

UNCONSTITUTIONAL PROROGATION OF PARLIAMENT¹

Abstract

Prorogation refers to the conclusion of a parliamentary session, causing a recess period and effectively terminating all parliamentary business. It is a prerogative power exercised in a predictable and virtually politically uncontroversial manner by the Monarch following ministerial advice. Drawing on the debate surrounding royal assent, the paper argues that the Monarch can refuse ministerial advice on prorogation in exceptional circumstances, namely in three scenarios where advice is tendered by a government (1) that has lost the confidence of the House of Commons and is hence no longer democratically legitimate; (2) in order to avoid parliamentary accountability, ultimately, but not exclusively through a motion of no-confidence; or (3) to undermine parliamentary sovereignty, for instance by preventing debate and passage of bills through Parliament because they are disfavoured by government. A modestly constitutionally assertive Monarch can prevent abuses of executive power and may be preferable in some respects to a hasty consent and judicial intervention. At the very least, monarchical discretion provides an additional safeguard for parliamentary sovereignty and accountability.

Keywords: prorogation, Parliament, ministerial advice, monarchical discretion, Miller/Cherry

‘The sovereign’, wrote Walter Bagehot in 1867, ‘has under a constitutional monarchy such as ours, three rights – the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others.’² Lately however, constitutional developments in the UK suggest that there are underappreciated virtues to an unelected head of state in a democracy: virtues that may justify affording them constitutional agency beyond rubber stamping and informal counsel.³

¹ Stefan Theil, Bonavero Institute, Faculty of Law, University of Oxford. The author would like to thank John Adenitire, Simon Allison, Nick Barber, Will Bateman, Paul Craig, Hayley Hooper, Aileen Kavanagh, Jeff King, Liora Lazarus, Ewan Smith, Scott Stephenson, Stephen Tierney, Alison Young, and the anonymous reviewers for helpful discussions and feedback on earlier drafts.

² Walter Bagehot, *The English Constitution* (Chapman and Hall 1867) 103.

³ See Vernon Bogdanor’s evidence to the *Constitution Committee, House of Lords, Fixed-term Parliaments Bill* (8th report, 1 December 2010, 2010) [147]; Peter Hennessy, *The Prime Minister: the Office and its Holders Since 1945* (Penguin 2001) 29-30.

When Prime Minister Boris Johnson sought a prorogation of Parliament in late August 2019, he drew significant public criticism for his decision, which some saw as an attempt to limit politically troublesome scrutiny and accountability for the EU withdrawal process. As will be well-known to readers, the Supreme Court held in *Miller II/Cherry* that the prorogation sought by Prime Minister Johnson was unlawful.⁴ The Supreme Court developed a test that outlined the limits of the prerogative power to prorogue, based on fundamental constitutional principles of parliamentary sovereignty and parliamentary accountability.⁵ The aim of this article is not to defend the ruling.⁶ The Supreme Court has provided a unanimous and for the time being authoritative interpretation of parliamentary sovereignty that forms the starting point for this article. Ultimately, however, the argument presented here does not turn on the notion of parliamentary sovereignty and accountability adopted by the Supreme Court.

As we shall see, the power to prorogue Parliament is problematic regardless of whether one locates the operative values in principles of parliamentary sovereignty and accountability or elsewhere in the constitution: an unchecked power to prorogue upsets the constitutional role of Parliament, suspends core accountability mechanisms of government to Parliament, dilutes notions of responsible and representative government, and undermines representative democracy. The one criticism that the article does express is that Supreme Court intervention was required at all: a modestly constitutionally assertive Monarch could act to restrain excesses of executive power and thus protect fundamental constitutional principles.

While it is well established that the Prime Minister advises the Monarch on prorogation, as on other prerogative powers, it remains unclear whether there are circumstances where the Monarch may reject such advice. Bagehot has been undeniably influential in shaping the prevailing view that the Monarch is comprehensively bound to follow ministerial advice.⁷ The Monarch essentially functions as a constitutional ‘automaton’ controlled by the government with only limited and unsystematic exceptions. The core justification is the unelected nature of monarchical power, which is said to favour a general presumption of governmental control.⁸

⁴ *R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41 [70].

⁵ *Ibid* [41] – [47].

⁶ Much ink has and will certainly be spent on this topic, see for instance Paul Craig, ‘The Supreme Court, Prorogation and Constitutional Principle’ [2020] *Public Law* 248.

⁷ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press 2018); Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 117.

⁸ In the context of royal assent, see Adam Tomkins, *Public Law* (Oxford University Press 2003) 64; Rodney Brazier, ‘Royal Assent to Legislation’ (2013) 129 *Law Quarterly Review* 184.

However, this position is in my view based on a superficial understanding of parliamentary democracy, obscured through a long history of majority governments. Crucially, it is not invariably true that the government of the day articulates the democratic will of Parliament when it advises the Monarch: minority governments, or a lack of support from backbench MPs can put Parliament and government at odds. Differences of opinion on prerogative powers are of course to be expected and are under most circumstances constitutionally acceptable. After all, the fact that a government cannot command a parliamentary majority on every policy decision does not necessarily indicate that MPs are prepared to sanction the government or necessarily wish to remove the government from power. The crucial question for the purposes of parliamentary sovereignty and accountability is whether Parliament retains the practical ability to discharge its law-making duties and hold the government accountable generally as well as specifically for its exercise of prerogative powers.

Prorogation is a prerogative power whose exercise raises concerns on precisely these issues. This is because the primary effect of prorogation is to eliminate Parliament as a constitutional actor for a time period determined, and as we shall see in principle also extendable, at the discretion of government under the terms of the Prorogation Act 1867. During the recess period, Parliament is unable to enact legislation or exercise any oversight and accountability powers, while the government remains in power by default and continues to govern through delegated legislation and prerogative powers.

The exercise of prerogative powers like prorogation is governed by the convention on ministerial advice. In its most general form, the convention holds that the Monarch will follow the advice given by Ministers when exercising personal prerogative powers. The ordinary democratic justification for the pivotal role of ministerial advice is that it is a mechanism of democratic accountability of the Monarch to Parliament via the advice of government. However, this justification quite simply breaks down when the prerogative power exercised is prorogation. Therefore, the paper argues that ministerial advice to prorogue Parliament contrary to the constitutional convention can and should be rejected by the Monarch. Specifically, the paper will develop and defend three connected claims.

First, pursuant to a strong constitutional convention the Monarch will only prorogue Parliament in a predictable and politically uncontroversial manner when prompted by ministerial advice. In application of the test developed by Jennings for the identification of conventions, there are both strong precedents and good constitutional reasons of principle for

this rule.⁹ The major caveat to this rule arises where a prorogation is sought to facilitate a general election.

Second, on its proper interpretation the ministerial advice convention does not require the Monarch to prorogue Parliament contrary to the constitutional convention. Academic writing specifically on prorogation has been limited, but there are some enlightening parallels to the debate on royal assent that explain how both the convention on prorogation and ministerial advice ultimately serve the same democratic ends. The Monarch has no obligation to follow unlawful advice, especially where it conflicts with core constitutional principles such as parliamentary sovereignty and accountability.

Specifically, the Monarch should reject advice on prorogation in three scenarios, namely when tendered by a government (1) that has lost the confidence of the House of Commons (lack of democratic legitimacy); (2) in order to avoid parliamentary scrutiny, ultimately, but not exclusively a motion of no-confidence (avoiding parliamentary accountability); or (3) to prevent debate and passage of a specific bill through Parliament because it is disfavoured by government, or in an effort to unduly limit parliamentary time, thus undermining Parliament's crucial legislative role (undermining parliamentary sovereignty). We may refer to this as the constitutional 'discretion' of the Monarch who thus operates as a guardian of parliamentary democracy.

Finally, the Monarch has a range of remedies at her disposal to respond to unlawful requests for a prorogation: namely, outright refusal to grant the prorogation, inviting Parliament to pass a motion that it is content to stand prorogued, and seeking advice from the Judicial Committee of the Privy Council where doubt persists.¹⁰ These remedies are preferable to a hasty consent to prorogation and in some respects complements judicial oversight through the courts.

Section A commences with an outline of the evidence for a constitutional convention on prorogation and makes the argument for limited monarchical discretion, while Section B explores the justiciability criticisms of the Supreme Court in *Miller/Cherry* and outlines possible monarchical remedies for abuses of executive power.

⁹ Ivor Jennings, *The Law and the Constitution* (London: University of London Press 1963).

¹⁰ On the latter, see section 4 of the Judicial Committee Act 1833.

A. PROROGATION OF PARLIAMENT

Prorogation is ‘an annual procedural event’¹¹ that brings to a formal end a parliamentary session thereby ending all business and puts Parliament in recess until the next session commences or it is dissolved.¹² Prorogation is a personal prerogative of the Monarch exercised on the advice of ministers.¹³ It is carried out by an announcement to both Houses that effects that Parliament should be prorogued until a specified time, and royal assent is granted to any outstanding bills duly passed by both Houses.¹⁴ Some business may be carried over from one session to another subject to the conditions provided in the Standing Orders.¹⁵

It is related to two other concepts which should be distinguished: adjournment and dissolution. Adjournment refers to the right of each House to interrupt and continue at a later time its current session, for instance at the end of each day and for periods of time determined by resolution.¹⁶ Dissolution on the other hand terminates the sitting Parliament and invariably leads to a general election and the summoning of the newly elected Parliament shortly after polling day.¹⁷ While originally a prerogative power, dissolution has been placed in abeyance through the Fixed Term Parliaments Act 2011 (FTPA).¹⁸ Pursuant to section 6(1) FTPA the statute however expressly does not affect the prerogative power of prorogation, which remains a personal prerogative power of the Monarch. In the past it has been common to prorogue Parliament before its dissolution, although this is not considered a firm requirement as there are a number of modern exceptions to this practice.¹⁹ The prerogative power of prorogation has not been shaped by statutory requirements, save for two notable exceptions.

¹¹ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (n 7) 587.

¹² *Ibid* 584; Wayne Morrison, *Blackstone's Commentaries on the Laws of England Volumes I-IV* (1st edn, Routledge-Cavendish 2013) 179; *The Cabinet Manual* (Cabinet Office, 2011) 103.

¹³ Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24 edn, LexisNexis 2011) 144; Gail Bartlett and Michael Everett, *The Royal Prerogative* (House of Commons Library, Briefing Paper 03861, 2017) 9; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn, Cambridge University Press 2011) 385; *Constitution Committee, House of Lords, Fixed-term Parliaments Bill* [144].

¹⁴ Malcolm Jack, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (n 13) 145-6.

¹⁵ *Ibid* 145.

¹⁶ *Ibid*.

¹⁷ *The Cabinet Manual* (n 12) 100.

¹⁸ An Act to Make Provision About the Dissolution of Parliament and the Determination of Polling Days for Parliamentary General Elections; and for Connected Purposes (Fixed-term Parliaments Act 2011).

¹⁹ *The Cabinet Manual* (n 12) 16.

I. Statutory provisions

First, Parliament must be summoned in the event of the demise of the Crown or where a state of emergency is declared, thereby cutting short any prorogation period.²⁰ More importantly, the Prorogation Act 1867 places some limitations on extending the recess period following prorogation, but is subject to competing plausible interpretations on scope.²¹

Section 1 of the Prorogation Act 1867 specifies that the recess period may be extended for at least a further fourteen days after the date of the proclamation by the Monarch on the advice of ministers. Section 2 appears to limit this power, but as we shall see its wording is open to competing interpretations: ‘This Act shall not apply to the case of the prorogation of Parliament at the close of a session.’

According to Hansard from the House of Lords, the chief objective of the Act was to simplify the procedure of extending a prorogation while Parliament was in recess.²² Previously, it had been necessary for the Royal Commission to summon the House of Commons again, and it was especially difficult to secure the attendance of a sufficient number of commissioners during the recess period. Instead, the practice was abolished in favour of an extension by mere proclamation. While the Prorogation Act 1867 was therefore not constitutive of the power to extend a prorogation, it has nonetheless put it on a statutory footing and provided for some restrictions. The difficulty lies in interpreting the Act in a modern parliamentary context, especially with respect to section 2 which excludes the application of the Act to some forms of prorogations, namely those ‘at the close of a session’. What precisely this means is unclear.

A session is a parliamentary year and normally commences in spring, generally lasting for about 12 months and ending with a prorogation. Typically, there are five sessions in each Parliament, although modern times have seen significantly longer sessions, for instance following the 2016 referendum on EU membership. On its ordinary meaning, section 2 would appear to exclude every prorogation from the extension power, because any prorogation – by definition – closes a session and is in that sense ‘at the close of a session’. This is regardless of how long the session has lasted, whether it facilitates a general election, or is sought for other reasons. This interpretation appears to capture too much, as it would exclude the extension power entirely, and thus deprive section 1 of any reasonable sphere of application. This cannot therefore be a sensible conclusion, especially as it cannot account for the last

²⁰ See section 5 of the Succession to the Crown Act 1707 and section 28 of the Civil Contingencies Act 2004, respectively.

²¹ An Act to simplify the Forms of Prorogation during the Recess of Parliament (Prorogation Act 1867).

²² HL Deb 18 July 1867 vol 188 cc1660-1.

extension under the Prorogation Act in 1950, when the prorogation was extended while Parliament was in recess by George VI.²³ This opens the door to at least two further interpretations of section 2 of the Prorogation Act, with different implications.

The first interpretation is narrower, and essentially would permit an extension of a prorogation under section 1 only for the purposes of a general election. The argument is that a prorogation for the purposes of a general election is different to a regular prorogation ‘at the close of a session’ because it can in principle arise at any point during the parliamentary year. In the past, a general election would be held at the discretion of the government as shaped by constitutional convention and now tempered through the provisions of the Fixed Term Parliament Act. Section 2 may have been designed to prevent arbitrary extensions outside of the clear political context of a general election. This interpretation would fit with the modern historical precedent. In 1950, Prime Minister Clement Attlee had announced a general election on 11 January for 23 February and extended the prorogation from 24 January to 14 February while Parliament was in recess. However, this interpretation is complicated by the fact that sessions of Parliament have in the recent past lasted significantly longer than twelve months, and parliaments have had fewer than five sessions. Therefore, it is unclear whether there is enough consistency to draw a distinction between ‘regular’ and ‘irregular’ prorogations and hence limit recess extensions to general election prorogations only.

A second, alternative interpretation is accordingly wider, and would focus on the purpose of the prorogation: it would permit an extension of any prorogation outside of a prorogation that primarily seeks to close a parliamentary session, for instance to pursue a general election or some other political purpose. The difficulty is, however, that outside of a 1948 prorogation to overcome obstruction from the House of Lords to the Parliament Act 1949, there is little modern precedent for irregular prorogations that did not facilitate a general election, and no precedent whatsoever for their extension while Parliament was in recess.

At the very least, there is no obvious statutory limit on extending prorogations under the Act in principle and at least on one interpretation any irregular prorogation could be extended. However, while the Prorogation Act 1867 potentially opens the door to politically expedient extensions, it has not affected the conditions under which a prorogation may be sought in the first place. In modern times the exercise of this prerogative power has generally been politically uncontroversial and predictable owing to a strong constitutional convention.

²³ *Election Timetables* (House of Commons Library - Research Paper 15/11, 2015) 11.

After laying out the basis for this convention, the following section draws on the rich debate on royal assent to argue that the Monarch has discretion and should refuse ministerial advice on prorogation tendered by the government under certain circumstances. This may seem as quite a radical statement, but fact comports well with British parliamentary democracy, especially principles of parliamentary sovereignty and accountability.

II. *Constitutional convention*

In the UK there is a strong constitutional convention that the Monarch prorogues Parliament when prompted by ministerial advice and in the modern era politically controversial and unpredictable prorogations are virtually non-existent.²⁴ Barring the notable exception of a General Election, a session of Parliament typically lasts for one year interrupted by a recess period lasting a few days before reassembly for a further one-year session.

1. *Historic precedent*

Before the English Civil War, Parliament was summoned infrequently, and sessions often lasted only for as long as necessary for Monarchs to secure the passage of laws they desired. Dissolution and prorogation were common and liberally utilised to exercise control over the proceedings and law-making powers of Parliament. At times, Monarchs chose to rule without Parliament altogether. For instance, once Charles I had secured the passage of finance bills and angered at the fact that Parliament was withholding statutory authority for the levying of *Tunnage and Pundage*, a key source of revenue for the Crown, he prorogued Parliament in 1628 and finally dissolved it altogether in 1629.²⁵ He then ruled without Parliament until 1640, levying revenue without statutory authority. The grievances with royal administration and the quick dissolution of what came to be known as the Short Parliament were direct catalysts for the English Civil War. However, in modern times, constitutional convention has ensured that prorogation of Parliament is largely a formality: it is highly predictable in terms of timing and duration of the recess period and has generally been exercised in a politically uncontroversial manner.²⁶ There are three modern examples of controversial prorogation that we need to consider here.

²⁴ *The Cabinet Manual* (n 12) 16; Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (n 7) 587; Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle', 263.

²⁵ Andrew Thrusch and John P Ferris (eds), *The History of Parliament: the House of Commons 1604-1629*, vol 1 (Cambridge University Press 2010).

²⁶ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (n 7) 587.

As alluded to in the previous section, in 1948 the Labour government instituted an exceedingly short session of Parliament to overcome the House of Lord's obstruction to what would become the Parliament Act 1949.²⁷ However, while certainly an unusual prorogation, it was not politically controversial in the sense considered here. A clear majority of MPs desired the legislation to pass and were in favour of prorogation to achieve this outcome. Rather, this episode of parliamentary history is part of a broader institutional conflict with the House of Lords at the beginning of the 20th century. In proroguing Parliament under these circumstances, the government was not subverting parliamentary sovereignty, accountability, and democracy, it was asserting them against an unelected House of Lords with the support of the House of Commons.²⁸

A more recent example stems from the run-up to the 1997 General Election. Two Conservative MPs were accused in a Guardian article of taking money in return for submitting questions to Parliament.²⁹ The aptly named *Cash for Questions* affair led the then Prime Minister Major to establish the Committee on Standards in Public Life, whose report was scheduled to be delivered before the next General Election. Faced with the imminent publication of the report, it has been alleged that the Prime Minister opted for an early prorogation, leaving an unusually long time period of three weeks before polling day in order to avoid embarrassment. However, it must be reiterated that this allegedly controversial prorogation was ultimately in facilitation of a general election. These two examples are broadly in line with precedent and support the constitutional convention on prorogation previously outlined: in the modern era, prorogation is a predictable and politically uncontroversial affair, barring the exception of general elections. The final and most recent example somewhat challenges this account of the convention on prorogation but was ultimately found unlawful by the Supreme Court.

2. *The 2019 Prorogation*

In late August 2019, the government under Prime Minister Johnson advised the Queen and she agreed to prorogue Parliament from no earlier than Monday 9th September and no later than Thursday 12th September 2019 to Monday 14th October 2019. This advice was tendered at the height of the controversy over the UK's departure from the European Union by default

²⁷ The session began on 14 September and ended on 25 October 1948, see Richard Kelly and Lucinda Maer, *The Parliament Acts* (House of Commons Library, Briefing Paper 00675, 2016) 13.

²⁸ Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' 285.

²⁹ 'History of Political Lobbying Scandals' *BBC News* (3 June 2013) <<https://www.bbc.co.uk/news/uk-politics-22754297>> accessed 1 February 2019.

operation of the law on 31 October 2019. The prorogation period significantly cut short the remaining parliamentary time to consider legislation that would prevent a departure from the EU without a withdrawal agreement.

This prorogation was out of step with previous prorogations both in terms of timing and length of the recess period. While this unpredictability is not invariably problematic, for instance in the context of a general election, this was not the case here. The government declared that the prorogation was primarily concerned with closing the unusually long session of Parliament and laying out a fresh legislative agenda in the Queen's speech. In light of the successful legal challenge against the advice to prorogue, the constitutional convention which emphasises the politically uncontroversial and predictable exercise of the prerogative power remains largely intact.

Crucially for our purposes, the Supreme Court expressly did not make any determination as to whether the Monarch was under the circumstances of the case obliged to follow the ministerial advice on prorogation.³⁰ That leaves the relationship between the convention on prorogation and ministerial advice unsettled. Indeed, it is difficult to see why the Monarch should be obliged to follow unlawful advice on prorogation at all: the convention on ministerial advice at least can scarcely justify such an outcome.

III. Ministerial advice

At its most general, the convention on ministerial advice stipulates that the Monarch will follow the advice given by Ministers when exercising personal prerogative powers.³¹ The convention is intimately tied to the democratic foundation of the British constitution, notably the principle of parliamentary accountability as well as responsible and representative government, including expertise and the availability of accountability mechanisms. The reasoning is that it would be difficult to justify vesting prerogative powers in an unelected head of state without a convention that ties the exercise of these powers to the government

³⁰ *Miller v Prime Minister; Cherry v Advocate General for Scotland* [30].

³¹ Mark Elliott and Robert Thomas, *Public Law* (2 edn, Oxford University Press 2014) 117; Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (n 7) 587; Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Blog*, 25 September 2013) <<https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/>> accessed 1 February 2019; Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?' (*UK Constitutional Law Blog*, 22 January 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 1 February 2019;

ultimately accountable to a democratically elected Parliament. The support that the Government must command in the House of Commons and the accountability and oversight exercised through Parliament are the good reasons for the convention on ministerial advice. At first glance, the convention would thus appear to suggest that the Monarch is bound to follow ministerial advice, regardless of how out of step it may be with the convention on prorogation. However, it is worth going beyond this initial reflection and considering the deeper relationship between the conventions on ministerial advice and prorogation.

Parliament and scholars rarely engage with the issue of ministerial advice in the context of prorogation. The Constitution Committee of the House of Lords briefly discussed prorogation in the course of scrutinising the Fixed Term Parliament Bill.³² Most of those giving evidence before the Committee suggested that an abuse of prorogation powers was theoretically possible, but a remote risk because it is subject to political controls. Vernon Bogdanor alone gave evidence that the Monarch would have discretion to refuse ministerial advice on prorogation.³³ Peter Hennessy has likewise suggested that the Monarch is not bound to accept ministerial advice on prorogation.³⁴ Mark Elliott has gone somewhat further in his response to suggestions by John Finnis that Parliament should be prorogued in order to achieve a ‘no-deal’ Brexit.³⁵ Elliott concludes that Finnis in effect advocates for executive supremacy over the sovereign Parliament which has no basis in the British constitutional tradition. However, even scholars who discuss the issue of ministerial advice and prorogation do not fully develop an argument to support why they hold this to be the correct constitutional position. Helpfully, there are some enlightening parallels to the debate on royal assent, engages with the relationship between a well-established convention that the Monarch will grant royal assent to bills and the role for ministerial advice.

1. Royal assent

Scholarly opinion on royal assent and ministerial advice can be broadly divided into two camps. On one view it is a mistake to assume that the convention on ministerial advice applies to royal assent, or at least that the two conventions conflict on their proper interpretation.

³² *Constitution Committee, House of Lords, Fixed-term Parliaments Bill* [144] – [149].

³³ *Ibid* [147].

³⁴ Peter Hennessy, *The Prime Minister: the Office and its Holders Since 1945* 29-30.

³⁵ Mark Elliott, ‘Brexit, the Executive and Parliament: A response to John Finnis’ (*Public Law for Everyone*, 2 April 2019) <<https://publiclawforeveryone.com/2019/04/02/brexit-the-executive-and-parliament-a-response-to-john-finnis/>> accessed 3 April 2019.

This position has been advanced by Mark Elliott.³⁶ He argues that ministerial advice to withhold royal assent would interfere with the constitutional bedrock of the constitution: parliamentary sovereignty. It is Parliament, not government, that can make and unmake any law and this is incompatible with an unqualified veto of the Prime Minister over bills that have duly passed both Houses. The convention on ministerial advice can only come into play if there is any doubt as to what the Monarch ought to do in a given situation. Given parliamentary sovereignty and the convention of invariably granting royal assent, Elliott argues there is no such reasonable doubt. Jeff King ultimately suggests drawing a distinction between the Crown in Council exercising prerogative powers, and the Crown in Parliament, which forms part of the legislative process and grants royal assent as a matter of course.³⁷ King argues that it is a mistake to believe that there is ministerial advice to be given to the Crown in Parliament at all. The relevant advice is issued not by the government, but by both Houses of Parliament, as is made clear in the introduction to every Act of Parliament. Ministerial advice thus simply forms no part of the legislative process in the UK and therefore cannot be tendered to achieve a refusal of royal assent. Nick Barber argues on the basis of the principles underlying both conventions: they ultimately serve to uphold principles of democracy, representative and responsible government. It is contradictory therefore to hold that the ministerial advice convention can justify an outcome contrary to the ordinary application of the convention on royal assent.³⁸

Not everyone shares this view on the interplay between the conventions on ministerial advice and royal assent. Adam Tomkins and Rodney Brazier argue that the ministerial advice convention applies to royal assent and may require the Monarch to withhold assent even if a bill has duly passed both Houses.³⁹ Tomkins and Brazier deny the existence of a clear convention on royal assent, and hence suggest the exercise of this prerogative requires clarification through ministerial advice. The argument is often predicated on the idea that MPs could, in the event that government advises to withhold royal assent, hold the government to account, ultimately through a motion of no confidence.⁴⁰ This view can point to some limited

³⁶ Mark Elliott, 'Can the Government veto legislation by advising the Queen to withhold royal assent?' (*Public Law for everyone*, 21 January 2019) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 30 January 2019.

³⁷ Jeff King, 'Can Royal Assent to a Bill Be Withheld If So Advised by Ministers?' (*UK Constitutional Law Blog*, 5 April 2019) <<https://ukconstitutionallaw.org/2019/04/05/jeff-king-can-royal-assent-to-a-bill-be-withheld-if-so-advised-by-ministers/>> accessed 30 April 2019.

³⁸ Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?'

³⁹ Adam Tomkins, *Public Law* 64; Rodney Brazier, 'Royal Assent to Legislation'; see also Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?'

⁴⁰ G Lindell, 'Assent or Refusal to Assent to Legislation - On Whose Advice?' (2009) 11 *Constitutional Law and Policy Review* 126, 132; also leaning towards this view Robert Craig, 'Could the Government Advise the Queen

historical precedent. Queen Anne last refused royal assent to the Scottish Militia Bill in 1708 reportedly on ministerial advice and George V reportedly contemplated doing the same with the Irish Home Rule Bill in 1914.

2. *Prorogation*

Admittedly there is some difficulty in drawing direct conclusions from the debate on royal assent for the purposes of prorogation. While the precedents for ministerial advice on royal assent are weak, they are firmly established with respect to prorogation. Notwithstanding the generally predictable and politically uncontroversial exercise of prorogation, there is clear precedent that ministerial advice is tendered to and followed by the Monarch. This may in part be a function of the routinely uncontroversial and predictable content of the advice. Nonetheless, the convention on ministerial advice ties both royal assent and prorogation together and can reveal important insights on the constitutional relationship between government and Parliament.

Transferring Elliott's view that the ministerial advice convention simply does not operate in the same sphere as prorogation appears untenable, because there is clear precedent to the contrary. King's elegant distinction between the Crown in Council and the Crown in Parliament does not help here either, because the Crown in Parliament is not a relevant constitutional actor with respect to prorogation. Better then to rely, in line with Barber, on the best reasons for the ministerial advice convention when determining its relationship with the convention on prorogation. As we have seen, ministerial advice chiefly serves parliamentary accountability and democracy, including principles of responsible and representative government.

The constitutional convention on prorogation arguably serves much of the same purpose. While significant government control over parliamentary business is accepted in principle under Standing Order 24 of the House of Commons, this control is subject to exceptions and ultimately subject to on-going consent of MPs. The provision is generally uncontroversial for instrumental reasons: a government that commands the confidence of the House of Commons must be given some leeway to implement its legislative agenda, notwithstanding the fact that a majority in Parliament does not amount to a legislative *carte blanche*.⁴¹ There are likewise well established parliamentary procedures that benefit the opposition and permit MPs to derail

to Refuse Royal Assent to a Backbench Bill?'; Adam Tomkins, *Public Law* 63-4; Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* 647.

⁴¹ Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' 266.

the legislative agenda even short of voting a government out of power. As Parliament has demonstrated by seizing control of the timetable during the Brexit debates, the Standing Orders are subject to amendment through a majority of MPs and the government is not inherently entitled to the level of control over the House of Commons it may have become accustomed to over the years.

Significantly shaping and setting the business of Parliament in order to implement a legislative agenda based on a manifesto is one thing, using a prerogative power to effectively eliminate Parliament as a constitutional actor whenever it is politically opportune is quite another. The former is a constitutionally acceptable implication of a government commanding a majority, the latter is an unconscionable abuse of procedural power that undermines parliamentary sovereignty and accountability: committee meetings are suspended, and debate of all bills and all further legislative initiatives are terminated abruptly. This fundamentally upsets the constitutional relationship between government and Parliament if it were entirely unfettered.

Crucially, this view appears to be shared even by those who in the context of royal assent argue for a stronger role of ministerial advice. This is because their arguments are premised on Parliament's ability to hold government accountable for tendering advice to withhold royal assent.⁴² Lindell, Tomkins, Ewing and Knight all expressly name a motion of no confidence as a core safeguard and justification for the primacy of ministerial advice.⁴³ However, prorogation deprives Parliament of precisely this ability, along with other accountability mechanisms. If ministerial advice to prorogue Parliament were to invariably prevail it would in the words of Barber speaking on royal assent '(...) operat[e] against democratic values rather than upholding them. Rather than supporting parliamentary government, it would undermine it.'⁴⁴ This applies even more forcefully when the exercise of a prerogative power leaves Parliament impotent to respond: it arguably amounts to complete denial of parliamentary accountability mechanisms.⁴⁵

⁴² *Miller v Prime Minister; Cherry v Advocate General for Scotland* [46]; Mark Elliott and Robert Thomas, *Public Law* 110; Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?'; Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* 592.

⁴³ G Lindell, 'Assent or Refusal to Assent to Legislation - On Whose Advice?', 132; Adam Tomkins, *Public Law* 63-4; A. W. Bradley, K. D. Ewing and Christopher Knight, *Constitutional and Administrative law* (17 edn, Pearson 2018) 21.

⁴⁴ Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?'

⁴⁵ Speaking in the context of prorogation sought to avoid a no-confidence motion, see Peter Russell, 'Codifying Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 238.

The predictable and politically uncontroversial exercise of prorogation powers pursuant to constitutional convention is designed precisely to prevent such abuses of executive power. In this sense, both the convention on ministerial advice and prorogation ultimately serve the same ends. They seek to prevent the exercise of prerogative powers in a manner that undermine Parliament's crucial legislative and accountability role. For good reasons, evidence from other Westminster style systems suggests a clear trend to eliminate, or at least significantly curtail executive control over the prerogative power to prorogue. While these countries have undoubtedly constitutionally diverged, the approach may nonetheless inform the underlying principles and approaches that are equally at the root of the UK constitution.

IV. Other Westminster systems

The definition and effects of prorogation are largely identical in most Westminster style systems, but constitutional law and practice has seen significant divergences. A majority of Westminster systems accepts that advice to prorogue Parliament may be rejected if it runs counter to the constitution. This takes the shape of constitutional provisions requiring a parliamentary session at regular intervals (every 12 month or less).⁴⁶ Accordingly, Parliament cannot be prorogued for longer than permissible and ministerial advice to that effect would be rejected as unconstitutional. Less commonly, the head of state or a presiding officer is empowered to recall Parliament following the wish of a certain number of MPs to test confidence in the government.⁴⁷ In India the dominant view is that prorogation must be exercised in line with ministerial advice, although the courts have recognised a duty of the President to disregard the advice given in bad faith or in breach of the constitution.⁴⁸ Examples of politically controversial use of prorogation mostly arise from Canada and Australia, which have not adopted express legal limits on prorogation.

Canada has seen Prime Ministers make repeated and highly contentious use of their power to advise the Governor General on prorogation. In late 2008 Canadian Prime Minister Stephen Harper's minority Conservative government narrowly avoided a parliamentary motion of no

⁴⁶ Notably present in the constitutions of Barbos, Fiji, India, Jamaica, Malta, Malaysia, Pakistan, Singapore, Sri Lanka, Trinidad and Tobago amongst others, see the references in Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* 586, footnotes 12 and 13.

⁴⁷ Notably in section 67(4) of the Constitution of Fiji, section 77 of the Constitution of Kiribati, and Article 54(3) of the Constitution of Pakistan, see *ibid* 587, footnote 16.

⁴⁸ *Ibid* 590-1.

confidence by advising the Governor General to prorogue Parliament.⁴⁹ The move came sixteen days into the current session and only after opposition parties had produced a written agreement to topple the Harper government and sustain an alternative minority government under the Liberal party. The Prime Minister's advice to the Governor General had the clear intention of depriving the elected legislature of the opportunity to remove the government from office. Following deliberations lasting a few hours, the Governor General, ostensibly motivated by a desire to avoid another general election so close to the previous one, acceded to this advice and Parliament stood prorogued for six weeks.⁵⁰ The condition reportedly was that the Prime Minister would upon the return of Parliament test confidence in his government by seeking approval of his budget.

During the recess period the leadership of the Liberal Party passed from Stéphane Dion to Michael Ignatieff. Ignatieff had been a reluctant supporter of efforts to topple Harper with the help of other opposition parties. It therefore did not come as a surprise when he withdrew his support for a no confidence motion and ultimately ensured the passage of the government's budget when Parliament reconvened. Prime Minister Harper would rely on prorogation to avoid parliamentary scrutiny again less than a year later, this time to frustrate a committee of inquiry into alleged torture of Afghan prisoners.⁵¹ These events sparked a lively academic debate as to whether the Governor General has discretion to reject ministerial advice. Most scholars now agree that the Governor General has discretion to reject advice from a Prime Minister that has or is almost certain to lose the confidence of the House of Commons.⁵²

In Australia legal scholarship likewise tends to recognise discretion of the Governor General when the Prime Minister has lost the confidence of the lower House.⁵³ Examples of politically controversial advice on prorogation mostly arises from the state level. The premier of New South Wales sought prorogation in 1899 to avoid a defeat on a vote of no confidence. The

⁴⁹ 'GG agrees to suspend Parliament until January' *CBC* (4 December 2008) <<https://www.cbc.ca/news/canada/gg-agrees-to-suspend-parliament-until-january-1.705593>> accessed 1 February 2019.

⁵⁰ See the detailed account of events in Peter W. Hogg, *Constitutional Law of Canada* (Thomson Reuters 2017) [9-34].

⁵¹ Les Whittington, 'Commons shut down, opposition furious' *Toronto Star* (31 January 2009) <https://www.thestar.com/news/canada/2009/12/31/commons_shut_down_opposition_furious.html> accessed 1 February 2019.

⁵² See Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* 587-90 and the scholarship cited; Peter W. Hogg, *Constitutional Law of Canada* 9-36 and scholarship cited; Peter Russell, 'Codifying Conventions' 238.

⁵³ Rosemary Laing (ed), *Odgers' Australian Senate Practice As Revised by Harry Evans* (14th edn, Department of Senate, Commonwealth of Australia 2016) 605; Michael Crommelin, 'Powers of the Head of State' (2014) 38 *Melb UL Rev* 1118, 1127-8; Eliot Olivier, 'Proroguing the parliament of Australia: The effect on the senate and the conventions that constrain the prerogative power' (2012) 40 *Federal Law Review* 69, 87.

Governor exercised his discretion and rejected the advice, seeing it as a ploy to gain political advantage.⁵⁴

The significant divergence in constitutional practice makes drawing direct comparisons difficult, but the overall trend appears clear: in the vast majority of Westminster style systems prorogation has either been subjected to strict constitutional limits on duration or there is a mechanism for Parliament to be recalled to test confidence. Canada and Australia are outliers in the sense that there is an absence of express constitutional limits, but both generally recognise discretion of the Governor General to refuse advice under certain circumstances, especially when confidence is in doubt.

V. *Constitutional implications*

The threat of an unrestrained power to prorogue Parliament to parliamentary democracy, sovereignty and government accountability is clear. At least where a government has lost or is almost certain to lose the confidence of the House of Commons, ministerial advice to prorogue Parliament is untenable. Otherwise, it would lead to a situation where a government can remain in power by virtue of the exercise of a prerogative power and not by virtue of its democratic legitimacy and support from MPs. As Anne Twomey concludes in her book *The Veiled Sceptre* this cannot be the correct constitutional position: ‘[a] government is not entitled to remain in office and continue governing simply because it can exercise procedural powers to avoid proof of the loss of confidence in it.’⁵⁵ It would be hoped that this much at least is common ground and acknowledged as deeply unconstitutional under the modern British constitution, regardless of views on ministerial advice and the proper role of the Monarch within that system.⁵⁶

But even short of a prorogation that sustains a government that has lost confidence, there is a threat of damage to the British constitution. Parliament is a deliberative body and coming to a majority decision through compromise and debate are core to its constitutional role and to parliamentary sovereignty.⁵⁷ The legislative agenda of the government and its ability to

⁵⁴ Eliot Olivier, ‘Proroguing the parliament of Australia: The effect on the senate and the conventions that constrain the prerogative power’, 85.

⁵⁵ Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* 594.

⁵⁶ It is a position accepted even by notable critics of the Supreme Court ruling, see Richard Ekins and Stephen Laws, ‘The Supreme Court has done lasting damage to our constitution’ (*Prospect Magazine*, 4 October 2019) <<https://www.prospectmagazine.co.uk/politics/the-supreme-court-has-done-lasting-damage-to-our-constitution-prorogation-law>> accessed 1 February 2020.

⁵⁷ *Miller v Prime Minister; Cherry v Advocate General for Scotland* [41] – [47].

compromise on amendments are crucial even where it commands majority support. This is because, as Paul Craig points out, winning a democratic election does not licence the unrestricted implementation of a policy agenda: the government can only pass bills in accordance with the procedural rules of Parliament, which grant MPs various control and accountability mechanisms short of a motion of no confidence.⁵⁸

Prorogation deprives Parliament of precisely these mechanisms and its constitutional legislative role: without these, Parliament is greatly diminished and subordinated to the government and the principle of parliamentary sovereignty is hollowed out. Parliamentary sovereignty would be reduced to a mere statement of legislative supremacy, without any practical safeguards that allow Parliament to fulfil its law-making role against the wishes of government. Some critics of the Supreme Court ruling have notably taken issue with this interpretation of parliamentary sovereignty that goes beyond the legislative supremacy of an Act of Parliament. Martin Loughlin asserts without further argument that parliamentary sovereignty is limited to legislative supremacy, emphasising that the facts in *Miller/Cherry* did not justify resort to a hypothetical scenario to determine legal principle.⁵⁹ Likewise, John Finnis notes his disapproval of what he views as the expansion of the principle but offers no argument as to why parliamentary sovereignty should not include the practical ability to discharge the constitutional law-making role.⁶⁰

For the purposes of this article, the problematic features of an unchecked power to prorogue do not turn on the particular notion of parliamentary sovereignty and accountability adopted by the Supreme Court. Prorogation allows a government to govern without accountability to the representatives of the people in Parliament through unscrutinised delegated legislation and use of prerogative powers.⁶¹ This is problematic in a representative democracy and of deep constitutional concern regardless of whether one locates the operative values in the principles of parliamentary sovereignty and accountability or elsewhere in the constitution: it suspends the constitutional role of Parliament, undermines core accountability mechanisms of

⁵⁸ Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' 266.

⁵⁹ Martin Loughlin, *The Case of Prorogation - The UK Constitutional Council's Ruling on Appeal from the Judgment of the Supreme Court* (Policy Exchange, 2019) <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf>> accessed 1 February 2020, 16.

⁶⁰ John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment* (Policy Exchange, 2019) <<https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>> accessed 1 February 2020, 8.

⁶¹ Alexandra Sinclair and Joe Tomlinson, 'Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments' (*UK Constitutional Law Blog*, 17 September 2019) <<https://ukconstitutionallaw.org/2019/09/17/alexandra-sinclair-and-joe-tomlinson-eliminating-effective-scrutiny-prorogation-no-deal-brexit-and-statutory-instruments-part-2/>> accessed 1 February 2020.

government to Parliament, dilutes notions of responsible and representative government, and undermines representative democracy.

This is also the reason why the (theoretical) ability of Parliament to pass legislation placing prorogation on a statutory footing or passing a motion of no-confidence in a government intending to prorogue is no adequate constitutional answer.⁶² There is nothing in the UK constitution that guarantees Parliament sufficient time to prevent its own prorogation. If a government is so minded, and there is no restriction on its power to prorogue as some scholars suggest, then there is nothing to prevent the implementation of a prorogation before Parliament can reasonably respond.

More importantly, even if a pre-emptive motion of no confidence were always available, the manner in which government ultimately exercises the power to prorogue (which cannot logically be known before the fact) and how it continues to govern during the prorogation period must also be subject to political and legal scrutiny in a representative democracy. The ability of Parliament to prevent its own prorogation cannot therefore alleviate the constitutional concerns that are inherent to any prorogation contrary to the constitutional convention. This is compounded by the fact that the Prime Minister may even be empowered to extend prorogation while Parliament is in recess under the terms of the Prorogation Act 1867.⁶³ The only upper limit would be a depletion of supply or the annual legislation required to maintain a standing army which can only be enacted by a sitting Parliament. But this is scant reassurance as the Supreme Court noted in *Miller/Cherry*.⁶⁴ A Parliament that is only recalled when required to ensure a steady stream of revenue or raising an army would put the Prime Minister in a position of power almost indistinguishable from a Stuart Monarch.

B. MONARCHICAL REMEDIES

Leaving to one side for the moment some valid criticisms voiced against the ruling, the UK Supreme Court undoubtedly had compelling reasons to find the prorogation sought by Prime Minister Johnson unlawful.⁶⁵ It is indeed difficult to see how the fundamental constitutional

⁶² John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment*, 15.

⁶³ Prorogation Act 1867; Malcolm Jack, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 146.

⁶⁴ *Miller v Prime Minister; Cherry v Advocate General for Scotland* [43].

⁶⁵ That view at least is shared amongst the vast majority of scholars and commentators, see for instance Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle'; Mark Elliott, 'The Supreme Court's Judgment in *Cherry/Miller* (No 2): A New Approach to Constitutional Adjudication?' (*Public Law for Everyone*,

principle of parliamentary sovereignty can be squared with an unfettered prerogative power to prorogue Parliament. This alone, however, does not answer the question whether judicial intervention was the only permissible, or indeed overall constitutionally most desirable remedy. Especially since the decision was undeniably controversial and because criticisms of the Supreme Court ruling centred on justiciability: the question whether it is appropriate for a court to intervene in what was perceived by some as a politically sensitive subject matter.⁶⁶

The Supreme Court held that the existence and scope of prerogative powers is generally justiciable, relying on the authority the *Case of Proclamations*. The case established in the early seventeenth century that courts could determine whether a prerogative power claimed by the Crown exists, holding that '[t]he King has no prerogative but that which the law of the land allows him.'⁶⁷ More recently, this principle was upheld in the decision of the House of Lords in *GCHQ*.⁶⁸ The case concerned a challenge against a ministerial decision taken without consultation to ban workers from belonging to trade unions.⁶⁹ Lord Scarman expressed the now dominant view, seeing '(...) no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review.'⁷⁰

However, the Supreme Court noted that *GCHQ* stood primarily for the proposition that a prerogative power, exercised *within* its legal limits could be justiciable under certain conditions. The circumstances of *Miller/Cherry* were different, according to the Supreme Court, because it was not clear whether the Prime Minister had in fact acted within the legal limits of the prerogative power. Therefore, it had to investigate the scope of the prerogative power before being in a position to determine justiciability.

The scope of the prorogation power was outlined as follows: a government decision to prorogue Parliament, respectively the advice to the Monarch, is unlawful if '(...) the

24 September 2019) <<https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/>> accessed 25 September 2019; Alison Young, 'Deftly guarding the constitution' (*Judicial Power Project*, 29 September 2019) <<http://judicialpowerproject.org.uk/alison-young-deftly-guarding-the-constitution/>> accessed 1 February 2020; Nick Barber, 'Playing Hardball with the Queen' (*Oxford Human Rights Hub Blog*, 2019) <<http://ohrh.law.ox.ac.uk/playing-hardball-with-the-queen/>> accessed 2 September 2019.

⁶⁶ Stephen Tierney, 'Prorogation and the Courts: A Question of Sovereignty' (*UK Constitutional Law Blog*, 17 September 2019) accessed 1 February 2020; Robert Craig, 'Judicial Review of Advice to Prorogue Parliament' (*UK Constitutional Law Blog*, 12 July 2019) <<https://ukconstitutionallaw.org/2019/07/12/robert-craig-judicial-review-of-advice-to-prorogue-parliament/>> accessed 1 February 2020.

⁶⁷ *Case of Proclamations* 2 Co Rep 74.

⁶⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

⁶⁹ Mark Elliott and Robert Thomas, *Public Law* 560.

⁷⁰ *Council of Civil Service Unions v Minister for the Civil Service* [410].

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.⁷¹ Some commentators perceived this distinction drawn by the Supreme Court as a mere sleight of hand, suggesting that there is no difference between determining the existence and scope of a prerogative power and scrutinising its exercise.⁷²

Some arguments instead focused on Article 9 of the Bill of Rights, which commentators suggest should have prevented judicial review of proceedings in Parliament.⁷³ However, the Supreme Court found that Article 9 did not preclude judicial review: Parliament had no meaningful input into the decision to prorogue and hence prorogation is a proceeding in Parliament, as opposed to a proceeding of Parliament. Anne Twomey and Paul Craig have in my view convincingly explained why this line of argument is defensible, emphasising the absence of any role for Parliament in prorogation.⁷⁴ The mere announcement of a decision made outside of Parliament in Parliament does not immunise it from judicial review, and the object and purpose of Article 9 points to principled distinctions between the Commissioners exercising their role in proroguing Parliament and expressing royal assent to bills.⁷⁵

For our purposes, it suffices to acknowledge that the controversial judicial intervention may have been avoided altogether through a modestly constitutionally assertive monarch. In terms of remedies, the Monarch has at least three options when confronted with a constitutionally dubious request for prorogation, all of which avoid a hastily granted consent to prorogation, undue politicisation of the monarchy, and direct judicial intervention.

First, following due consideration the Monarch could refuse the ministerial request for a prorogation. The case for this remedy appears strongest where the government either has or is almost certain to lose the confidence of the House of Commons. These are constitutionally indefensible grounds for a prorogation and are almost universally rejected in other Westminster systems and legal writing as abuses of executive power. As we have seen, there are some limited examples from the state level in Australia where a request for a prorogation

⁷¹ *Miller v Prime Minister; Cherry v Advocate General for Scotland* [50].

⁷² John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment* 14-15; Richard Ekins and Stephen Laws, 'The Supreme Court has done lasting damage to our constitution'; Paul Yowell, 'Is Miller (No 2) the UK's Bush v Gore?' (*UK Constitutional Law Blog*, 7 October 2019) accessed 1 February 2020.

⁷³ Martin Loughlin, *The Case of Prorogation*.

⁷⁴ Anne Twomey, 'Article 9 of the Bill of Rights 1688 and Its Application to Prorogation' (*UK Constitutional Law Blog*, 4 October 2019) <<https://ukconstitutionallaw.org/2019/10/04/anne-twomey-article-9-of-the-bill-of-rights-1688-and-its-application-to-prorogation/>> accessed 1 February 2020; Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' 282.

⁷⁵ Anne Twomey, 'Article 9 of the Bill of Rights 1688 and Its Application to Prorogation'.

was indeed refused for that reason. Likewise, there is a troubling, but so far singular example from Canada where a prorogation was granted for this purpose, albeit subject to certain conditions, most notably that confidence be tested as soon as Parliament returned from recess.

Second, the Monarch could consent to the prorogation, provided that Parliament pass a resolution expressing that it is content to stand prorogued for the duration of time requested by the government. Should Parliament fail to pass such a motion within a specified time period, the Monarch would reject the ministerial advice thus upholding the primacy of Parliament in the British constitution. This remedy removes doubts over the democratic support for a prorogation and appears especially attractive when the government does not clearly command a majority of the House of Commons. The crucial justification is that it is possibly, but not invariably true under these circumstances that the government continues to command confidence in light of the request for a prorogation.

Finally, if there is reasonable doubt about the legality of a prorogation, for instance whether the ministerial advice comports with principles of parliamentary sovereignty and accountability as outlined by the Supreme Court, the Monarch could seek legal advice from the Judicial Committee of the Privy Council.⁷⁶ A statutory basis for this course of action is found in section 4 of the Judicial Committee Act 1833:

‘(...) His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.’

Crucially, the Committee could consider complicated legal questions better than is possible through informal communication between advisors to the Monarch and the government. In the first instance, it would determine whether the prorogation sought is in line with the constitutional convention, whether it was predictable and politically uncontroversial. Then it could consider whether the advice comports with the principles of parliamentary sovereignty and accountability: namely whether the government has lost democratic legitimacy, is seeking to avoid parliamentary accountability more generally, or subverting parliamentary sovereignty. Depending on the legal advice from the Judicial Committee, the Monarch would then either consent to the prorogation or reject ministerial advice. Through these remedies, the Monarch is granted moderate constitutional agency to safeguard the fundamental

⁷⁶ Recounted in Nick Barber, ‘Playing Hardball with the Queen’.

constitutional principles that the conventions on ministerial advice and prorogation serve and that ultimately underpin parliamentary sovereignty and accountability.

C. CONCLUSION

Prorogation in the UK has for the most part been an uncontroversial and predictable affair. This is reflected in the constitutional convention that has developed around the exercise of this prerogative power and has spared the British constitution highly questionable prorogations observed elsewhere. In Canada, this procedural power coupled with political fortune permitted the Harper government to remain in power despite having lost the confidence of the House of Commons. One can see in these events the normality of the political process, but under the surface lies a more sinister and constitutionally troubling precedent.

The paper has attempted to illustrate some of the ramifications if the constitutional convention in the UK were to develop along the lines of the Canadian example. Parliament is the principle democratically legitimate actor under the UK constitution, and crucial to holding the government to account, especially for its exercise of prerogative powers. Although the protection of the constitutional role of Parliament has most recently fallen to the courts, the paper has argued that a monarchical remedy might have been preferable, or at least a suitable additional safeguard.

Therefore, the Monarch may reject advice on prorogation tendered by a government (1) that has lost the confidence of the House of Commons and is hence no longer democratically legitimate; (2) in order to avoid parliamentary scrutiny of its conduct, ultimately, but not exclusively through a motion of no-confidence, because it violates parliamentary accountability; or (3) to undermine parliamentary sovereignty, for instance by preventing debate and passage of bills through Parliament because they are disfavoured by government, or by unduly limiting parliamentary time in order to curtail Parliament's crucial legislative role. A modestly constitutionally assertive Monarch can provide constitutional remedies that restrain excesses of executive power and uphold the fundamental constitutional role of Parliament.

This conclusion is not reached lightly. The convention on ministerial advice serves crucial principles that underpin the British constitution and parliamentary accountability of

government. However, the convention cannot be invoked to justify undermining the very parliamentary democracy and accountability it serves. The analogy to the debate over royal assent is helpful in this regard, at least to a point. The crucial difference is that in the event of ministerial advice to deny royal assent, Parliament may still react and hold the government to account in a myriad of ways. This option is simply not available following prorogation. In that sense monarchical discretion on prorogation appears as a sensible remedy and perhaps even a preferable one to judicial intervention of the Supreme Court we have recently witnessed.

Nonetheless, likely rejoinders would contend that this is a slippery slope towards broader undemocratic discretionary powers of the Monarch. However, I believe these concerns are misplaced. The core reason is that prorogation is unique amongst prerogative powers in its ability to temporarily eliminate Parliament as a constitutional actor, along with its crucial democratic accountability mechanisms and legislative functions. The worst possible outcome of any exercise of monarchical discretion suggested here is that Parliament remains sitting and ready to legislate and scrutinise governmental power. The reasons that justify monarchical discretion on prorogation are also not readily transferable to other prerogative powers that do not threaten Parliament and its fundamental role in this existential manner.

While the prorogation power may ultimately be acceptable in the hands of government if exercised pursuant to the constitutional convention it is also undeniably open to abuse. In a stable parliamentary democracy that respects parliamentary sovereignty and accountability this raises serious concerns, in a system strained by rapid and fundamental constitutional change in an era of minority governments it is potentially disastrous. Until such a time as prorogation is placed on a statutory footing or eliminated entirely, the potential for abuse must be counteracted and a modestly constitutionally assertive Monarch can take on this role.