Brodie's view, based on the material in the record (and, indeed, in the public record), the petitioners were "entitled to ask the court to infer" that

84 *Cherry* CSIH, *supra* note 28.

85 *Ibid* at para 53.

86 *Ibid* at paras 54–56.

the Prime Minister's goal was to shut down Parliament, ultimately "to allow the Executive to pursue a policy of No-Deal Brexit without further Parliamentary interference". [87] This contributed to Lord Brodie's conclusion that the prorogation decision in the instant case was so outrageous as to be unlawful as a matter of public law (based, ultimately, on impropriety of purpose).[88]

Lastly, of particular importance for Lord Drummond Young was the absence of any reason in the documents provided to the court which was capable of justifying the length of this particular prorogation,[89] which led him to infer that the Prime Minister "wished to restrict debate in Parliament for as long as possible".[90] But this was not a proper use of the prorogation prerogative.

The Inner House's analysis sidestepped some doctrinal fundamentals completely. To begin with, as the Supreme Court emphasized just a year earlier in *R (Gallaher Group) v Competition and Markets Authority*,[91] reversing the Court of Appeal, language such as " 'abuse of power' … adds nothing to the ordinary principles of judicial review", such as rationality, which are the criteria against which the lawfulness of administrative action must be addressed.[92] Indeed, "[l]egal rights and remedies are not usually defined by reference to the visibility of the misconduct".[93] Egregious behaviour, on its own, is not a basis for judicial review. Yet the egregiousness of the Prime Minister's conduct was a central concern for the Inner House.

Moreover, where improper purpose is claimed, it is important to identify the dominant purpose: "If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had

87 *Ibid* at para 89. See also at para 117, per Lord Drummond Young.

88 *Ibid* at para 91.

89 See especially *ibid* at paras 120–22.

90 *Ibid* at paras 123–24.

91 [2018] UKSC 25 [*Gallaher*].

92 *Ibid* at para 41, per Lord Carnwath, critiquing [2016] EWCA Civ 719.

93 *Ibid* at para 31, per Lord Carnwath.

some other purpose in mind which was lawful".[94] Relatedly, courts will not lightly impute impropriety to executive officials.[95] But no consideration was given by the Inner House to this point.

The approach taken by Lady Hale and Lord Reed allowed them to avoid these problems, or at least, allowed them to manipulate the exercise/existence distinction to avoid these problems. Their generation of an evidently justiciable standard of reasonable justification avoided the *Gallaher*[96] problem. Meanwhile, Lady Hale and Lord Reed did not need to address whether Prime Minister's Johnson's dominant purpose was unlawful (or whether, rather, the desire to shut down Parliament was only one of a number of competing purposes): the focus on justification permitted by their treatment of the exercise/existence distinction meant that they had no need to consider propriety of purpose.

Another doctrinal fundamental was, however, entirely sidestepped by Lady Hale and Lord Reed. It is trite law that a claimant for judicial review must make out her case, on the balance of probabilities. There is no free-standing burden on administrative officials to justify the lawfulness (including rationality or proportionality) of their actions.[97]

Yet the effect of rationality review seeping into the determination of the extent of the prorogation prerogative is to place a free-standing burden on the Prime Minister to justify the exercise of the prorogation power.[98] Rather than

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94 *Earl Fitzwilliam's Wentworth Estates Co v Minister of Town and Country Planning*, [1951] 2 KB 284 (CA (Eng)) at 307, per Denning LJ. But see *Westminster Corporation v London and North Western Railway Company*, [1905] AC 426 (HL) at 432, per Lord Macnaughten.

95 *CREEDNZ Inc v Governor-General*, [1981] 1 NZLR 172 (CA) at 200, per Cooke J (on irrelevant considerations); see also *R (Bancoult) v Foreign and Commonwealth Secretary (No. 3)*, [2018] UKSC 3.

96 *Gallaher*, *supra* note 91.

97 See *e.g. R v Inland Revenue Commissioners, ex parte Rossminster Ltd*, [1980] AC 952 (HL(Eng)) at 1013, per Lord Diplock and at 1022–23 per Lord Scarman [*Rossminster*]. *Rossminster* was doubted in *Haralambous v Crown Court at St Alban's*, [2018] UKSC 1 but not on this point.

98 See also McHarg, *supra* note 52.

the onus being placed — as it ordinarily is in judicial review cases — on the applicant to 'make her case', the burden of justification is shouldered by the respondent. It will then be for the courts "to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation" having regard to the "extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive".[99] It is true that an applicant has to identify such an inability on the part of Parliament, but the mere fact of prorogation will surely suffice to place a burden of justification on the Prime Minister, even in respect of a "short period" designed to end one parliamentary session and begin another.[100] All prorogations necessarily interfere with Parliament's legislative and scrutiny functions. Given, further, the obligations imposed on judicial review respondents by the duty of candour, any Prime Minister wishing to justify a prorogation will have to produce extensive (and persuasive) contemporaneous reasons, the failure to do so here having doomed the legality of Mr Johnson's advice to the Queen. To put it mildly, this is a significant doctrinal departure.

There are echoes here of the decision of the Ontario Court of Appeal in *Lalonde v Ontario*.[101] Here the Court struck down a discretionary decision to shut a hospital because the decision contravened an unwritten principle of the Canadian constitution, namely the protection of minorities. Justice Sharpe and Weiler wrote, for example:

> The Commission offered no justification for diminishing Montfort's important linguistic, cultural, and educational role for the Franco-Ontarian minority. It said that matter was beyond its mandate. The Commission failed to pay any attention to the relevant constitutional values, nor did it make any attempt to justify departure from those values on the ground that it was necessary to do so to achieve some other important objective. While the Commission is entitled to deference, deference does not protect decisions,

99 *Case of Prorogations*, *supra* note 1 at para 51.

100 *Ibid* at para 51.

101 (2001), OJ No 4767 (CA) [*Lalonde*].

> purportedly taken in the public interest, that impinge on fundamental Canadian constitutional values without offering any justification.[102]

There is a clear analogy between *Lalonde* and the *Case of Prorogations*: the Johnson prorogation interfered with a fundamental constitutional principle, the sovereignty of Parliament, by shutting down Parliament (and its committees) for several weeks at a critical juncture to prevent parliamentarians from holding government to account and from legislating to prevent a No-Deal Brexit.[103] Yet there is also an important distinction between *Lalonde* and the *Case of Prorogations*. In the former case no reasons at all were provided,[104] but in the *Case of Prorogations*, a justification was provided. The issue then becomes whether the justification offered for the Johnson prorogation was adequate. In this regard, doctrinal coherence would demand a high degree of deference to the sensitive policy choices involved in setting the appropriate length of a prorogation, as it is settled law that where matters involving political judgement are justiciable, administrative decision-makers should benefit from a wide margin of appreciation.[105]

But Lady Hale and Lord Reed did not mention deference at all. Their focus on the absence of any reasons justifying a six-week prorogation might be thought to obviate the need for any discussion of deference. With respect, however, in any judicial review of policy decisions, reasons could be cast in a similarly poor light. All a court would ever need to do is ask whether there were reasons relating to a particular point of concern, which could be identified with great exactitude. In the *Case of Prorogations*, the reasons given for the six-week prorogation were that time would be required to prepare a Queen's Speech and that Parliament would not be sitting for several weeks in any event. Reviewed

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102 *Ibid* at para 184.

103 *Case of Prorogations*, *supra* note 1.

104 As a government lawyer involved in the case remarked to me, still frustrated many years after the fact: "How could we have anticipated the requirement to write reasons in respect of an unwritten constitutional principle?".

105 See *e.g. R (Lord Carlile) v Home Secretary*, [2014] UKSC 60 at para 32, per Lord Sumption.

deferentially, given the highly sensitive political judgements underpinning them, these reasons should have been considered to be sufficient.[106]

C. Historical Coherence

There are two reasons to doubt the historical coherence of the *Case of Prorogations*. First, Lady Hale and Lord Reed's manipulation of the existence/exercise distinction was unprecedented. There is no doubt, of course, that it is the role of the courts to determine the scope or existence of a prerogative power. Moreover, there is no doubt that the courts may, in determining the scope or existence of a prerogative power, rely on constitutional first principles. In *Edward Darcy Esquire,*[107] for instance (better known as the *Case of Monopolies*), the impact on personal economic liberty and property rights helped to support the conclusion that the Crown could not grant a monopoly.[108] However, in every previous case delineating the limits of prerogative power, the courts treated the question as essentially binary: either the prerogative extends to cover a particular instance, or it does not; it is either lawful, or unlawful. There has never, prior to the *Case of Prorogations*, been any hint that the *reasonableness* of a particular use of the prerogative may form part of the inquiry into the existence or scope of the prerogative. The *Case of Prohibitions*[109] stands for the proposition that the Crown may not adjudicate — such matters are for the "artificial reason and judgment of the law";[110] the *Case of Monopolies* prevented the Crown from granting monopolies in trade;[111] and the *Case of Proclamations* establishes that the Crown may not legislate.[112] In each of these instances, the

106 *Case of Prorogations*, *supra* note 1 at paras 58–60. See also Tierney, *supra* note 52.

107 *Edward Darcy Esquire v Thomas Allin of London Haberdasher*, (1602) 74 ER 1131 (QB) [*Case of Monopolies*].

108 See further Craig, "Prerogative", *supra* note 55 at 65, 69.

109 *Case of Prohibitions*, *supra* note 50.

110 *Ibid.*

111 *Case of Monopolies*, *supra* note 107.

112 *Case of Proclamations*, *supra* note 49.

question put was binary: does the power exist or not? And the answer was either 'yes' or 'no', not at all contingent on whether the Crown had complied with an obligation of reasonableness. The *Case of Prorogations*, therefore, marks an important departure: Lady Hale and Lord Reed did not treat the power to prorogue as binary but imported instead substantive limitations on its exercise: 'yes', the power to prorogue exists, as long as it is backed by a reasonable justification. There is no historical precedent for Lady Hale and Lord Reed's approach.[113]

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113 There are two potential counterpoints to address here. First, in *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority*, [1989] QB 26 (CA), a question arose as to whether the Home Secretary could provide for the supply of tear gas to Chief Constables (without going through police authorities) in reliance on the royal prerogative to keep the peace. Lord Justice Purchas characterized this prerogative as the prerogative "to do all that is *reasonably necessary* to preserve the peace of the realm" (at 53 [emphasis added]). However, neither Lord Justice Croom-Johnson nor Lord Justice Nourse characterized the prerogative in this way. Moreover, for all three members of the Divisional Court, the key question was whether this prerogative (however characterized) had been ousted by legislation (at 45, 51–52 and 59). Indeed, Purchas LJ noted that it was an "open" question "whether once the power is held to exist the courts will interfere with its exercise" (at 47). In holding that the prerogative continued to subsist, the Divisional Court focused on its existence, not on its manner of exercise. Second, in *Laker Airways Ltd. v Department of Trade*, (1976) [1977] QB 643 [*Laker Airways*] at 705, Lord Denning commented as follows:

> The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and *it can intervene if the discretion is exercised improperly or mistakenly*. That is a fundamental principle of our constitution. It derives from two of the most respected of our authorities. In 1611 when the King, as the executive government, sought to govern by making proclamations, Sir Edward Coke declared that: 'the King hath no prerogative, but that which the law of the land allows him': see the (1611) 12 Co.Rep. 74, 76. In 1765 Sir William Blackstone added his authority, *Commentaries,* vol. I, p.252: 'For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused

Second, Lady Hale and Lord Reed's standard of reasonable justification fits uneasily with the historical evidence. A striking feature of the classic cases on the prerogative — *Proclamations, Prohibitions* and *Monopolies* — is that the analyses therein draw heavily on history. Precedent plays a dominant, perhaps determinative, role in assessing whether a particular prerogative power exists. Yet it is difficult to accept the proposition that previous prorogations would satisfy Lady Hale and Lord Reed's "reasonable justification" test.[114] Leaving aside the obviously contentious issue of prorogations designed by minority governments to avoid votes of confidence,[115] there are other prorogations which are difficult to reconcile with the standard set by Lady Hale and Lord Reed.[116] Fearful of opposition to his nationalisation policies, Clement Attlee prorogued Parliament to create a pro forma session to satisfy the requirements of the *Parliament Act 1911*.[117] What eventually became the *Parliament Act 1949*[118] halved the length

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to the public detriment, such prerogative is exerted in an unconstitutional manner'.

With respect, Lord Denning's citations do not support the highlighted proposition. The point in the *Case of Proclamations*, *supra* note 49 was that the existence of the prerogative was a matter for the courts; the exercise of the prerogative was not in issue. And Blackstone's reference to unconstitutionality should not be taken to be a reference to invalidity: it can be quite improper — or unconstitutional — for a prerogative power to be used in a particular way without the courts having the power to declare the use invalid; rather, any sanction for impropriety would be handed out in a political forum, not a court. In any event, *Laker Airways* was a case about the existence of the prerogative, not its exercise. See Robert Craig, "Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum" (2016) 79 Modern Law Review 1041.

114 *Case of Prorogations*, *supra* note 1 at para 49.

115 See generally Anne Twomey, *The Veiled Sceptre* (Cambridge: Cambridge University Press, 2018) at chapter 8.

116 See generally Loughlin, *supra* note 52.

117 (UK), 1 & 2 Geo V [*PA 1911*].

118 (UK), 12, 13 & 14 Geo VI.

of the House of Lords' suspensory veto over bills passed by the House of Commons, despite the objections of the Lords. Indeed, Attlee received internal advice (which a present-day Prime Minister would presumably be bound to disclose in judicial review proceedings) that a pro forma session would frustrate the spirit of the *Parliament Act 1911*.[119] A more recent example comes from Canada. In 2009, Canadian Prime Minister Stephen Harper's prorogation of Parliament frustrated a parliamentary committee's inquiry into the alleged mistreatment of detainees by Canadian armed forces. The prorogation took effect for the period of the 2010 Winter Olympics in Vancouver. The official justification offered was that a prorogation would allow the government time to consult with Canadians on its policy programme.[120] Constitutional scholars did not consider this prorogation to be problematic (as Harper had, at the time, the confidence of the House of Commons[121]) but it is difficult to see how it would survive the imposition of a 'reasonable justification' test.

Of course, any exercise of the prerogative *today* will be subject to greater judicial scrutiny than past exercises of the prerogative, as it is now uncontroversial that the legality, rationality and procedural propriety of exercises of the prerogative may now be examined by the courts.[122] It would have been perfectly proper for Lady Hale and Lord Reed to conclude that the Johnson prorogation was illegal, irrational or procedurally improper, but that would have

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119 Chris Ballinger, "The Parliament Act 1949" in David Feldman, ed, *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2016) at 181–82. The existence of such internal advice casts some doubt on Professor Craig's view that the 1948 prorogation would have survived the reasonable justification test: Paul Craig, "Response to Loughlin's note on Miller; Cherry" [2020] 1:2 Public Law 282.

120 "PM shuts down Parliament until March" (30 December 2009), online: *CBC News* < www.cbc.ca/news/politics/pm-shuts-down-parliament-until-march-1.829800>.

121 Peter Hogg, "*Prorogation* and the Power of the Governor General" (2009) 27 *National Journal of Constitutional Law* 193.

122 *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374; *Bancoult (No.2)*, *supra* note 57.

required them to scale the doctrinal hurdles set out in the preceding subsection. Rather than scale the hurdles, though, they circumnavigated them: Lady Hale and Lord Reed proceeded on the basis that they were simply defining the scope of the prorogation prerogative, as courts have done in respect of prerogative powers for centuries. But if they were simply defining the scope of the prorogation prerogative, their definition should have accorded with historical practice.

D. Remedy and Parliamentary Privilege

In the *Case of Prorogations*, the Prime Minister argued that the most the courts could offer the applicant by way of remedy was a declaration that the advice to the Queen to prorogue Parliament was unlawful, leaving the consequences of any such declaration to be worked out by the political branches of government. To go any further, the Prime Minister argued, would be contrary to parliamentary privilege as partially codified in Article 9 of the *Bill of Rights, 1689*[123] because it would involve the courts interfering in "proceedings in Parliament".[124]

Lady Hale and Lord Reed roundly rejected this assertion. As they explained, the prorogation ceremony "is not the core or essential business of Parliament" but rather the act which "brings that core or essential business of Parliament to an end".[125] As a consequence, a judicial finding of unlawfulness did not compromise parliamentary privilege:

> This court is not…precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect…It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null

123 (UK), (1 William and Mary Sess 2 c 2) (1688).

124 *Case of Prorogations*, *supra* note 1 at para 65.

125 *Ibid* at para 68.

> and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.[126]

Three points follow from this important passage. First, judicial remedies as to lawfulness do not necessarily compromise parliamentary privilege. A judge must look closely at the consequences of a judicial finding before concluding that a remedy would interfere with parliamentary privilege.

Second, where a remedy granted by a court has *indirect* consequences in Parliament or for parliamentary business, this is not an interference with parliamentary privilege. The granting of Royal Assent is undoubtedly a 'proceeding in Parliament' protected by parliamentary privilege from direct judicial interference.[127] Part of the prorogation ceremony considered in the *Case of Prorogations* involved the giving of Royal Assent to the *Parliamentary Buildings (Restoration and Renewal) Act 2019*.[128] When Parliament reconvened after the UK Supreme Court's decision in the *Case of Prorogations*, Royal Assent was given *again* to the same legislation. Indeed, the date of Royal Assent is now officially recorded as 8 October 2019 (not the original date of 10 September 2019).[129] Plainly, the analysis of Parliament was that the remedy granted in the *Case of Prorogations* had the effect of nullifying a Royal Assent ceremony and nullifying legislation along with it. Nonetheless, given that this was an *indirect* consequence of a judicial remedy, the remedy itself did not interfere with parliamentary privilege. There is no doubt that *direct* judicial interference with Parliament's control of its own proceedings or freedom of speech within Parliament would violate parliamentary privilege, as held by a majority of the Supreme Court of Canada in *Mikisew Cree First Nation v Canada (Governor General in Council)*.[130]

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126 *Ibid* at para 69.

127 *R (Barclay) v Secretary of State for Justice*, [2014] UKSC 54.

128 (UK).

129 UK, HL Deb (09 September 2019), vol 664, col 645 (Mr. Speaker). See also Loughlin, *supra* note 52.

130 2018 SCC 40.

But in light of the analysis of Lady Hale and Lord Reed, it is much less clear that the *indirect* consequences of a judicial remedy invariably interfere with parliamentary privilege.

Third, it normally follows from a finding that an official acted unlawfully (or *ultra vires*) that any decisions taken by the official or flowing from the official's decisions are nullities and *void ab initio* as a matter of law. However, the proposition that unlawful advice to prorogue Parliament 'should' lead to the quashing of the Order in Council and the conclusion that Parliament has not been prorogued [131] is too confident. Common law courts often make a distinction between a finding of illegality and its effect or consequences. [132] Judicial review remedies are discretionary, which allows judges to manage the effect or consequences of relief in any given case. [133] When the effect or consequences of relief would interfere with, for instance, the interests of third parties or cause administrative chaos, judges tend to be very careful as to the choice of remedy. [134] Judges can withhold a remedy altogether, but issuing a declaration is typically a better way of proceeding carefully: the effect is to leave an instrument tainted by illegality in place and allow other actors to decide best how to proceed. Furthermore, when courts are faced in subsequent cases by applicants 'piggybacking' on a remedy granted in a previous case they have an inveterate tendency to refuse to accept that illegal action was a nullity incapable

131 *Case of Prorogations*, *supra* note 1 at paras 69–70.

132 Jeff King, "*Miller/Cherry* and Remedies for Ultra Vires Delegated Legislation" (19 September 2019), online (blog): *UK Constitutional Law Blog* < ukconstitutionallaw.org/2019/09/19/jeff-king-miller-cherry-and-remedies-for-ultra-vires-delegated-legislation/>.

133 See variously *Dr Astley McLaughlin v A-G of the Cayman Islands*, [2007] UKPC 50 at para 16; *Seal v Chief Constable of the South Wales Police*, [2007] 1 WLR 1910 at para 33 (HL (Eng)); *Walton v Scottish Ministers*, [2012] UKSC 44, [2013] Env LR 16 at para 81, per Lord Reed; paras 103, 112, per Lord Carnwatch; and paras 155–56, per Lord Hope.

134 See *e.g. R v Monopolies and Mergers Commission, ex parte Argyll Group* plc, [1986] EWCA Civ 8 (Eng); *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6 at para 52; *R (New London College) v Secretary of State for the Home Department*, [2013] 1 WLR 2358 (UKSC (Eng)) at paras 45–46.

of having legal consequences.[135] My point here is that the observations about nullity should not be taken too seriously and certainly not to disturb the settled position that a court may carefully fashion public law remedies in response to contextual considerations.

Some uncertainty is bound to arise in future cases in respect of these three points. Just how closely parliamentary proceedings can be scrutinized, just how many indirect consequences can be created without compromising parliamentary privilege and whether any unlawful advice to the Crown is a nullity incapable of justifying subsequent actions are difficult questions. To be clear, apart from my doubts about the automaticity of a finding of invalidity, I do not consider that Lady Hale and Lord Reed were wrong in their analysis of parliamentary privilege,[136] only that their analysis is likely to provoke harder questions in future cases.

E. Summary

To sum up the critical analysis in this section, Lady Hale and Lord Reed rightly concluded that the exercise of the prorogation prerogative is justiciable. But in setting out the scope of the power to prorogue they manipulated the distinction between the existence and exercise of the prerogative. Of course, one lawyer's sleight of hand is another's craftsmanship. Here, however, the manipulation of the existence/exercise distinction created problems of doctrinal and historical coherence. Lady Hale and Lord Reed's approach allowed them to circumnavigate doctrinal fundamentals and, indeed, turn settled doctrine on its head by effectively imposing a free-standing obligation to justify *any* prorogation to the satisfaction of the courts. And in terms of historical coherence, Lady Hale and Lord Reed's standard is difficult to reconcile with existing understandings of the scope of the prorogation prerogative, a significant problem in an area where history weighs heavily. Lastly, Lady Hale and Lord Reed probably overstated the inevitability of their conclusion that the unlawfulness of Prime

135 See generally David Feldman, "*Error of Law* and Flawed Administrative Acts" (2014) 73:2 *Cambridge Law Journal* 275.

136 See also Craig, "Prorogation", *supra* note 37.

Minister Johnson's advice to prorogue Parliament meant that it was a nullity incapable of having further legal consequences. Nonetheless, their analysis of remedy is persuasive.

Given the likely impact of the *Case of Prorogations* on judicial review of prerogative powers around the Commonwealth, how future courts deal with justiciability and issues of doctrinal and historical coherence, as well as remedy, will be extremely important.

VI. Conclusion: The *Case of Prorogations* and Democratic Delay

So far, I have set the *Case of Prorogations* in its immediate context, explained Lady Hale and Lord Reed's reasoning and subject the decision to a critical analysis. In this concluding section, I turn to the more general matter of democratic decay, consistent with the overall vision for this special issue.

On one view of the *Case of Prorogations*, Prime Minister Johnson and his advisors could be seen as playing constitutional hardball, pushing the limits of constitutional propriety.[137] The Court's decision not to simply declare that the advice was unlawful and leave the next steps up to the Prime Minister and Parliament suggests a striking lack of trust in Mr. Johnson and his advisors and thus a desire to deliver a high-profile reprimand. If so, the Supreme Court's decision was a laudable attempt to push politics back onto safe constitutional ground.

There is, however, another view, one which I find more plausible and which casts the Supreme Court in less heroic light. Prime Minister Johnson and his advisors seem to have been engaged in a cynical game, the goal of which was to set up a general election — either immediately or in the near future — in which Johnson could campaign as a died-in-the-wool Brexiteer seeking to be freed from the shackles of an anti-No Deal Parliament. Prorogation, on this view, was simply a device to provoke an election or a legislative response. Successfully, as

137 *Mark Tushnet,* "Constitutional Hardball" (2004) 37 John Marshall Law Review 523.

it turned out, as Parliament passed the *European Union (Withdrawal) (No. 2) Act 2019*[138] on September 9 mere hours before the prorogation took effect; this Act obliged the Prime Minister to seek a further extension of the Article 50 period until 31 January 2020. In the event, Johnson did seek an extension but when he finally managed to achieve a general election — held on 12 December 2019 — he did indeed portray himself as a Brexiteer champion (albeit one who had also negotiated a withdrawal agreement[139] which gained parliamentary backing).[140] The electorate plainly appreciated the portrait, as they returned Conservative Party MPs to Westminster with a thumping majority and thus Johnson to Downing Street.[141]

If this view is more accurate — and I think, even acknowledging the risk of falling into the *post hoc ergo propter hoc* trap, it chimes with the available evidence — the Supreme Court did not need to act at all. Johnson was attempting to provoke Parliament and, by the time the Supreme Court heard the *Case of Prorogations*, he had already succeeded. The No-Deal Brexit that parliamentarians were concerned to scrutinize and legislative against had already been ruled out. Worse, on this view the Supreme Court was not reasserting the boundaries of constitutional propriety so much as playing into Johnson's hands. Like the anti-No Deal Brexit coalition in Parliament, the Supreme Court formed part of the establishment against which Johnson campaigned — the Conservative Party manifesto for the December 2019 election contained a pledge to form a Constitution, Democracy & Rights Commission to investigate a range of issues including "the functioning of the Royal Prerogative" and

138 2019, c. 26 (UK).

139 "Brexit: EU and UK reach deal but DUP refuses support" (17 October 2019), online: *BBC News* <www.bbc.com/news/uk-politics-50079385>.

140 See generally Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential: The Conservative and Unionist Party Manifesto 2019* (London: Paragon Customer Communications Company, 2019) [Conservative Party].

141 "Election results 2019: Boris Johnson returns to power with big majority" (13 December 2019), online: *BBC News* <www.bbc.com/news/election-2019-50765773>.

ensuring that judicial review "is not abused to conduct politics by another means or to create needless delays".[142] Accordingly, the decision in the *Case of Prorogations* can be seen to have unnecessarily aggravated the relationship between the courts and the executive, precipitating future conflicts over the role of the judiciary.

On the whole, then, my view of the *Case of Prorogations* is a sceptical one. I am dubious about the analytical robustness of Lady Hale and Lord Reed's reasoning and apprehensive about the tensions the decision seems to have provoked. But in the greater scheme of things, these are quibbles or disagreements at the margins; they might influence how the *Case of Prorogations* is applied and received but in the long-run the *Case of Prorogations* is sure to take its place in the pantheon of momentous common law decisions.

142 Conservative Party, *supra* note 140 at 48.