# The prerogative: Boris and the 'girly swot'

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The exercise of executive prerogative powers plays a central role from time to time in a nation's life, yet often the exercise of those government powers goes unnoticed until a constitutional issue erupts, fanning the flames of factionalism. This article discusses those moments in a nation's history where application of prerogative powers has influenced the evolution of political debate. This has occurred recently both with Britain's 2016 referendum to part from the European Union and the two notable Supreme Court cases, in which 11 judges sat, which followed that referendum.

**The Brexit case (No 1)**

In January 1973, the United Kingdom (UK) became a member of the European Economic Community (the EEC). In December 2015, the UK Parliament passed the *European Union Referendum Act*, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union (the EU). Thereafter, ministers of the Crown announced that they would bring UK membership of the EU to an end, which raised the question whether a formal notice of withdrawal could lawfully be done by ministers, pursuant to prerogative powers, without prior legislation being passed in both Houses of Parliament and assented to by the Queen.

The government (the Ministers) argued that withdrawal from the EU could take place in the exercise of prerogative powers and did not require prior legislation to be passed for this to occur. A challenge was raised by two applicants, Gina Miller and Deir Dos Santos, against the Secretary of State, contending parliamentary legislative approval was necessary. The proceedings were heard before the Chief Justice; the Master of the Rolls; and Lord Justice of Appeal, who ruled against the Secretary of State in a judgment.[1] The Ministers took the matter on appeal to the Supreme Court, which sat the full bench of 11 judges and which in January 2017 found, by a majority of eight judges to three, that the Ministers' appeal should be dismissed.[2] The case reviewed existing prerogative powers and the relationship between domestic law and international legislation. It also raised constitutional issues.

**The EEC treaties and UK statute law**

The Ministers' case was based on the existence of well-established prerogative powers of the Crown to enter into and to withdraw from treaties. It was argued that Ministers are entitled to exercise prerogative powers in relation to withdrawal. In January 1972, Ministers signed a *Treaty of Accession*, which provided that the UK would become a member of the EEC and would accordingly be bound by the 1957 *Treaty of Rome*, which was the main treaty in relation to the EEC. A Bill was then laid before Parliament which received the royal assent when it became the *European Communities Act 1972* (the 1972 Act) and the following day

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1 *(R) (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (3 November 2016).

2 *(R) (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

ratified the Accession Treaty on behalf of the UK. Section 2(1) of the 1972 Act provided that:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …

Section 2(2) of the 1972 Act authorised and designated Ministers to make regulations for the purpose of implementing EEC (now EU) community obligations.

In the past 40 years, over 20 treaties relating to the EU were signed on behalf of Member States and, in the case of the UK, by Ministers. One of those treaties — the *Treaty of Lisbon* — inserted Article 50, which provided that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. A Member State which decides to do so notifies the European Council of its intention, which will result in the European Council negotiating and concluding an agreement setting out the arrangements for withdrawal. The European Treaty shall cease to apply to the State from the date of entry into force of the withdrawal agreement or, failing that, two years after notification unless the European Council unanimously agrees in conjunction with the Member State to extend that period. Once notice is given it cannot be withdrawn. Where notice is given, the UK has embarked upon an irreversible course that will lead to EU law ceasing to have effect in the UK so that the EU treaties will cease to apply.

**International law and the 1972 Act**

The general rule is that power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts. This principle rests on the so-called dualist theory, which is that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign States have effect in international law and are not governed by the domestic law of any State — that is, treaties are governed by other laws than those which municipal courts administer. The second proposition is that, although they are binding on the UK in international law, treaties are not part of the UK law and give rise to no legal rights or obligations in domestic law.[3]

Although Ministers do in principle have an unfettered power to make treaties which do not change domestic law, it had become standard practice by the late 19th century for treaties to be laid before both Houses of Parliament at least 21 days before they are ratified to enable parliamentary objections to be heard.

The 1972 Act authorised a dynamic process by which, without further primary legislation and without any domestic legislation, EU law not only became a source of UK law but also takes precedence over all domestic sources of UK law, including statutes. However, consistent with the principle of parliamentary sovereignty, this 'unprecedented state of affairs' only lasts so long as Parliament wishes, and the 1972 Act could be repealed like any other statute.[4]

3 Ibid [55].
4 Ibid [60].

EU law may take effect as part of the law of the UK in three ways. First, the EU treaties themselves are directly applicable by virtue of s 2(1), and some of the provisions of those treaties create rights and duties which are directly applicable in the sense that they are enforceable in UK courts. Secondly, s 2(1) provides that the EU treaties are to have direct effect in the UK without the need for further domestic legislation. Thirdly, s 2(2) authorises the implementation of EU Law by delegated legislation. This applies mainly to EU directives which are required to be transposed into national law.[5]

The majority considered that, although the 1972 Act gives effect to EU law, the 1972 Act is not itself the originating source of that law. It is only the 'conduit pipe' by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law as an independent and overriding source of domestic law.[6] The 1972 Act therefore has a constitutional character and, following the 1972 Act coming into force, the normal rule is that any domestic legislation must be consistent with the EU law; such EU law has primacy as a matter of domestic law; and legislation inconsistent with the EU law is ineffective. However, legislation which alters the 'domestic constitutional status of EU institutions or of EU Law' is not constrained by the need to be consistent with the EU law. This is because of the principle of parliamentary sovereignty, which is fundamental to the UK's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that is a matter for Parliament.[7]

The government's argument was that s 2(1) of the 1972 Act is ambulatory in that the wording that EU law rights, remedies and so on 'from time to time provided for by or under the treaties' were 'to be given effect or used in the United Kingdom' accommodated the possibility of Ministers withdrawing from the treaties without parliamentary authority.[8] However, the majority considered there was a vital difference between changes in domestic law resulting from variations in the content of EU law and changes in domestic law resulting from withdrawal by the UK from the EU.[9] The latter involves unilateral action by the relevant constitutional bodies, which effects a fundamental change in the constitutional arrangements of the UK.[10] The majority concluded that they could not accept a major change to UK constitutional arrangements can be achieved by Ministers alone and it must be effected by parliamentary legislation.[11]

**The dissenting view**

The leading judgment for the three dissentients was given by Lord Reed. He said that there is no legal requirement for the Crown to seek parliamentary authorisation for the exercise of the power except to the extent that Parliament has so provided by statute. Since there is no statute which requires the decision under Article 50(1) enabling withdrawal to be taken by Parliament, it follows that the decision can lawfully be taken by the Crown in the exercise of

5 Ibid [63].
6 Ibid [65].
7 Ibid [67].
8 Ibid [75].
9 Ibid [78].
10 Ibid.
11 Ibid [82].

the prerogative. There is therefore no legal requirement for an Act of Parliament to authorise the giving of notification of withdrawal under Article 50(2).[12]

He accepted the importance in constitutional law of the principle of parliamentary supremacy over domestic law, but that principle did not require that Parliament pass an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU laws in domestic laws under the 1972 Act is inherently conditional on the application of the EU treaties to the UK and therefore the UK's membership of the EU. The 1972 Act imposed no requirement and manifested no intention in respect of the UK's membership of the EU. It did not therefore affect the Crown's exercise of prerogative powers in respect of UK membership. The effect of the EU law in the UK is entirely dependent on the 1972 Act.[13]

Referring to the words 'from time to time' appearing in s 2(1), he said that the rights, powers, liabilities, obligations and restrictions arising under the EU treaties and the remedies and procedures provided for under those treaties alter from time to time. This demonstrates that Parliament has recognised that rights given effect under the 1972 Act may be added to, altered or revoked without the necessity of a further Act of Parliament. As to the majority of the Court drawing a distinction described as 'a vital difference' between changes in domestic law resulting from variations in the content of EU law and changes resulting from withdrawal by the UK from the EU, there is no basis in the language of the 1972 Act for drawing any such distinction.[14]

The differences between the majority and minority views turned largely upon differing statutory constructions of the relevant legislation. However, there was general consensus about the nature and history of prerogative powers which the judgment discussed.

**The history of the royal prerogative**

Unlike Australia, the UK constitution is unwritten and has been described as 'the most flexible polity in existence'.[15]

Originally sovereignty was concentrated in the Crown, which largely exercised all the powers of the State, but prerogative powers were progressively reduced as parliamentary democracy and the rule of law developed. By the end of the 20th century the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the State: the legislature (the two Houses of Parliament), the executive (Ministers and the government more generally) and the judiciary (the judges). Statutes such as the *Bill of Rights 1689* and the *Act of Settlements 1701* in England and Wales, and the *Claim of Right Act 1689* in Scotland and various Acts of Union in 1706 and 1707, formally recognised the independence of the judiciary, whose role is to uphold and further the rule of law.[16]

12 Ibid [161].
13 Ibid [177].
14 Ibid [186]–[187].
15 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) p 87.
16 [2017] UKSC 5 [41]–[42].

Sir Edward Coke CJ said that:

> The King by his proclamation or in other ways cannot change any part of the Common Law, or Statute Law, or the customs of the realm.[17]

It had become established by the *Bill of Rights 1689* that the pretended power of suspending or dispensing with laws by the monarch was illegal.[18] The Crown's administrative powers are now exercised by the executive, being the Ministers, who are answerable to the UK Parliament. However, the exercise of those powers must be compatible with legislation or the common law. The King in Council and any branch of the executive cannot prescribe or alter the law to be administered by courts of law and to do so is 'out of harmony with the principles of our constitution'.[19] It is true that Ministers can make laws by issuing regulations, known as secondary or delegated legislation, but they can only do so if authorised by statute.

**The scope of prerogative powers**

Today, the royal prerogative encompasses a residue of powers which remain vested in the Crown, exercisable by Ministers, provided that the exercise is consistent with parliamentary legislation. It is 'only available for a case not covered by statute'. Professor Wade described it as:

> The residual prerogative is now confined to such matters as summoning and dissolving Parliament, declaring war and peace, regulating the armed forces in some respects, governing certain colonial territories, making treaties (though as such they cannot effect the rights of subjects) and conferring honours. The one drastic internal power of an administrative kind is the power to intern enemy aliens in time of war.[20]

Since the 17th century, the prerogative has not empowered the Crown to change English common or statute law. A prerogative power, however well established, may be curtailed or abrogated by statute. There are important areas of governmental activities even today essential to the effect of operation of the State that are not covered by statute such as the conduct of diplomacy in war, and these are viewed as best reserved to Ministers.[21]

Although prerogative powers cannot change the domestic law, they may have domestic legal consequences. First, where it is inherent in the prerogative power that its exercise will affect the legal rights or duties of others, the Crown has a prerogative power to decide on the terms of service of its servants and it is inherent in that power that the Crown can alter those terms so as to remove rights, albeit such a power is susceptible to judicial review. The Crown also has a prerogative power to destroy property in wartime in the interest of national defence, although at common law compensation is payable. The exercise of such powers may affect individual rights, but it does not change the law because the law has always authorised the exercise of that power.[22]

17 *The Case of Proclamations* (1610) 12 Co Rep 74.
18 [2017] UKSC 5 [44].
19 As per Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77 [90].
20 Professor H W R Wade, *Administrative Law* (1st ed, 1961) p 13; [2017] UKSC 5 [47].
21 [2017] UKSC 5 [48]–[50].
22 Ibid [52].

## The constitutional principles: accountability to Parliament for prerogative exercise

The most significant area is the conduct of foreign affairs, but as Lord Oliver said in *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry*:

> As a matter of the *Constitutional* Law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.[23]

Since treaty making is outside the purview of the courts because it is made in the conduct of foreign affairs, which is the prerogative of the Crown, this may be regarded as a necessary corollary of parliamentary sovereignty because:

> If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, Parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged.[24]

A further constitutional principle was pointed to by Lord Carnwath, who also dissented with Lord Reed. He did not see the choice as simply one between parliamentary sovereignty, exercised through legislation, and the untrammelled exercise of the prerogative by the executive. No less fundamental to the constitution is the principle of parliamentary accountability. The executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law. That account is made through ordinary parliamentary procedures. Subject to specific statutory restrictions, they were matters for Parliament alone. The court may not inquire into the methods by which Parliament exercises control over the executive or their adequacy.[25]

## Lord Justice Sedley: an ethical preference

In commenting upon the Brexit judges' respective positions, Sir Stephen Sedley, a retired Lord Justice of Appeal, preferred the view of the majority on broad historical grounds notwithstanding what he regarded as the 'astute reasoning' of the dissenting Lord Reed. Sedley LJ said that, for over 400 years, British monarchs and their ministers have contested the claims of Parliament to have the last word on matters of state. Judges have arbitrated between them, laying down as part of the common law what ministers can lawfully do in the exercise of the royal prerogative, such as declaring war, making peace, signing treaties, granting honours, governing colonies, and what requires the authority of either the common law or Parliament. In 1685, James II had packed a 12 jury court, which supported him in declaring in exercise of prerogative powers that he could dispense with the Test Acts which barred Catholics and dissenters from public office. He was later forced to abdicate and, in 1688, Parliament reconstituted itself and passed the *Bill of Rights 1689*, which is still the foundational statute of the British State.

23 [1990] 2 AC 418, 500.
24 Professor C McLachlan, *Foreign Relations Law* (2014) para 5.20; [2017] UKSC 5 [57].
25 [2017] UKSC 5 [249].

That Bill provided in its second article that 'the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late, is illegal'.

Sir Stephen Sedley considered that all this boiled down to a simple proposition: to use the royal treaty-making prerogative to stultify primary domestic legislation is to do exactly what the Bill of Rights forbids — to dispense with laws by regal authority. He saw the critical reasoning to be that of the majority when they said that there was a fundamental difference in withdrawal under Article 50 from abrogation of particular rights, duties or rules derived from EU law. It amounted to a significant constitutional change. The introduction of EU law was brought into existence by Parliament through primary legislation and so, too, withdrawal under Article 50 should be done through legislation, for it was a constitutional alteration of arrangements.[26]

**The sequel to the first Brexit decision and the withdrawal agreement**

Parliament responded to the first decision by passing the *European Union (Notification of Withdrawal) Act 2017* authorising the Prime Minister to give notice of withdrawal from the EU. Parliament then proceeded with some of the legislative steps needed to prepare the UK law for leaving the EU. The *European Union (Withdrawal) Act 2018* defined the 'exit day', but this allowed for an extension by statutory instrument if needed. It repealed the *European Communities Act 1972*, which had provided for entry into the EU (at that time the EEC). Crucially, s 13 of the 2018 Act required parliamentary approval of any withdrawal agreement reached by the government. The machinery for leaving the EU in Article 50 of the *Treaty on European Union* requires that the EU must negotiate and conclude an agreement with the Member State 'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'. The European Union Treaty will cease to apply to that State when the withdrawal agreement comes into force or, failing that, two years after the notification unless the European Council unanimously agrees to extend that period.

A withdrawal agreement with the EU by the Ministers was concluded on 25 November 2018, but this agreement was rejected by the House of Commons three times.

Following the voting down of the withdrawal agreement there was a change of Prime Minister, with Mr Boris Johnson being chosen by the Conservative Party. He had been the leading light contending that Britain should leave the EU. He contended that the European Council of the European Union would only agree to changes in the withdrawal agreement if they thought that there is a genuine risk that the UK would leave without any such agreement. However, a majority of the House of Commons would not support withdrawal from the EU without an agreement, so the *European Union (Withdrawal) Act 2019* was passed, requiring the Prime Minister to seek an extension of three months from the EU if no withdrawal agreement had been approved by Parliament.

26 Stephen Sedley, 'Short Cuts', *London Review of Books*, Vol 39, No 5, 2 March 2017, pp 26–7.

## The proroguing of Parliament

On 28 August 2019, members of the Privy Council attended a meeting of the Council held by the Queen at Balmoral Castle and an order in council was made that Parliament be prorogued on a day no later than Monday, 14 September 2019, until 14 October 2019, when Parliament would reconvene for the Queen's speech, which was to set out the government's legislative program. In approving the prorogation, Her Majesty was acting on advice of the Prime Minister, who saw no merit in extending the deliberations of a Parliament now largely hostile to the UK leaving the EU without a withdrawal agreement to their liking and in which some members were now calling for a second referendum to review the 2016 result.

As it happened, the Prime Minister and his Ministers did get a modified withdrawal agreement with the EU, but the government no longer commanded enough parliamentary support to get it approved. Accordingly, in an endeavour to secure an outright majority to pass his modified withdrawal agreement, the Prime Minister called an election for 12 December 2019, the result of which enabled his conservative government to leave the EU on 31 January 2020 with the modified withdrawal agreement. The framework for the future relationship with the EU is intended by the UK Government to be finalised within the next year.

## The second Brexit case[27]

As soon as the prorogation was announced, Mrs Gina Miller, who mounted the first Brexit challenge, launched proceedings in the High Court in England and Wales seeking a declaration that the Prime Minister's advice to Her Majesty to prorogue was unlawful. Those proceedings were heard by a divisional court comprising the Chief Justice, the Master of the Rolls and the President of the Queen's Bench Division, and these judges dismissed the claim on the ground that the issue was not justiciable. Similar proceedings were mounted in the Scottish Court of Sessions, where initially the government succeeded but the Inner House, on appeal, held that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of stymying parliamentary scrutiny of the executive and that the advice and the prorogation which followed it were unlawful and thus null and of no effect. There was then an appeal of both decisions to the Supreme Court, which again sat all 11 members.

## The principles in question

The Supreme Court said, firstly, that the power to order prorogation of Parliament is a prerogative power, being a power recognised by the common law and exercised by the sovereign in person acting on advice in accordance with modern constitutional practice.[28] Secondly, whilst the Court cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it.[29] For this they gave the example of the *Case of Proclamations*[30] that an attempt to alter the law of the land by the use of the

27 *R (On the Application of Miller) v The Prime Minister & Others* [2019] UKSC 41.
28 Ibid [30].
29 Ibid [31].
30 (1611) 12 Co Rep 74.

Crown's prerogative was unlawful, the Court there holding that 'the king hath no prerogative, but that which the law of the land allows him', indicating that the limits of prerogative powers were set by law and were determined by the courts. Another example was *Entick v Carrington*,[31] where the Court found that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.[32]

Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. This is so because the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Further, a court has a duty to give effect to the law irrespective of the Minister's political accountability to Parliament. Ministerial responsibility is no substitute for judicial review.[33] Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers by ensuring the prorogation power is not used unlawfully. Indeed, the court will be giving effect to the separation of powers by ensuring the prorogation power is not used unlawfully.[34]

**Whether these issues are justiciable**

The Court saw the first issue as whether a prerogative power exists and its extent. Secondly, if it is accepted that a prerogative power existed and it has been exercised within its limits, the question then was whether a purported exercise of power was challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In *Council of Civil Service Unions v Minister for the Civil Service*[35] the dissolution of Parliament was seen by Lord Roskill as one of a number of powers whose exercise was non-justiciable. It was important to appreciate that this argument advanced by the government that prorogation is analogous to dissolution, and is therefore an excluded category, only arises if the issue in the proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits rather than as one concerning the lawful limits of the power and whether they have been exceeded. No question of justiciability can arise in relation to whether the law recognises the existence of a prerogative power or in relation to its legal limits. These are by definition questions of law for the courts.[36]

**Deciding the limits of prerogative power**

Whilst it is relatively straightforward to determine the limits of a statutory power, determining the limits of a prerogative power which is not constituted in any document is less straightforward. Nevertheless, every prerogative power has its limits and it is the function of the court to determine when necessary where they lie. The common law recognises prerogative power and that power has to be compatible with common law principle which may illuminate where its boundaries lie.[37]

31 (1765) 19 State Trials 1029.
32 [2019] UKSC 41 [32].
33 Ibid [32].
34 Ibid [34].
35 [1985] AC 374; Lord Roskill mentioned at 418.
36 [2019] UKSC 41 [36].
37 Ibid [38].

Constitutional principles may be developed by the common law — for example, that justice must be administered in public; and the principle of the separation of powers between the executive, Parliament and the courts. The principle may extend to the application of governmental powers, including prerogative powers. For example, the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation.[38]

**Sovereignty of Parliament is a foundational principle**

The Court said that the sovereignty of Parliament would be undermined as the foundational principle of the constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority. That would be the position if there was no legal limit on the power to prorogue Parliament.[39] The longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government.[40] A prerogative power is therefore limited by statute and the common law and 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 the legislature and as the body responsible for the supervision of the executive.[41]

**The Prime Minister's explanation for prorogation**

The government argued that there were no circumstances whatsoever in which the Court could review a decision to prorogue Parliament.[42] However, it is a concomitant of parliamentary sovereignty that the length of prorogation is not unlimited.[43] The question then is whether the Prime Minister's explanation for advising the Parliament should be prorogued was a reasonable justification. It was recognised that the courts can rule on the extent of prerogative powers and the Court is not concerned with the mode of exercise of the prerogative powers within its lawful limits. But the advice given by Boris Johnson to the Queen to prorogue Parliament for five out of the possible eight weeks was to frustrate or prevent the constitutional role of Parliament in holding the government to account.

The government argued that to declare the prorogation null and of no effect is contrary to Article 9 of the *Bill of Rights 1689*, which states that 'the freedom of speech in debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. It is a principal role of the courts to interpret Acts of Parliament.

In *R v Chytor*[44] a prosecution of several members of Parliament for allegedly making false expenses claims was resisted on the ground that these claims were 'proceedings in Parliament' which ought not to be 'impeached or questioned' in any court. It was held unanimously by nine justices that MPs' expenses were not 'proceedings in Parliament'. The case established that it is for the court and not for Parliament to determine the scope of

38 Ibid [40].
39 Ibid [42].
40 Ibid [48].
41 Ibid [50].
42 Ibid [43].
43 Ibid [44].
44 (2010) UKSC 52.

parliamentary privilege, whether under Article 9 of the Bill of Rights or matters within the exclusive cognisance of Parliament. The principle in Article 9 is directed to freedom of speech and debate. The prorogation itself takes place in the presence of members of both houses, but it cannot be sensibly described as a 'proceeding in Parliament'. It is not a decision of either house; rather, it is something which is imposed upon members of Parliament from outside.[45] The Court is therefore not precluded by Article 9 or by any wider parliamentary privilege from considering the validity of the prorogation itself.

The Prime Minister did not submit any evidence to the Court about what passed between him and the Queen when advising her to prorogue. However, the Court had three documents leading up to the advice, one of which contained the Prime Minister's handwritten comments on a memorandum which said 'the whole September session is a rigmarole introduced [redacted] to show the public that MPs were earning their crust, so I don't see anything especially shocking about this prorogation'.[46] The words redacted above were 'by girly swot Cameron'[47] — a reference to the former Prime Minister David Cameron, who had been at Eton College with Johnson.

The minutes of a Cabinet meeting held by conference call on 27 August, after the advice had been given, asserted that prorogation had not been driven by Brexit considerations. It had been portrayed as a means to prevent MPs from intervening to prevent the UK's departure from the EU due on 31 October 2019, but that was not so. A Queen's speech was to be delivered on 14 October and the Prime Minister sent a letter to MPs setting out 'an ambitious and domestic legislative agenda for the renewal of our country after Brexit'.[48]

**The legal test of unlawfulness**

However, the longer Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government.[49] The relevant limit in this case upon the power to prorogue can be expressed thus: the decision to prorogue Parliament will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[50]

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 the exit date from the EU, set for 31 October 2019.[51] Sometimes this interruption may not matter, but where a fundamental change was due to take place in the UK constitution on 31 October 2019 it was important.[52]

45 [2019] UKSC 41 [68].
46 Ibid [18].
47 Stephen Sedley, 'In Court', *London Review of Books*, Vol 49, No 19, 10 October 2019, p 16.
48 [2019] UKSC 41 [21].
49 Ibid [48].
50 Ibid [50].
51 Ibid [56].
52 Ibid [57].

There was no reason given for closing down Parliament for five weeks on the pretext that this time was needed for preparation of the Queen's speech setting out the government's program. The unchallenged evidence of Sir John Major, a former Prime Minister, that four to six days is sufficient for that purpose was accepted.[53] It was impossible to conclude that there was any reason to advise a prorogation of five weeks.[54]

It was found, therefore, that the advice was unlawful because it was outside the powers of the Prime Minister to give it and therefore it was null and of no effect.

**The political consequences**

The two decisions of the Supreme Court have had political consequences well beyond the arcane points of constitutional law which the Court decided. Had the dissenting view of the three judges succeeded in the first Brexit case, Theresa May's government would have been able to implement the withdrawal agreement with the EU without recourse to Parliament for approval of that agreement and the UK would have left the EU before that time.

It is because, in the years following the ousting of the Stuarts, the Crown ceased to govern through the Ministers and Ministers began to govern through the Crown that an issue like the prorogation crisis addressed in the second Brexit case has been able to arise.[55]

The *Bill of Rights 1689* created today's constitutional monarchy, leaving in existence a range of prerogative powers which have been significantly reduced in their scope by the recent decisions. The first Brexit case affirmed the established proposition that prerogative powers do not allow for extending or altering laws which confer rights upon individuals where those are enjoyed under domestic law. Although the executive may make treaties under international law in exercise of the prerogative, those powers have no effect upon the domestic law unless Parliament legislates to adopt the treaty terms as part of the domestic law.

The dissenting view saw the withdrawal of EU membership under Article 50 of the *Treaty of Lisbon* as the exercise of a prerogative power by Ministers. It took the literal view that the *European Communities Act 1972*, taking the UK into the EU, was simply a conduit for rights and obligations derived from a treaty, which was an exercise of the royal prerogative, and therefore could be abrogated like any other treaty terms by Ministers. There was no legal requirement that an Act of Parliament authorise the granting of notification of withdrawal under Article 50.

Conversely, the majority view in the first Brexit case was that parliamentary sovereignty, allied to the fact that this was a substantial alteration in constitutional arrangements, meant that legislative approval for withdrawal was required. Emboldened by the majority decision, Parliament introduced s 13 of the *European Union (Withdrawal) Act 2019*, requiring parliamentary approval of any withdrawal agreement reached by the government. After the withdrawal agreement reached by Theresa May with the EU had been voted down three times, Parliament legislated to require the Prime Minister to seek an extension of time from

53 Ibid [59].
54 Ibid [61].
55 Sedley, above n 47.

the EU since no withdrawal agreement had been approved by Parliament. Boris Johnson's subsequent obtaining of a modified withdrawal agreement with EU then met the difficulty that he could not command enough parliamentary support to get the withdrawal agreement passed, so an election was needed to secure a majority for passage of the modified agreement.

The two Brexit cases reaffirmed that Ministers may only govern as long as they have the confidence of Parliament; that Ministers have an accountability to Parliament for their conduct of both foreign and domestic policy; that an executive becomes rudderless where it does not have parliamentary support to pass legislation; and that the courts may hold an executive government to account for an unlawful exercise of its prerogative powers.

**The excluded prerogative powers**

It must be now doubted whether even the limited prerogative powers set out by Professor Wade and cited in the first Brexit case or those described by Lord Roskill in the *Council of Civil Service Union* case alluded to in the second Brexit case are non-justiciable. Lord Roskill saw the prerogative powers free from challenge as the making of treaties; the defence of the realm; the prerogative of mercy; the grant of honours; the appointment of ministers; and the dissolution of government.[56]

**The separation of powers**

The prerogative powers excluded from challenge have been diminished, the sovereignty of Parliament reaffirmed and the judicial role both to patrol the boundaries of political lawfulness and to scrutinise by judicial review political actions enlarged. The second Brexit case recognised that constitutional principles may be developed by the common law and that this would include recognising the separation of powers between executive, Parliament and the courts.

**Are these modern developments?**

In his BBC Reith Lectures Lord Sumption, who formed one of the majority in the first Brexit case but had retired before the second case, said relations between government and the citizen are governed by 'an elaborate system of administrative law largely developed by Judges since the 1960s'. Sir Stephen Sedley saw this comment as a 'historical solecism', for he said there is little in the principles in modern public law (a term he preferred to that of administrative law) which was not already there by the 19th century, but what has changed is that the polity to which these principles applied as judicial review can now reach acts done under the royal prerogative, not only when it departs from what is lawful but also to review some of the excluded prerogative categories referred to earlier by Lord Roskill.[57]

56 1985 AC 374, 418 (Lord Roskill).

57 *R (on the application of Privacy International (Appellant) v Investigatory Powers Tribunal and Others (Respondents)* [2019] UKSC 22.

## Political or legal constitution?

Sir Stephen Sedley drew attention to Lord Sumption's view, expressed in the BBC Reith Lectures, that the UK constitution is 'essentially a political and not a legal constitution'.[58] This was consistent with Lord Sumption's view that the judiciary does no more than patrol the boundaries of political legality whereas two party politics should make for moderation, toleration and compromise.

It is shown by recent events in Parliament, where the members could not agree upon a course for withdrawal from the EU, and recent decisions of the Supreme Court that this 'idealised dualism'[59] of law and politics has now fallen apart.

## The UK constitution and ouster clauses

Another Supreme Court decision in 2019 illustrates the increased reliance which the courts place upon the principle of legality to ensure that Parliament does not preclude the higher courts from determining what is the law. In *R (on the application of Privacy International) (Appellant) versus the Investigatory Powers Tribunal and others (Respondents)*[60] Lord Carnworth, speaking for the majority, said an ouster clause which sought to oust the supervising role of the higher courts to correct errors of law by tribunals would conflict with the rule of law. He saw this principle as fundamental to the constitution as that of parliamentary sovereignty. His Lordship held that, consistent with the rule of law, binding effect cannot be given to a clause which purports to exclude the jurisdiction of the higher court to review a decision of an inferior court or tribunal whether it be for excess or abuse of jurisdiction or the error of law.[61]

## Constitutional contrast with Australia

In arriving at this result his Lordship acknowledged that in Australia the High Court in *Kirk v Industrial Court of NSW*[62] had already arrived at a similar result by use of a 'broadened concept of jurisdiction'. That case also determined that state legislators could not legislate to exclude review for jurisdictional error. Legislation to oust jurisdiction of the higher courts in Australia arose most visibly under the *Migration Act 1968* (Cth), where a 'privative clause' in legislation purporting to oust jurisdiction to review tribunal decisions was struck down on the basis of jurisdictional error.[63] Unlike the UK, the High Court has thus far preserved the difficult distinction between jurisdictional and non-jurisdictional error. This is deemed necessary because the majority in the High Court and Privy Council in the *Boilermakers case*[64] decided that the exercise of judicial power did not permit interference with executive decision-making unless there had been jurisdictional error or the legislation itself permitted some form of merits review. It remains to be seen what effect the recent public law developments in the two Brexit

58 Stephen Sedley, 'A Boundary Where There Is None', *London Review of Books*, Vol 41, No 17, 12 September 2019.
59 Ibid.
60 [2019] UKSC 22.
61 Ibid [144].
62 2010 HCA 1.
63 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) HCA 2; 211 CLR 476.
64 *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

cases, together with the anticipated uncoupling of the UK from European jurisprudence, will have on constitutional developments in the Australian High Court.