

UKSC 2019/0193

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF SESSION

FIRST DIVISION

Inner House Judgment: [2019] CSIH 49

BETWEEN:

JOANNA CHERRY QC MP

Respondents

and

THE ADVOCATE GENERAL FOR SCOTLAND

Appellant

CASE FOR THE RESPONDENTS

1. INTRODUCTION

- 1.1 In this Case for the Respondents, for the purposes of maintaining clarity the Union Parliament at Westminster will be referred to as “Parliament” and the Crown in right of the United Kingdom Government will be referred to as the “Executive”.
- 1.2 Parliament represents the people and nations of the United Kingdom as its sovereign legislature to which the United Kingdom Government is on all matters *politically* answerable and accountable. Separately the United Kingdom Government is *legally* answerable and accountable to the courts.
- 1.3 The Respondents’ case is that the Inner House of the Court of Session was correct to find that the Executive’s decision as published on 28 August 2019 to prorogue Parliament was unlawful. Accordingly, and necessarily the purported prorogation of Parliament on 9 September 2019 was also unlawful. The Appellant’s new claim (first made in this court) that the prorogation itself having been effected by the Lords Commissioner by reading the commission to both Houses of Parliament, is therefore covered by the Article 9 of the English Bill of Rights 1688 and cannot therefore now “be impeached or questioned in any Court or Place out of Parlyament” is unsustainable nonsense, and should be summarily so treated by this court and dismissed.¹ Article 9 of the Bill of Rights 1688 was passed to

¹ For a recent similar attempt by the Appellant to cloak executive action in Parliament privilege which was rejected by the court see *Craig v Advocate General for Scotland* [2018] CSOH 117, 2019 SC 230 per Lord Malcolm at §§ 13-15

“13. The Advocate General objects to any reliance on the answer given by the Minister of State to various questions (see above), and also to a reference made in the petitioner’s submissions to a statement made by Jeremy Browne MP when promoting the Bill as Parliamentary Under-Secretary of State before the House of Commons Public Bill Committee, on 12 February 2013, that

‘because Scottish Ministers and courts have a role in the process, we have decided that the [forum bar] provisions should be commenced only with their consent’.

This is on the basis that to do so would be in breach of the parliamentary privilege attaching to these statements.

14. It would, I think, be surprising if an answer of the kind made by the minister of state could not be relied upon as an explanation of why the Government had not brought the forum bar provisions into force in Scotland. No doubt it could have been reported in the media, and if one were a journalist or an interested member of the public subsequently inquiring of the department, it is likely that one would be referred to the answer. There is no suggestion that the minister was in error or misled the House. No contrary explanation for the current state of affairs has been proffered to the court. Nonetheless under reference to various authorities, including *Adams v Guardian Newspapers Ltd.*, 2003 SC 425 and *Coulson v HM Advocate* [2015] HCJAC 49, 2015 SLT 43, it was insisted that neither the petitioner nor the court could have regard to the answer (or Mr Browne’s statement) for the purpose of the present proceedings.

15 I am not of that view. ...”

stop Members of Parliament from being prosecuted or sued by the King’s procurators or proxies before the Royal Courts of Justice. To uphold the Appellant’s new claim

“would be an ironic consequence of article 9 [of the Bill of Rights]. Intended to protect the integrity of the *legislature* from the executive and the courts, article 9 would become a source of protection of the executive from the courts.”²

1.4 The Respondents offer, and will expand upon, the following as the proper understanding of the constitution which should be upheld by this court

- (1) Parliamentary sovereignty is the undoubtedly the animating principle of the UK constitution. It is inherent in this concept of Parliamentary Sovereignty that the Executive is subordinate *to the law* and is accountable *to Parliament*.
- (2) The *essence* of the constitutional principle of *accountability* in our Parliamentary representative democracy is that the Executive is accountable *to Parliament*, and that Parliament is, in turn, accountable to the people.
- (3) The Executive in this country is *not* elected directly by the people. The Executive’s accountability under our constitution is therefore *not* directly to the people. To claim otherwise is not to uphold democracy in this country, but to attempt to

² See *Toussaint v Attorney-General of St Vincent and the Grenadines* [2007] UKPC 48 [2007] 1 WLR 2825 in which the judgment of the Board was delivered by Lord Mance who noted (at §16) that the House of Lords had on a number of occasions stated that use could be made of ministerial statements in Parliament in judicial review proceedings. It was described as ‘an established practice’ in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40 [2004] 1 AC 816. Lord Mance continued (at § 17):

“In such cases, the minister’s statement is relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it. *This is unobjectionable although the aim and effect is to show that such conduct involved the improper exercise of a power “for an alien purpose or in a wholly unreasonable manner”*: *Pepper v. Hart* [1993] AC 593, *per* Lord Browne-Wilkinson at p. 639A.

The Joint Committee on Parliamentary Privilege, (United Kingdom, Session 1998–1999, HL Paper 43-I, HC 214-I) expressed the view that Parliament should welcome this development, on the basis that

‘Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society’ (§ 50)

and on the basis that

‘The contrary view would have bizarre consequences’,
hampering challenges to the

‘legality of executive decisions ... by ring-fencing what ministers said in Parliament’,
and

‘making ministerial decisions announced in Parliament ... less readily open to examination than other ministerial decisions’ (§ 51).

The Joint Committee observed, pertinently, that

“That would be an ironic consequence of article 9 [of the Bill of Rights]. Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.”

establish populism. The Executive constitutional accountability under our system is always and only to the elected representatives of the people duly assembled together in Parliament. Thus, where the Prime Minister chooses to webcast videos under the title “The People’s PMQs” rather than face real and direct questioning in Parliament from the elected representatives of the people during Prime Minister’s Questions and other sittings of Parliament he is parodying, and so subverting, the true principle of his accountability to Parliament as protected and embodied under the constitution.

- (4) Since the UK constitution is fundamentally premised on the accountability of the Executive to Parliament for its actions and inactions in government, the residual power of the Executive to be able to suspend the sittings of Parliament can only properly lawfully and constitutionally be exercised in a manner which is consistent with the overarching principle of accountability.
- (5) As a derogation from the general constitutional principles of the Executive’s subordination to and answerability before Parliament, the Executive power to suspend Parliament by prorogation has to be construed narrowly and strictly.
- (6) Further any justification offered by the Executive for the specific use of this power in any particular circumstances be subject to anxious scrutiny *by and before the courts*, precisely because Parliament has no say as to when, how, and for what period the Executive might choose to suspend or close down Parliament and so prevent its sitting.
- (7) In the present case, the Prime Minister’s action in proroguing has had the intent and effect, in fact, of preventing Parliament from holding the government politically to account when the government is taking decisions that will have constitutional and irreversible impacts. This fundamentally alters the balance of the constitution in that it permits the Executive to govern, at this crucial time, without accountability. This is not, and cannot be, a lawful use of the power of prorogation.
- (8) The Prime Minister has exercised the power to prorogue Parliament for an improper purpose and in bad faith. The reason originally publicly given by the Prime Minister (in his letter to MPs which was circulated on 28 August 2019) was that this was simply “good housekeeping”, to allow sufficient time for a new Queen’s Speech to be prepared by on behalf of the current Government which, even after taking into account its confidence and supply agreement with the DUP, holds

no majority in the House of Commons. The internal government documents of 15, 16 and 23 August 2019 which were subsequently and belatedly revealed to the Inner House in redacted form show that “good housekeeping” claim was untrue. A fair reading of these documents - even in their form as redacted by the Government - show that that claim was simply untrue. The true dominant purpose of prorogation was, as the Inner House correctly observed, to stymie Parliamentary scrutiny of the executive regarding Brexit.

- (9) Lying (albeit wholly unconvincingly) about the true reasons for exercising the prorogation power in the manner, at the time and for the period it has been exercised in this case, calls into question the lawfulness of the Executive’s action. The fact that it has now been established before and by the Inner House that the prorogation power was used in the manner, at the time and for the period it has been exercised in this case so as to minimise the possibilities for the Executive being held to account by and before Parliament in this period in the immediate run up to the possible Exit of the United Kingdom from the European Union on 31 October 2019 shows it to have been used for an improper purpose and is therefore unlawful because it is intended to undermine the fundamental constitutional principle of the accountability of the Executive to Parliament.
- (10) In (albeit ineptly and unsuccessfully) seeking to conceal the true dominant purpose of prorogation, and telling the public and the Court of Session (in which this litigation was live at the time) that (i) the government did not intend to prorogue parliament when the decision to prorogue had already been taken, and (ii) that the reason for prorogation was to hold a Queen’s Speech, the Prime Minister exercised the power to prorogue in bad faith.
- (11) Separately the use of prorogation in the manner, at the time and for the period it has been exercised in this case frustrates the intention of Parliament, as set out in the European Union (Withdrawal) Act 2018, notably sections 9, 10 and 13.
- (12) In any event, the use of prorogation in the manner, at the time and for the period it has been exercised in this case is vitiated by error in law. One of the reasons given the Prime Minister for the exercise of this power was the better to allow the Government to proceed with its policy of ensuring that the United Kingdom leaves the European Union with or without a deal. The Prime Minister has however misunderstood the law in this regard. The Government has received no express mandate in any provision of any statute passed by Parliament authorising it to

allow the United Kingdom to withdraw from the European Union without a deal. If the Government were to purport to do so, it would be in breach of the United Kingdom's constitutional requirements and so would be unlawful as a matter of UK constitutional law. And since a no deal departure of the United Kingdom from the European Union has not been duly authorised under UK constitutional law arguably any (in)action to this effect by the UK Government would also not be effectual for the purposes of European Union law. The Government has misunderstood the law in this regard and has exercised the power of prorogation for the furtherance of an unlawful purpose, the better to allow for a no deal Brexit.

1.5 Further, the Court of Session considered that all the above issues were justiciable and were subject to that court's supervisory jurisdiction. It was correct to do for the following reasons, among others:

- (1) Prorogation is transparently not a matter of "high policy". It is an administrative power that has, in this case been used abusively by the Executive.
- (2) The Executive's abuse of administrative power falls squarely within the Court of Session's supervisory jurisdiction in constitutional matters.
- (3) In any case, it is not, and cannot be, right that the Executive can exercise its powers so as to remove itself from accountability to Parliament in relation to decisions of high constitutional - and potentially irreversible legal, economic and social - impact. If the courts cannot or will not hold the Executive to account for such an abuse of power, then the Executive is, in practice, able to act entirely without accountability should it choose to do so and the constitution is subverted.
- (4) The Inner House can and did properly review this matter by asking itself the following questions of public law:
 - (i) Does the Executive have the power to prorogue Parliament with the intent and effect of insulating itself from its normal accountability to Parliament at a time of fundamental constitutional change and profound political controversy? ?
 - (ii) Was the decision to prorogue Parliament in the manner, at the time and for the period it has been exercised in this case taken for an unlawful purpose (stymieing parliamentary accountability) and/or in bad faith?

- (iii) Does the decision to prorogue Parliament in the manner, at the time and for the period it has been exercised in this case frustrate the intention of parliament expressed in European Union (Withdrawal) Act 2018 or otherwise proceed on an unlawful basis or misunderstanding of the law?

1.6 In the light of recent non-attributable briefings from the UK Government which have been provided to sympathetic news outlets that it will simply exercise the power of prorogation again should its present appeal against the decision of the Inner House be unsuccessful, the Executive should be reminded that decision of the Inner House that the Executive acted unlawfully in ordering the prorogation of Parliament on 28 August 2019 was not based on some procedural impropriety which might be remedied once the quashed decision goes back down to the decision maker for it to re-consider. If a fresh decision is taken by the Executive to prorogue Parliament that new decision will again be unlawful if and insofar as it is still taken for an unlawful purpose (stymieing parliamentary accountability) and/or is done in bad faith and/or is done with the intent or effect frustrating the intention of Parliament expressed in European Union (Withdrawal) Act 2018 and/or is otherwise taken on the basis of its misunderstanding of the law that it has been duly authorised by Parliament to allow the United Kingdom to leave the European Union without a deal, whether on 31 October 2019 or at some later date. So we will all just be back in court again and the relevant Government officials behind any such new decision may well find themselves subject to the court's contempt jurisdiction.

1.7 Finally, in considering this appeal, this court should bear in mind that the Court of Session is regularly called upon to exercise its jurisdiction in constitutional matters, in a manner which may be relatively unfamiliar to courts working in non-devolved jurisdictions. In Scotland (as in Wales and in Northern Ireland) there *two* general and democratically elected legislatures (the Union Parliament and the Scottish Parliament) and *two* democratically accountable executives (the UK Government and the Scottish Government). The Court of Session is therefore regularly called upon to review the lawfulness of executive actions and policies (for example slopping out in Scottish prisons³) and the lawfulness of Scottish primary legislation (to cite some recent example, the

³ *Napier v Scottish Ministers*, 2005 SC 307 (IH); 2005 SC 229 (OH)

named persons legislation, ⁴ minimum alcohol pricing, ⁵ the exclusion of prisoners from the right to vote, ⁶ and certain legislation relating to sex offences ⁷ and sex offenders ⁸).

1.8 In its review of Scottish executive policies and Scottish primary legislation the Court of Session regularly applies, among other public law principles, the principle of proportionality and therefore hears evidence on and determines among other things: the true reasons for the executive or legislative policy under challenge; whether those reasons indicate that a legitimate end is being pursued by the executive action or legislative provision; whether the means chosen in the executive or legislative policy at issue is rationally connected with the identified legitimate end; whether there are alternative less restrictive means by which any identified legitimate end might be achieved by the executive or through legislation.

1.9 Against the background that it is already mandated by Parliament to act as a constitutional court in devolved areas, the Court of Session has in more recent years accepted that it may be called upon to exercise a more general supervisory role in constitutional matters. The First Division's decision in *Wightman* ⁹ is just one example of that broader constitutional role which the Court of Session now exercises in public law, which is not confined to the review of decisions or failures to act but which may allow the court to give authoritative guidance on the meaning and application of the existing law and state what the existing law is, or how it applies. This is to, ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities

⁴ *Christian Institute and others v. Lord Advocate* [2016] UKSC 61; [2015] CSIH 64; [2015] CSOH 7 JR on Data Protection grounds of the "named person service" provisions in Part 4 of the Children and Young People (Scotland) Act 2014

⁵ Case C-333/14 *Scotch Whisky Association and others v. Scottish Ministers* [2017] UKSC 76; [2016] CSIH 77; EU:C:2015:845; [2014] CSIH 38; [2013] CSOH 70 re compatibility minimum pricing for alcohol with EU free movement of goods/CAP

⁶ *Moohan and others v. Scottish Government* [2014] UKSC 67; [2014] CSIH 56; [2014] CSOH 199 JR of the Scottish Independence Referendum (Franchise) Act 2013 for its exclusion of convicted prisoners from franchise

⁷ *AB v. Her Majesty's Advocate* [2017] UKSC 25 JR of Scottish legislation removing reasonable belief defence as to the age of a sexual partner

⁸ *R (JF and Thompson) v. Minister of Justice* [2010] UKSC 17 Article 8 ECHR right to privacy and its compatibility with the imposition of indefinite period of notification on the sex offenders register without provision for review or removal

⁹ Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* (Tab 7/ MS 1379; Tab 41/ MS 2761) EU:C:2018:999 [2019] QB 199 [2018] CSIH 62 [2018] CSOH 61 [2018] CSIH 18 [2018] CSOH 8 (decision by the CJEU on a reference by the First Division on the question of whether Article 50 TEU notification is unilaterally revocable by UK

of every sort, from national government downwards, must observe the law as determined by the court. It is against that background, that understanding of the potentially extensive nature of the supervisory jurisdiction of the Court of Session in constitutional matters, that the decision of the Inner House must be understood.

1.10 This may well be a jurisdiction which is as yet unknown to or unfamiliar to English law. But it is now an established feature of Scots law and of the Court of Session. It is not for this court to trespass upon or over-rule the Court of Session's understanding of the extent of the supervisory jurisdiction of this court. While it is accepted that many of the same principles of public law are applied across both countries ¹⁰ and that there is cross-fertilisation of ideas across the jurisdictions, ¹¹ once the Court of Session has accepted that a decision or issue is *habile* for judicial review, there is certainly no necessary uniformity of approach in deciding what questions do or do not fall within the supervisory jurisdiction of the Court of Session, ¹² as compared to the supervisory public law

¹⁰ See the decision in *West v Secretary of State for Scotland*, 1992 SC 385 at page 413 in which the First Division held that there is no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review

¹¹ *Davidson v Scottish Ministers*, 2006 SC (HL) 42 (Tab 30/ MS2243) per Lord Hope at 39, "39. ... There are occasions when those of your Lordships who come from Scotland feel justified in defending Scots law and the Scottish legal system against what are perceived to be alien influences. But this is not one of them. There is everything to be gained by the sharing of views among your Lordships which it has been possible to enjoy in this case. This has helped greatly, as we step back and try to take a broader view of section 21 of the Crown Proceedings Act 1947. I wish to pay tribute in particular to the analysis of how the 1947 Act operates in England which has been provided by my noble and learned friend Lord Nicholls of Birkenhead, as this is crucial to a proper understanding of how the Act as a whole was intended to operate.

....

47. In *West v Secretary of State for Scotland*, 1992 SC 385 at page 411 the court said that the use of the expressions 'public law remedy', 'public law areas' and 'public administrative law' was inappropriate in a discussion as to whether an application for judicial review under RC 260 (now Chap 58 of the Rules of the Court of Session 1994) was competent. At p 413 it said that the competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor was it correct in regard to issues about competency to describe judicial review as a public law remedy.

48. There is an obvious tension here between the way the English system of judicial review is described and the extent of the supervisory jurisdiction in Scotland.

¹² As was pointed out in *West v Secretary of State for Scotland*, 1992 SC 385 at page 397 a distinction must be made between the question of competency as to whether a decision is open to review by the Court of Session in the exercise of its supervisory jurisdiction, and the substantive grounds on which it may do so:

"The extent of the supervisory jurisdiction is capable of a relatively precise definition, in which the essential principles can be expressed. But the substantive grounds on which that jurisdiction may be exercised will of course vary from case to case. And they may be adapted to conform to the standards of decision-taking as they are evolved from time to time by the common law."

jurisdiction of the High Court.¹³ The answer to the appellant’s complaint that “*it would be most astonishingly inconvenient if, notwithstanding that England and Scotland have been united since 1707*” the UK Executive might be subject to greater scrutiny and more readily called to account before court based on the north bank of the Tweed as compared to those on its south bank is simply this: don’t be persuaded by complaints of inconvenient for the Executive that it is even open to this court in the exercise of its appellate jurisdiction to lower Scots law standards, in this regard, to that which is regarded as properly justiciable before the courts of England and Wales. Let English law, if it is deficient in this regard, be brought up to the standards by which the Executive is called to account under Scots law. That is what is required of this court, acting as a constitutional court for the Union as a whole.

2. SUMMARY OF THE RESPONDENTS’ POSITIVE CASE

2.1 In summary, against the foregoing background, the respondents reiterate as follows:

- (1) This court must take full and proper account of the Scottish constitutional tradition in deciding this appeal.¹⁴ There is no necessary correlation between Scots law and English

¹³ See for example *Eba v Advocate General* [2011] UKSC 29, 2012 SC (UKSC) 1 per Lord Hope at § 27: 27. [T] he grounds of judicial control of administrative action in Scotland are based on legal principle. Judicial review by the Court of Session is not an exercise of judicial discretion, in contrast to what was said as to the position in English law in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738 [2003] 1 WLR 475 (§ 47). Every person who complains that he has suffered a wrong because of an error or abuse of the power conferred on a decision-maker is entitled to apply to the Court of Session for judicial review under Chapter 58 of the Rules of the Court of Session as of right, in exactly the same way as he could have done by way of an ordinary action before the Rules of Court were amended to introduce the current procedure in 1985 (*West v Secretary of State for Scotland*, 1992 SC 385 at page 404). He does not have to apply for permission to do so and, although the court has a discretion to refuse a remedy in judicial review on what may be described as equitable grounds, it has no discretion to refuse to entertain a competent application (*Tehrani v Secretary of State for the Home Department* [2006] UKHL 47 2007 SC (HL) 1 (§ 53).”

¹⁴ *R (Jackson) v. Attorney General* [2005] UKHL 56 (Tab 29/ MS2177) [2006] 1 AC 262 per Lord Hope at § 104, 106:

“104. ... Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

...

106. It has been suggested that some of the provisions of the Acts of Union of 1707 are so fundamental that they lie beyond Parliament’s power to legislate. Lord President Cooper in *MacCormick v Lord Advocate*, 1953 SC 396, 411, 412 reserved his opinion on the question whether the provisions in article XIX of the Treaty of Union which purport to preserve the Court

law on the question of what prerogative powers the Executive may claim and how they might lawfully be exercised.¹⁵

- (2) *Esto* there be any difference between Scots law's and English law's respective understandings on the limitations which the law imposes on the Executive's power to prorogue Parliament (which is not known and not admitted), that constitutional tradition within these islands and this Union polity which is *more* limiting of the manner in which the Executive may exercise this power to prorogue Parliament is to be preferred, the better to ensure the Executive's democratic and legal accountability for the use of this power and to prevent its *abuse* of that power in an unlawful attempt to shift the proper constitutional balance of power among the

of Session and the laws relating to private right which are administered in Scotland are fundamental law which Parliament is not free to alter. Nevertheless by expressing himself as he did he went further than Dicey, *The Law of the Constitution*, 10th ed. (1959), p 82 was prepared to go when he said simply that it would be rash of Parliament to abolish Scots law courts and assimilate the law of Scotland to that of England.

In *Gibson v Lord Advocate*, 1975 SC 136, 144, Lord Keith too reserved his opinion on this question and as to the justiciability of legislation purporting to abolish the Church of Scotland.

In *Pringle, Petitioner*, 1991 SLT 330, the First Division of the Court of Session again reserved its position on the effect of the Treaty of Union in a case which had been brought to challenge legislation which introduced the community charge in Scotland before it was introduced in England.

But even Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: *Thoughts on the Scottish Union*, pp 252–253, quoted by Lord President Cooper in *MacCormick* at p 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.”

¹⁵ See for example *Admiralty v Blair's Trustees* 1916 SC 247 (Tab 2/ MS1288) per Lord President:

“My own views in this case may be expressed briefly in the form of propositions: (First) That *by the common law of Scotland the Crown possesses no prerogative right such as is laid claim to in this appeal*, and, consequently, is not entitled to a preferential ranking in this sequestration. That proposition, I think, was not disputed. (Secondly) That *the prerogative right claimed by the Crown was not imported into the law of Scotland by the statute of Anne*. I can find no words in that statute adequate to that end. *It is, to my mind, inconceivable that a doctrine of the law of England should thus be engrafted on the law of Scotland. We do not know what the law of England on this head is*. It is not averred; and it is not proved. (Thirdly) The statute of Anne did import into the law of Scotland the English process as a means of recovery of Crown debts in Scotland, and particularly the facilities and preference conferred on the Crown by the statute of Henry VIII.” (emphasis added)

three pillars of State and allow it unconstitutionally to *dominate*,¹⁶ and so govern without due and proper regard to, Parliament.¹⁷

- (3) Parliamentary sovereignty is a fundamental principle of the UK constitution.¹⁸ Parliament derives its sovereignty from the consent of the peoples and nations of the United Kingdom.¹⁹ The Executive must act within the powers permitted it by Parliament, and for the purposes for which those powers were left with it by Parliament.²⁰ Under the UK constitution the Executive has *no* inherent legislative

¹⁶ *R (Jackson) v. Attorney General* [2005] UKHL 56 [2006] 1 AC 262 (Tab 29/ MS 2177) per Lord Steyn at para 71:

“The Dominance of the Government.

71. The power of a government with a large majority in the House of Commons is redoubtable. That has been the pattern for almost 25 years. In 1979, 1983 and 1987 Conservative Governments were elected respectively with majorities of 43, 144 and 100. In 1997, 2001 and 2005 New Labour was elected with majorities of respectively 177, 165 and 67. As Lord Hailsham explained in *The Dilemma of Democracy* (Collins, London, 1978), 126 the dominance of a government elected with a large majority over Parliament has progressively become greater. This process has continued and strengthened inexorably since Lord Hailsham warned of its dangers in 1978.”

¹⁷ See Professor Paul Craig “Prorogation: Constitutional Principle and Law, Fact and Causation” *Oxford Human Rights Hub* (31st August 2019) (Tab 70/ MS3135):

“The political discussion of prorogation by the present government was predicated on the assumption that it could be legitimate for the Prime Minister to make use of this power intentionally to bypass what was felt to be a recalcitrant Parliament. This is not and cannot be constitutionally correct. To subscribe to such reasoning *per se* diminishes parliamentary sovereignty as a foundational principle, and transforms the UK constitutional order such that the cards become stacked in the executive’s favour.”

¹⁸ *R (Jackson) v. Attorney General* [2005] UKHL 56 [2006] 1 AC 262 (Tab 29/ MS 2177) per Lord Bingham at § 9:

“9. The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament. It is, as Maurice Kay LJ observed in para 3 of his judgment, unnecessary for present purposes to touch on the difference, if any, made by our membership of the European Union. Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority. But such Acts required the consent of both Houses, Lords and Commons: A V Dicey, *Introduction to the Study of the Law of the Constitution*, 6th edn (1902), pp 37–38, 350–351. Where such consent was given, the royal assent to the measure had become a constitutional formality. Where and so long as one or other House withheld its consent, the measure could not become an Act of Parliament.”

¹⁹ See *R (Jackson) v. Attorney General* [2005] UKHL 56 [2006] 1 AC 262 (Tab 29/ MS 2177) per Lord Hope at § 126

“The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve.”

²⁰ See *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, (Tab 23/ MS1864) per Lord Browne-Wilkinson at 552E:

power. It cannot – in the way that the French government can and does - resort to some constitutional *pouvoir réglementaire* when it is necessary to make regulations for purposes of public order or in emergencies. Parliamentary authority is indispensable in the UK. It follows that rules and regulations made by the Executive which have not been duly made under statutory authority are legally ineffective.²¹

- (4) The “prerogative” encompasses the residue of powers which Parliament as the sovereign authority and lawgiver under our constitution has permitted, for the time being, to remain vested in the Executive. The prerogative is a source of power which is only available for a case not covered by statute.²² It is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute.²³ And the

“The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body”

²¹ *R (Javed) v Home Secretary* [2002] QB 129 per Lord Phillips MR at § 33 approving a passage from Wade & Forsyth *Administrative Law*, 8th ed (2000), p 854 (emphasis added):

33. ... In *Wade & Forsyth, Administrative Law*, 8th ed (2000), p 854 the authors summarise the position:

‘In Britain the executive has no inherent legislative power. It cannot, as can the French government, resort to a constitutional *pouvoir réglementaire* when it is necessary to make regulations for purposes of public order or in emergencies. Statutory authority is indispensable, and it follows that rules and regulations not duly made under Act of Parliament are legally ineffective. Exceptions have been made, it is true, in the case of a number of non-statutory bodies. But they do not alter the fact that the courts must determine the validity of delegated legislation by applying the test of ultra vires, just as they do in other contexts. It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the courts, for there is a fundamental difference between a sovereign and a subordinate law-making power. Even where, as is often the case, a regulation is required to be approved by resolutions of both Houses of Parliament, it still falls on the ‘subordinate’ side of the line, so that the court may determine its validity. *Only an Act of Queen, Lords and Commons is immune from judicial review.*’

²² *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*, 1964 SC (HL) 117 (Tab 19/ MS 1671) per Lord Reid at page 122:

“The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute. So I would think the proper approach is a historical one: how was it used in former times and how has it been used in modern times?”

²³ *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 (Tab 16/ MS 1558) per Lord Dunedin at 526:

The prerogative is defined by a learned constitutional writer as ‘The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.’ Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and

Executive's prerogative power can *never* be used to defeat or frustrate domestic rights which have been created by Parliament.²⁴ This includes rights under EU law.²⁵

specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.”

²⁴ *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 (Tab 39/ MS 2596) at §§ 44-5 (emphasis added):

“44. In the early 17th century *Case of Proclamations* (1610) 12 Co Rep 74, 75 Coke CJ said that

‘the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm’.

Although this statement may have been controversial at the time, it had become firmly established by the end of that century. In England and Wales, the Bill of Rights 1688 confirmed that

‘the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall’

and that

‘the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall’.

In Scotland, the Claim of Right 1689 was to the same effect, providing that

‘all Proclamationes asserting ane absolute power to Cass [*i.e.* to quash] annull and Dissable lawes ... are Contrair to Law’.

And article 18 of the Acts of Union of 1706 and 1707 provided that (with certain irrelevant exceptions) ‘all ...laws’ in Scotland ‘should remain in the same force as before ...but alterable by the Parliament of Great Britain’.

45 The Crown’s administrative powers are now exercised by the executive, *i.e.* by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, *the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do.*”

²⁵ *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 (Tab 39/ MS 2596) the majority judgment of the court confirmed that EU law can become part of the national legal order without any direct or active involvement of a sitting parliament, precisely because the European Communities Act 1972 provides for a variety of modes of EU law obligations being transformed into enforceable rights and obligations in the national legal order as follows (at §§ 63-4) (emphasis added):

“63 Under the terms of the 1972 Act, EU law may take effect as part of the law of the United Kingdom in one of three ways.

- First, the EU Treaties themselves are directly applicable by virtue of section 2(1). 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, where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the United Kingdom without the need for further domestic legislation. This applies to EU Regulations (which are directly applicable by virtue of article 288 TFEU).
- Thirdly, section 2(2) authorises the implementation of EU law by delegated legislation. This applies mainly to EU Directives, which are not, in general, directly applicable but are required (again by article 288 TFEU) to be transposed into national law. While this is an

- (5) No less fundamental to our democratic constitution than the principle of Parliamentary sovereignty is the principle of Parliamentary accountability. The Executive is politically accountable to Parliament for its exercise of its powers, particularly its actions in the international sphere (which, for these purposes, includes the Executive's discussions and negotiations with the EU institutions and other member States anent the withdrawal of the United Kingdom from the European Union). But if and insofar as the Executive would use the power of prorogation of Parliament to avoid its political accountability to Parliament, or to impede Parliament from exercising its control over the Executive, the Executive is acting unlawfully.²⁶
- (6) The proper constitutional relationship of the Executive with the courts is that the courts will respect all acts of the Executive within its lawful province, and that the Executive will respect all decisions of the courts as to what its lawful province is. The Executive's political accountability to Parliament and its legal accountability to the courts are not mutually exclusive, but complementary constitutional checks on the power of the Executive. They may overlap.²⁷

international law obligation, failure of the United Kingdom to comply with it is justiciable in domestic courts, and some Directives may be enforced by individuals directly against national governments in domestic courts.

...

64 Thus, EU law in EU Treaties and EU legislation will pass into UK law *through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act*, so long as the United Kingdom is party to the EU Treaties."

²⁶ *Moohan v Lord Advocate* [2014] UKSC 67, 2015 SC (UKSC) 1 (tab 36/ MS 2499) Lord Hodge (with whom Lord Neuberger PSC, Lady Hale DPSC, Lord Clarke and Lord Reed agreed) observed (at § 35) that:

"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful."

²⁷ *R (Barclay) v Lord Chancellor (No 2)* [2014] UKSC 41 [2015] AC 276 (Tab 34/ MS 2452) per Baroness Hale at § 57 (emphasis added):

"[T]he defendants [Lord Chancellor and Secretary of State for Justice, the Privy Council Committee for the Affairs of Jersey and Guernsey Committee and the Privy Council as a whole] were advising Her Majesty both in right of the Bailiwick of Guernsey and of Sark and in right of the United Kingdom. They were advising her on the final stage of the Island's legislative process. But they were doing so because of the United Kingdom's continuing responsibility for the international relations of the bailiwick. *They were politically accountable to the United Kingdom Parliament for that advice. I see no reason to doubt that they were legally accountable to the courts of the United Kingdom*"

- (7) The Executive is obliged to obey the law as declared by the courts.²⁸ It is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government which exceed the limits of the power that organ derives from the law. This principle protects the individual from arbitrary government.²⁹ The rule of law enforced by the courts is the ultimate controlling

²⁸ *Edwards v Cruickshank* (1840) 3 D 282 (Tab 1/ MS 1260) per Lord President Hope at pp 306-307 (in remarks that were expressly endorsed by Lord Rodger of Earlsferry “on Scots Law, on general principle, and on the substance of the matter” as “surely absolutely right”: *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [2009] 1 AC 453 at § 106) (emphasis added):

“With regard to our jurisdiction, and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty persons whether single or corporate; and, in our noble constitution, *I maintain - though at first sight it may appear to be a startling proposition - the law can compel the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty.*

Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or if he exceed his duty to the injury of the subjects, the law gives redress.

In this country a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law.”

M v. Home Office [1994] 1 AC 377 (Tab 22/ MS 1813) per Lord Templeman 395H

“The argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.

²⁹ *Wightman and others v Secretary of State for Exiting the European Union (No. 2)* [2018] CSIH 62, 2019 SC 111 (Tab 7/ MS 1379) per As Lord Drummond Young at § 67:

“67. The fundamental purpose of the supervisory jurisdiction is in my opinion to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose. Consequently, I would have no hesitation in rejecting any arguments based on procedural niceties, or the detailed scope of previous descriptions of the supervisory jurisdiction, if they appear to stand in the way of the proper enforcement of the rule of law.

See, too, *Taylor v. Scottish Ministers* [2019] CSIH 2, 2019 SLT 288, per Lord Drummond Young at §15:

“15. *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 emphasises the importance of the rule of law in public law decisions. It is one of a number of recent cases (including the recent decision in *Wightman v Secretary of State for Exiting the European Union*) that place stress on the proposition that government must in a civilised society be conducted in accordance with the law, and a major function of public law remedies is to achieve that result. Procedural niceties should not stand in the way of due observance of the rule of law, and enforcing the rule of law is a vital function of the courts.”

factor on which the constitution of the United Kingdom is based.³⁰ And it is for the court to ensure the rule of law by providing an effective remedy against any constitutional violations³¹, “since for every right there must be a remedy, and want of right and want of remedy are the same thing”.³² The courts may therefore

³⁰ *R (Jackson) v. Attorney General* [2005] UKHL 56 [2006] 1 AC 262 (Tab 29/ MS 2177) per Lord Hope at § 107:

107. Nor should we overlook the fact that one of the guiding principles that were identified by Dicey at p 35 was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon, “The Law and Constitution” (1935) 51 *Law Quarterly Review* 590, 596 was making the same point when he said that it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”

³¹ *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458 (Tab 18/ MS 1652) per Lord Diplock at 473:

Apart from annulment by resolutions of both Houses of Parliament [a security area proclamation] can be brought to an end only by revocation by His Majesty the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32 (1) of the Constitution makes His Majesty the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the cabinet, mandamus could, in their Lordships' view, be sought against the members of the cabinet requiring them to advise His Majesty the Yang di-Pertuan Agong to revoke the proclamation.”

³² Bankton *Institute* IV, xxiii, 18 (Tab 57/ MS 2960)

enforce the law against the Executive by interdict³³ and, if necessary, by contempt proceedings.³⁴

- (8) The Claim of Right Act 1689 sets down, in plain and unequivocal terms, that the fundamental constitution of the United Kingdom is one of a legally limited monarchy in which the regal power” may *not* be exercised in violation of the laws and liberties of the Kingdom, and which constitution may not be altered into an arbitrary despotic power by the advice of evil and wicked counsellors. The Claim of Right makes it explicit – as the parallel provision in the English Bill of Rights 1688 does not – not only that Parliament are to be frequently called but once called are not to be impeded by the Crown from continuing to sit to carry out their business of redressing of all grievances and for the amending strengthening and preserving of the laws.³⁵ It is therefore clear that the exercise of the executive’s power

³³ *Davidson v Scottish Ministers*, 2006 SC (HL) 42 (Tab 30/ MS 2243) per Lord Rodger of Earlsferry: “58. At its broadest, the issue of public importance in the appeal is whether the Scottish courts can ever grant interdict and interim interdict, or an order for specific performance and an interim order for specific performance, against the Crown. ...

...
85. ... [T]he restriction on the availability of the remedies of interdict or specific performance applies only to private law actions against the Crown and not to proceedings like the present where the appellant’s case is based on the duties of the Crown in public law.

...
88. ... [T]he proviso in § (a) of sec 21(1) applies only in proceedings against the Crown to enforce a pursuer or claimant’s private law rights. I would so hold. It follows that the court cannot grant an interim or final interdict or an interim or final order for specific performance in private law proceedings against the Crown, but in other proceedings against the Crown the section is no bar to such remedies. In particular, since a pursuer’s contractual, proprietary and other private law rights are not enforced by invoking the supervisory jurisdiction of the Court of Session, I agree with my noble and learned friend, Lord Nicholls of Birkenhead, that references to civil proceedings in sec 21 are to be read as not including proceedings invoking that supervisory jurisdiction in respect of acts or omissions of the Crown or its officers.

89. The need for a specific statutory bar to prevent the grant of the remedies in private law proceedings against the Crown shows that Parliament legislated on the basis that the courts would otherwise have the power to grant them. I would so hold.”

³⁴ *Beggs v. Scottish Ministers* [2007] UKHL 3, 2007 SLT 235 (Tab 31/ MS 2273) per Lord Hope at § 9:

“9. Ministerial responsibility for acts and failures of civil servants in their departments cannot be delegated. So where an undertaking is given such as that by the Scottish Ministers in this case, responsibility to the court for its observance is that of the Scottish Ministers, not of the officials or other civil servants within the Scottish Executive. It is the Scottish Ministers, not the civil servants, who are answerable for any breach of the undertaking.”

per Lord Rodger at § 38:

“38. Once the Division had decided that the ministers were in contempt of court, it was for their Lordships to decide the appropriate way to deal with the situation. Having decided not to impose a penalty, they could none the less have decided to order the ministers, or one of them, to appear personally, as the respondent had craved.”

³⁵ Cf *R (Sandiford) v Foreign Secretary* [2014] UKSC 44 [2014] 1 WLR 2697 (Tab 35/ MS 2475) at §§ 50, 52, 65

to prorogue Parliament is a matter which is justiciable before the courts and is reviewable on the grounds of irrationality or breach of other judicial review principles.³⁶

“50. ... [T]he judgment of the Court of Appeal in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76 concerned the possible responsibility of the United Kingdom Government to make representations to the USA Government or take other action on behalf of British citizens detained in Guantanamo bay. The Court of Appeal held that, although the Foreign Office’s discretion as to exercise of its prerogative powers in such a case was ‘a very wide one’ and although ‘the court cannot enter the forbidden areas, including decisions affecting foreign policy’, there was ‘no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation’ (§ 106)

...
52 The court’s role is dependent on the nature and the subject matter of the power or its exercise, particularly on whether the subject matter is justiciable: *Council of Civil Service Unions v Minister for the Civil Service: re GCHQ* [1985] AC 374, 417-418, per Lord Roskill, *R v Secretary of State for the Home Department, Ex p Bentley* [1994] QB 349.

In the former case, at p 418B-C, Lord Roskill suggested as prerogative powers which would not be justiciable those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers. Even so, it has been held that a decision to refuse to issue any pardon based on a failure to identify the possibility in law of a conditional pardon may be reviewable (see *Ex p Bentley*); and it has also been held that a decision to refuse to issue a passport is reviewable (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett* [1989] QB811).

...
65. ... [T]his does not mean that the formulation or exercise of a prerogative power may not be susceptible to review on other grounds. In particular there is no reason why a prerogative refusal to fund foreign litigation should be immune from all judicial review. It does not raise any real issues of foreign policy. As we understand it, the Government’s current blanket policy is motivated largely by domestic policy and funding considerations. In particular, as *Abbasi* [2003] UKHRR 76 made clear, there is no reason why action or inaction in the exercise of such a power should not be reviewable on the grounds of irrationality or breach of other judicial review principles.”

³⁶ Cf *R (Sandiford) v Foreign Secretary* [2014] UKSC 44 [2014] 1 WLR 2697 (Tab 35/ MS 2475) at §§ 50, 52, 65

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- (9) The Executive’s exercise of the power of prorogation of Parliament is certainly not unlimited or unfettered.³⁷ The exercise of this power of prorogation is lawful only if consistent with constitutional principle.³⁸ It can only be exercised for a proper

it has also been held that a decision to refuse to issue a passport is reviewable (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett* [1989] QB811).

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³⁷ *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 (Tab 16/ MS 1558) per Lord Parmoor at 567-8 (emphasis added):

“The Royal Prerogative connotes a discretionary authority or privilege, exercisable by the Crown, or the Executive, which is not derived from Parliament, and is not subject to statutory control. *This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily but per legem and sub modo legis.*”

In the present appeal, it is not alleged that if the Royal Prerogative did authorize the taking of possession of the premises of the respondents, for temporary use and occupation, without payment of rent or compensation, the authority was used improperly or in an arbitrary manner. Under this head no objection is put forward.

The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the Royal Prerogative gave legal sanction to a large majority of the executive functions of the Government, it is now restricted within comparatively narrow limits. The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion.”

³⁸ Professor Paul Craig “Prorogation Constitutional Principle and Law, Fact and Causation” *Oxford Human Rights Hub* (31st August 2019) (Tab 70/ MS 3135):

The constraints on prerogative power embodied in the *Case of Proclamations* (1610) 12 Co Rep 74, *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 and *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 all protect parliamentary sovereignty. Parliament is the legitimate legislator within the UK and the case law protects that authority from being undermined. If the executive could change the law of its own volition, it could thereby bypass legislation without amendment or repeal, hence the principle in *Proclamations*. If the executive could use the prerogative where Parliament had already addressed the issue in an existing statute it could then avoid the legislation crafted by Parliament, hence the principle in *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508, and its extension to cases where the prerogative would frustrate the legislation. If the executive could render a constitutional statute devoid of effect through recourse to the prerogative, the statute would not be worthy of that appellation, hence the reasoning on this issue in *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61, drawing on that in *R (Buckinghamshire County Council) v Secretary of State for Transport: re HS2* [2014] UKSC 3 [2014] 1 WLR 324.

Proclamations protects parliamentary sovereignty directly, by preventing recourse to the prerogative where it would change the law. *De Keyser* and *Miller* protect sovereignty indirectly: the former by precluding use of the prerogative where the formal law is left intact, but the

purpose. And the exercise of this power, even for a proper purpose, is subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.³⁹

- (10) The Executive is subject, in the present case, to the obligation owed to the court by a public authority facing a challenge to its decision, to co-operate and to make candid disclosure⁴⁰ of all the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.⁴¹ On 30

executive seeks to circumvent it by use of the prerogative; the latter case by preventing a constitutional statute from being emasculated through executive action, even if it remained formally on the statute book.”

³⁹ *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [2009] 1 AC 453 (Tab32/MS 2282) *per* Lord Hoffmann at § 35:

“I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.”

per Lord Rodger at § 105:

“[L]ike Lord Hoffmann, I see no reason in principle why, today, prerogative legislation, too, should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety.”

per Lord Carswell at § 122

“I would reject the appellant’s submission that the validity of an Order in Council made under the prerogative legislating for a colony cannot be reviewed by the courts. I agree with the reasons which Lord Hoffmann has given for this conclusion and do not need to add anything to them.

per Lord Mance at § 141:

“Dicey observed in his *Introduction to the Study of the Law of the Constitution*, 8th ed (1915), that ‘we may use the term “prerogative” as equivalent to the discretionary authority of the executive’ (p 421) and that ‘it applies ... also to that large and constantly increasing number of proceedings which, though carried out in the King’s name, are in truth wholly the acts of the Ministry’: p 422. Into the latter category fall the making of legislative Orders in Council such as the BIOT Order 2004. I see no good reason why they should not be reviewable in the same way as other steps, administrative or legislative, by the executive, and every reason why they should be, on the familiar grounds of legality, rationality and procedural propriety, due weight being of course given to the executive’s role as primary decision-maker. A recognition that a legislative Order in Council is invalid by a judgment given in proceedings such as the present directed against the minister responsible for the making of the order no more involves the making of an impermissible order against the Sovereign than a successful challenge to any other prerogative act undertaken in Her name.”

⁴⁰ In *Shetland Islands Council v. Anderson* [2014] CSOH 23 (Tab 5/ MS1342) Lord Stewart at § 44.

“a duty of candour is incumbent on all litigation parties, and incumbent above all on public authorities engaged in judicial review proceedings and their legal representatives”

⁴¹ *Belize Alliance of Conservation v Department of Environment* [2004] UKPC 6 [2004] Env. LR 38 (Tab 27/ MS 2035) *per* Lord Walker of Gestingthorpe at § 86:

“It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as

August 2019 when the Lord Ordinary handed down his judgment refusing in hoc status interim relief, the petitioners called upon the Executive in open court was expressly requested to lodge affidavit with the court at first instance – in particular from the Prime Minister - setting out, under oath, a proper and complete account the Executive’s true reasons for exercising the power of prorogation at this time in the manner in which it has.⁴² While in his public statements on this matter it is doubtless thought to be politically acceptable to be economical with the truth, the Executive’s legal accountability to the courts entails that any such sworn statement set out a true and comprehensive account (“the truth, the whole truth and nothing but the truth”) on this issue.⁴³ The Executive declined to put in any supporting affidavit.

- (11) This refusal by the Executive, and in particular the Prime Minister to give full and frank disclosure explaining his decision-making process and the true reasons and reasoning underlying the decision to exercise the power of prorogation at the time and in the manner which he has chosen to, meant that the Inner House was able to draw inferences of fact against the Executive and Prime Ministers on the basis of such limited information (redacted documents unsupported by any affidavit attesting to their provenance, timing or truth). It is submitted that the Inner House was right to do draw such adverse inferences and it is not for this court in the exercise of its appellate jurisdiction to gainsay the Inner House judges’

they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.”

See too *McGeoch v Scottish Legal Aid Board* [2013] CSOH 6, 2013 SLT 183 at para 64:

“[A]dministrative bodies should be prepared to explain their decisions candidly and when they fail to do so, it may be appropriate for the court to require that to be remedied.

⁴² *I v Secretary of State for the Home Department* [2010] EWCA Civ 727 at § 55.

“This is far from being the first occasion when the judges have had to complain about deficiencies in the Secretary of State’s response to claims such as the one which is before us. *If, despite all this, the court is again left having to draw inferences in such a situation, then the Secretary of State should anticipate that the inferences drawn may well be adverse to him.*”

⁴³ *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 (Tab 11/ MS 1433) per Laws LJ at § 50 (emphasis added):

“[T]here is of course a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. *If the court has not been given a true and comprehensive account*, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see *Padfield* [1968] AC 997, per Lord Upjohn at 1061G 1062A

conclusions on this point.⁴⁴ In particular, it is submitted that it was perfectly proper for the Inner House court to critically to examine and sceptically to question the “reasoning” and justification given for the exercise of the power of prorogating Parliament in this manner and at this time which were provided by the Prime Minister in his letter dated 28 August 2019 to MPs.⁴⁵ This approach of “anxious scrutiny”⁴⁶ -

⁴⁴ *R (Das) v Home Secretary* [2014] EWCA Civ 45 [2014] 1 WLR 3538 (Tab 13/ MS 1481) per Beatson LJ at § 80, approving the approach taken by Sales J (as he then was) at first instance:

“80. Miss Anderson submitted that there is no obligation to file witness evidence in relation to whether or not there is an entitlement to compensatory or nominal damages, and that question is a matter for the court to assess. She also urged the court not to punish the Secretary of State for not filing evidence, and referred to the scarcity of resources, the heavy litigation burden on the Secretary of State, and the need to prioritise resources on those currently detained. The latter submission may reflect the position in which this part of the public service finds itself, but it was not and could not have been an invitation to the court to give the Secretary of State a privileged position in litigation. There is equally no question of the court punishing the Secretary of State or treating her less favourably than other litigants. *The judge stated the correct position clearly.* He observed [2013] EWHC 682 at [21]:

“Where a Secretary of State fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision they take a substantial risk. In general litigation where a party elects not to call available witnesses to give evidence on a relevant matter, the court may draw inferences of fact against that party ... The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well-known obligation owed to the court by a public authority facing a challenge to its decision, [in the words of Lord Walker of Gestingthorpe in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] Env LR 761 , para 86] ‘to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings’.”

⁴⁵ Professor Paul Craig “Prorogation Constitutional Principle and Law, Fact and Causation *Oxford Human Rights Hub* (31st August 2019) (Tab 70/ MS 3135):

“Consider the following. We have a fact, the Prime Minister’s statement that he wishes to press ahead with his new agenda. We have assertion of a second fact, prorogation is said to be necessary to enable the first fact to happen. There is assumed to be causation between the two. This assumption is a *non-sequitur*. If the Prime Minister wishes to kick start his new agenda now, there is nothing legally or politically to prevent him from instructing civil servants in the relevant departments from pressing on to draft the requisite legislation, sort out the finances and the like. They were probably already doing this before prorogation. The reality is not merely that the causation is lacking. It is that prorogation will almost certainly hamper prime ministerial efforts to roll out the new agenda. If prorogation occurs, Parliament does not sit, no legislation is enacted, and there is a danger that some necessary Brexit legislation will be lost or impeded because of prorogation. If Brexit happens there will then be a log-jam of Brexit-related measures that require enactment, thereby pushing into the long grass efforts legislation designed to address non-Brexit issues.”

⁴⁶ *R v Ministry of Defence, Ex p Smith* [1996] QB 517 per Sir Thomas Bingham MR at 554E-G:

“*Irrationality*
(a) *The test*

Mr. David Pannick, who represented three of the applicants, and whose arguments were adopted by the fourth, submitted that the court should adopt the following approach to the issue of irrationality:

requiring the Executive to demonstrate that the most compelling of justifications existed for the exercise of the prorogation power in this way and at this time—applies because the manner in which the power is being exercised affects individuals’ fundamental rights⁴⁷ and has profoundly intrusive and distortive effects on the constitution.⁴⁸

- (12) It is, in any event, clear that the Executive’s exercise of the power of prorogation in the present case has been vitiated by the fact that it has involved the improper exercise of this power “for an alien purpose or in a wholly unreasonable manner”⁴⁹ namely: to prevent or impede Parliament from holding the executive politically to account in the run up to Exit Day; to prevent or impede Parliament from legislating on the United Kingdom’s exit from the European Union; to allow the Executive, notwithstanding that it has no Parliamentary mandate to do so, to pursue a policy of a No Deal Brexit without

“The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.”

This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in *R. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514 and *R. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696.”

⁴⁷ Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199 (Tab 41/ MS 2761) at para 64:

“Any withdrawal of a member state from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, *inter alia*, their right to free movement, as regards both nationals of the member state concerned and nationals of other member states.”

⁴⁸ *Wightman and others v Secretary of State for Exiting the European Union (No. 2)* [2018] CSIH 62, 2019 SC 111 (Tab 7/ MS 1379) per As Lord Drummond Young at § 53:

“If the Government’s proposal is not acceptable, the default position currently appears to be that the United Kingdom would leave the European Union on a ‘no deal’ basis. This would obviously have important implications; the law of the European Union at present covers large areas of legal practice, including international trade, customs and transport; financial services, regional aid, industrial policy, and trading standards (notably in chemicals and pharmaceutical products); employment rights; higher education; nuclear energy; agriculture and fisheries; criminal justice (notably extradition); immigration; asylum (through the Dublin Regulations (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31)), which involve return of asylum seekers to the first country in which they are able to claim asylum); and the recognition of foreign judgments and other legal acts.”

⁴⁹ *Pepper v. Hart* [1993] AC 593 per Lord Browne-Wilkinson at p. 639A

further Parliamentary interference. The Executive has purported to use the power of prorogation in the present case as a pre-emptive strike intending to silence and disempower Parliament for the crucial period in the immediate run up to Exit Day. Prorogation used in this way seeks to circumvent merely one piece of legislation (which would be unlawful) but more broadly to curtail Parliament’s capacity to exercise the totality of its legislative authority, thereby severely curtailing the opportunity for a Parliamentary say on an issue which is of fundamental importance for the UK’s future. Where, as in the present case, the Executive so abuses its power of prorogation of Parliament it is the “paramount duty” of the court to say so.⁵⁰

- (13) Further and in any event, Parliament is not given to idly passing legislation. Parliament legislates only for the purpose of bringing about an effective result. Its intention can be taken to be that an enactment, when brought into force, will not be futile but will have practical consequences for the life of the community.⁵¹ The Executive’s exercise of the power of prorogation in the present case is unlawful because it runs contrary to the intention of Parliament by rendering futile, *inter alia*, the provisions of Sections 9, 10 and 13 of the European Union (Withdrawal) Act 2018 which clearly provide that Parliament has proper time and opportunity to give full consideration to and, if approved, legislate to give full effect to the terms of *any* withdrawal of the United Kingdom from the European Union, whether with or without a deal, and separately while continuing to respect the obligations of the United Kingdom Government set out in the British-Irish Agreements of 1998 and 2007 the principles of which are incorporated into domestic law by the Northern Ireland Act 1998 and the Northern Ireland (St Andrews Agreement) Act 2006.⁵² When and if Parliament had passed the necessary statute, then and only then does the Executive have authority to effect the withdrawal of the United Kingdom from the European in accordance with whatever terms Parliament has stipulated in primary legislation. It is only in this way that our liberal democratic Parliamentary constitution,

⁵⁰ *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 (Tab 23/ MS 1864) per Lord Lloyd of Berwick at p 571E–F

⁵¹ *RM v Scottish Ministers* [2012] UKSC 58 2013 SC (UKSC) 139 per Lord Reed at § 34

⁵² As Lord Browne-Wilkinson observed in *R v Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (Tab 23/ MS 1864) at 552D–E

“It would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute

founded on respect for individuals' fundamental rights and for rule of law, will be maintained and vindicated.⁵³

- (14) Finally, the Executive's exercise of the power of prorogation in the present case is vitiated by error in law, because it is wrongly predicated on the idea that the Executive has the authority to cause or allow the United Kingdom to leave the European Union on the basis of no deal. The process provided for under Article 50 of the Treaty on European Union (TEU) - for initial notification of intentions to leave the European Union, subsequent negotiations on the terms of any such withdrawal, and ultimately a final decision on whether or not to leave⁵⁴ - involves, under the UK constitution, a necessary partnership between Parliament and the Executive. Primary legislation from Parliament was required to authorise the Executive to *initiate* this Article 50 TEU process. And, separately and equally, primary legislation is required from Parliament to *conclude* this Article 50 TEU process by authorising the Executive to end the United Kingdom's membership of the European Union, whether on the

⁵³ Cf *AXA v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 (Tab33/ MS 2365) per Lord Reed at §§ 153:

"153. ... Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law."

⁵⁴ See Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199 (Tab 41/ MS 2761) at §§ 68-9, 75:

68. ... [T]he voluntary and unilateral nature of the withdrawal decision should be ensured.

69 It follows from the foregoing that the notification by a member state of its intention to withdraw does not lead inevitably to the withdrawal of that member state from the European Union. On the contrary, a member state that has reversed its decision to withdraw from the European Union is entitled to revoke that notification for as long as a withdrawal agreement concluded between that member state and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in article 50(3) TEU, possibly extended in accordance with that provision, has not expired.

...
75. In view of all the foregoing, the answer to the question referred is that article 50 EU must be interpreted as meaning that, where a member state has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that member state - for as long as a withdrawal agreement concluded between that member state and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in article 50(3) EU, possibly extended in accordance with that paragraph, has not expired - to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the member state concerned has taken the revocation decision in accordance with its constitutional requirements. The purpose of that revocation is to confirm the EU membership of the member state concerned under terms that are unchanged as regards its status as a member state, and that revocation brings the withdrawal procedure to an end."

basis of a terms of a concluded deal or on the basis that no agreement on the terms of withdrawal could ultimately be reached.⁵⁵ In fact, the Executive has not been given the necessary express statutory authority by Parliament to allow it to pursue a policy of no deal Brexit. Neither Section 1(1) of the European Union (Notification of Withdrawal) Act 2017 (which provides that “The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom’s intention to withdraw from the EU”) nor Section 1 of the European Union (Withdrawal) Act 2018 (which provides that “The European Communities Act 1972 is repealed on exit day”) when interpreted in accordance with the principle of legality⁵⁶ provides the necessary statutory authority – whether expressly or by any *necessary*

⁵⁵ *Wightman and others v Secretary of State for Exiting the European Union (No. 2)* [2018] CSIH 62, 2019 SC 111 (Tab 7/ MS 1379) per As Lord Drummond Young at § 54:

“[T]he final decision about the United Kingdom’s withdrawal from the European Union and the arrangements that will replace the existing law are matters for Parliament, not the Government in the exercise of the prerogative. This means that, at a practical level, it is important that MPs should be properly and authoritatively advised as to the existing legal position. The present law, however, is a matter for the courts alone”

⁵⁶ *AXA v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 (Tab 33/ MS 2365) per Lord Reed at §§ 151-3 (emphasis added):

“151. One familiar principle of statutory interpretation is the principle of legality explained by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at page 131, in the dictum to which Lord Steyn referred in *Anufrijeva* [2003] UKHL 36 [2004] 1 AC 604:

‘*Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.* In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.’

152. The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that *it cannot confer on another body, by general or ambiguous words, the power to do so.* As Lord Browne-Wilkinson stated in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p 575:

‘A power conferred by Parliament in general terms *is not to be taken to authorise the doing of acts by the donee of the power which adversely affect ...the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.*’

Lord Steyn said in the same case *ex p Pierson* [1998] AC 539 at p 591:

‘Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.’

153. ... Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.”

implication⁵⁷ - to authorise a no deal Brexit. Given that the exercise of the power of prorogation at issue is aimed, at least in part, to facilitate the achievement, if so advised, of an Executive policy (“no deal Brexit”) which is unlawful in the absence of express Parliamentary sanction for this course in the form of statutory authorisation expressly permitting this course, the exercise of prorogation in this case is itself unlawful.

3. GENERAL CONSTITUTIONAL CONTEXT

- 3.1 In Scots law the principle of equality before the law means that every official, from the Prime Minister down, is under the same responsibility as any private citizen for every act done without legal justification, or any failure or refusal to act as required by law. The first respondent is convened before this court to answer in his personal capacity for acts done in his official character as Prime Minister but in excess of the lawful authority accruing to that office.
- 3.2 This court is faced with a particular exercise by the Prime Minister of the Executive’s power to prorogue, suspend, or close down the business of Parliament. On 28 August 2019 the following order was published, without prior warning:

“It is this day ordered by Her Majesty in Council that the Parliament be prorogued on a day no earlier than Monday 9 September 2019 and no later than Thursday 12 September 2019 to Monday 14 October 2019 to be then holden for the despatch of

⁵⁷ *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563 (Tab 26/ Ms 1978) per Lord Hobhouse of Woodborough at page 616, § 45 (emphasis added):

45. It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *B v DPP* [2000] 2 AC at 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and *what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.*”

R (Black) v. v Secretary of State for Justice [2017] UKSC 81 [2018] AC 215 per Baroness Hale at paras 36(3) and (4) (Tab 40/ MS 2740).

“(3) The goal of all statutory interpretation is to discover the intention of the legislation.

(4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose. In this context, it is clear that Lord Hobhouse of Woodborough’s dictum in *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, 616, para 45, that

‘A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context’
must be modified to include the purpose, as well as the context, of the legislation.”

divers and urgent and important affairs and that the Right Honourable the Lord High Chancellor of Great Britain do cause a Commission to be prepared in the usual manner for proroguing the Parliament accordingly.”

3.3 In advising the Queen to prorogue the Union Parliament, a Minister of the Crown (including the Prime Minister) and/or a Privy Councillor (including the Lord President of the Council and Leader of the House) has none of the Crown's prerogatives and immunities. The actions of those individuals, Boris Johnson MP and Jacob Rees-Mogg MP, who hold those offices for the time may be invalidated, or those individuals may be compelled properly to perform the duties of their office, by remedies which may not lie directly against the Crown. And court judgments may be enforced against them personally. Lord Templeman noted the position in English law as follows in *M v Home Office* [1994] 1 AC 377 at 395:

“The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but *judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown. A litigant complaining of a breach of the law by the executive can sue the Crown as executive bringing his action against the minister who is responsible for the department of state involved, in the present case the Secretary of State for Home Affairs. To enforce the law the courts have power to grant remedies including injunctions against a minister in his official capacity. If the minister has personally broken the law, the litigant can sue the minister, in this case Mr. Kenneth Baker, in his personal capacity.* For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court.”

3.4 This exercise of the power of prorogation on 28 August 2019 raises a number of important constitutional law questions for this court to answer because the Appellant's position is, in effect, that, at least as regards the power to prorogue Parliament, the Divine Right claims of James VI and I⁵⁸ survived the constitutional upheavals of the 17th century, the Glorious

⁵⁸ See James VI and I *The Trew Law of Free Monarchies or The Reciproock and mutuall duetie betwixt a free King and his naturall Subjects* (1598) in which he elaborates his fundamental thesis that

“The King is above the law, as both the author and giver of strength thereto”

by claiming that the Crown may use its Royal Prerogative even to suspend Acts of Parliament, noting:

“According to these fundamental laws already alleged, we daily see that in the Parliament (which is nothing else but the head court of the King and his Vassals) the laws are but craved by his subjects, and only made by him at their rogation and with their advice: for albeit the king make daily statutes and ordinances, enjoining such pains thereto as he thinks meet, without any advice of parliament or estates, yet it lies in the power of no parliament to make any kind of law or statute, without his sceptre [that is, Royal authority] be to it, for giving it the force of a Law

....

[But] where the King sees the law doubtsome or rigorous, he may interpret or mitigate the same, lest otherwise *summum jus be summa injuria* [the greatest right be the greatest wrong]: and therefore general laws made publicly in parliament may upon known respects to the King by his authority be

Revolution and the Treaty of Union 1707. But as Lord Templeman wisely noted when similar arguments were run on the issue of whether Ministers of the Crown could ever be made to obey the law as declared by the courts:

“[T]he argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.”⁵⁹

3.5 Is, then, the Executive’s decision in this case on whether, when and for how long to prorogue Parliament wholly uncontrolled by law, as the appellant now claims before this court?⁶⁰ Can this Executive power to suspend Parliament sitting - without any warning to, or veto from, or regulation by Parliament - really be used for any purpose whatsoever which the Executive might deem, from time to time, it wants to further at any particular time? Are there *no* limits which the law imposes and the courts can enforce as to the length of time for which the Executive might decide to shut down Parliament in this way? Can the Executive, between elections, simply otherwise stop Parliament from sitting indefinitely? Does the Executive have any obligation to give its reasons for deciding to prorogue Parliament? If the Executive does give reasons, do those reasons have to be the true reasons, or can it simply lie for the purposes of political expediency? All these questions necessarily arise for this court’s consideration and decision in the present appeal.

3.6 The decision of the Inner House is clear and unequivocal and correct and may be summarised as being to the following effect:

- (1) the Executive’s power to prorogue the Union Parliament is controlled by law.
- (2) Because of its exceptional nature in preventing the democratic elected and accountable legislature sitting by executive fiat, and the danger that it might be abused by an

mitigated, and suspended upon causes only known to him. And likewise as I have said *a good king will frame all his actions to be according to the law; yet he is not bound thereto but of his good will, and for good example-giving to his subjects.*”

⁵⁹ *M v Home Office* [1994] 1 AC 377 (tab 22/ MS1813) per Lord Templeman at 395H

⁶⁰ In *R (Jackson) v Attorney General* [2006] 1 AC 262 (Tab 29/ MS 2177) Lord Steyn observed (at §102) that:

“We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision [1991] 1 AC 603 made that clear. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998, created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which *the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction.*”

unscrupulous Government holding itself unbound by mere constitutional conventions and heedless of the profound damage its action will do the fabric of our constitution – the Inner House found that this power to suspend the Union Parliament sitting could only be used for a proper purpose, which is to say a purpose consonant with our principle of democratic governance and the principle of the accountability of the executive to Parliament at this particular time of major potential constitutional upheaval in the run up to a possible Brexit

- (3) The Inner House correctly recorded senior counsel for the appellant stating on behalf of the UK Government that it accepted that it would be unlawful for the Executive to prorogue Parliament for, say two years. That having correctly been conceded by counsel for the appellant, the issue then became for the Inner House whether the length of time and the period in which it had been ordered time which was set out in the prorogation order at issue in this case confirmed to constitutional norms.
- (4) Finally given the importance of this power and its direct and immediate effect adverse effect on the principle of representative democracy and the Parliament accountability of the Executive if misused, the Inner House correctly held that the Executive is obliged to give good and proper reasons justifying its use of the power of prorogation should the matter be brought before the court. It further held that such reasons as it gave publicly (in this case the reasons were contained in a Prime Ministerial letter to the MPs) were to be examined carefully for the cogency and truth. This having been done, and those reasons having been found wanting by the court, the Inner House correctly found that it could interrogate the justification given to establish the true justification, albeit one clumsily and apparently half-heartedly concealed from the public and not properly disclosed to the court. Those true reasons having been established – namely to allow the UK Government to avoid the necessary Parliamentary scrutiny in the run up to Brexit, the court found them to be illicit and incapable of sustaining a lawful exercise of the power of prorogation. It accordingly found that the use of the power of prorogation in the circumstances of this case was unlawful and made formal orders appropriately reflecting this finding in law.

3.7 The Divisional Court, by contrast, simply failed to enter the fray, instead “grasping at the lock-out of non-justiciability”,⁶¹ and deemed all questions as to whether the Executive was abusing

⁶¹ The abdication of any judgment by the Divisional Court on the basis that the whole question of how the Executive uses the power prorogation of Parliament is completely non-justiciable, a no go area for the judges no matter the circumstances is certainly not supported by the developing case law noted and summarised by Sir Jonathan Mance, when Deputy President of this court in the 40th Annual FA Mann Lecture given on 27 November 2017 on the topic Justiciability. He notes, inter alia (emphasis added) (Tab 67/ MS 3073):

“[T]he question who is the appropriate recipient of an honour, or who should be appointed as a minister is of such intensely subjective a nature that no recognized ground of judicial review would ordinarily apply. Suppose however that it were shown that an honour had been procured by bribery? *Is it clear that all possibility of judicial review could still be absolutely excluded?*”

its power to stop Parliament from sitting as being an issue of “high policy”, politics as usual, to which the courts could only turn a blind eye, and the law have nothing to say. The implication of the Divisional Court’s judgment would appear to suggest that resistance to unconstitutional executive action lies in the streets rather than before the courts. They are in this perhaps following all too uncritically the writings of Dicey on the English constitution who claimed that:

“A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance, and it is on many accounts worth observation that the exact point at which the external limitation begins to operate, that is, the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision.

...

Usually, it will be possible and better to adopt a more refined approach, using conventional tools of judicial review, rather than the blanket approach of excluding all possibility of judicial review because of the subject matter.

....

[M]y thesis is that, for the most part, courts can and should adjudicate upon civil claims and public law claims, without it being necessary or appropriate to resort to a doctrine of non-justiciability. There are a few *ad hoc* situations where an international law principle, in the form of State immunity, or a domestic law principle, such as Article 9 of the Bill of Rights, debar the courts from fulfilling their ordinary function. But *the nature of ordinary civil claims makes non-justiciability a very rare phenomenon. Judicial review can in contrast range wider, into areas which may potentially be thought to throw up problems of justiciability, but it is subject to other controls – such as standing, institutional competence, discretion – which commonly make it unnecessary to grasp at so blunt a response.*

...

The political question doctrine has faded from English common law thinking. But very often it will be unnecessary and inappropriate to accept the blunt argument of a no-go area. *There is a continuing shift to a more nuanced recognition that each case must be approached on its own merits, weighing all relevant factors to decide whether the particular issue is really non-justiciable, or whether any relief by way of judicial review should as a matter of discretion be granted. This shift will be promoted by fuller recognition that the intensity of any judicial review should always reflect the respective institutional competence and expertise of the original decision-maker compared with that of any court asked to review the original decision.* The four-stage test of proportionality identified in *Bank Mellat v Her Majesty’s Treasury* [2013] UKSC 39, [2014] AC 700 [74] – sometimes thought to require equivalently intrusive review in every case – must be read in this light. Elliott and Thomas’s *Public Law* (OUP 2017, 3rd edn), 563 makes the very pertinent comment that ‘justiciability and deference may be thought of as different points on a continuum’. I would prefer to speak not of ‘deference’ but of ‘respect for institutional or constitutional competence’, but otherwise I entirely agree; and *the modern tendency is to give weight to institutional and constitutional competence, rather than grasp at the lock-out of non-justiciability.*

....

The modern focus on individual rights and freedoms, both at common law and under the ECHR, makes it increasingly difficult for domestic courts simply to withdraw from adjudication upon issues arising out of State activity on the international plane. In an era, when domestic recourse is in reality often the only practicable means by which an individual, as opposed to a State, may obtain redress for alleged misconduct on the international plane (as *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 once again illustrates), the legal position as it is currently emerging seems on the whole desirable.

It would be rash of the Imperial Parliament to abolish the Scotch Law Courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scotch resistance to such a change would become serious.”⁶²

3.8 The result of the Divisional court judgment is that the Executive can close down Parliament for any reason and none. It can lie to the public and to the court (and presumably to the Sovereign when requesting her assent) as to its true reasons for excusing this extraordinary residual power. This, alas, is a very peculiar and dangerous vision of the State. It is one in which the Executive is above the law when it comes to stopping the otherwise sovereign legislature to which it is in law subject and to which it is accountable from sitting. The Divisional Court gives no proper reason for this lofty stance of its powerlessness. As has been noted “there is ‘no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review.’”⁶³ But the Divisional Court’s use of the brocard of non-justiciability feels like empty rhetoric in the circumstances of this case, masking what might be said to be a dereliction of its constitutional duty to uphold the rule of law. The Divisional Court decision certainly in practice amounts to an abdication of its constitutional responsibility and results in a *déni de justice*. It should not be followed by this court.

4. SCOTTISH CONSTITUTIONAL LAW AND THE UK CONSTITUTIONAL COURT

4.1 Answering the questions posed above (which have been answered in very different ways in the courts of Scotland from the approach of the courts of England and indeed Northern Ireland) also necessary shines a spotlight on just what the UK constitution is.

4.2 UK constitutional law has been the law that dare not speak its name. This is because the 1707 Parliamentary union between England and Scotland undoubtedly created a new State, but it did not create one Nation. Various schemes for a wholly incorporating ‘perfect’ Union of Scotland and England had, unsuccessfully, been proposed to the English Parliament by James VI, King of Scots, after he had acceded to the English throne in 1603. The 1707 Union differed from these earlier schemes in that, while ensuring the de-politicisation of Scotland, it put into place measures intended to protect - and indeed to strengthen - other aspects of Scotland’s distinctive continuing nationhood. Conrad Russell put it thus (internal footnote added):

⁶² A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982), 29 and 33.

⁶³ See *R (Cart) v Upper Tribunal* [2012] 1 AC 663 per Lord Dyson JSC at § 122
“122 ... [T]here is no principle more basic to our system of law than the maintenance of [the] rule of law itself and the constitutional protection afforded by judicial review. But the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law.”

“That the Scots found a perfect union politically unacceptable, and the English an imperfect union intellectually incomprehensible, provides the basis for the odd mixture of the two which was set up in 1707. The English got the unitary sovereign power which they wanted, and got it in the form based upon the existing English Parliament, with an English majority in it. The Scots got their recognition as a separate sovereign state, both from the form of the Union of 1707 as an international treaty, and from the survival of Scots law and the Scottish church. It is that claim that Scotland is a sovereign nation state which is reasserted whenever the English forget that 1707 was not a ‘perfect union’ and has recently been repeated in the Claim of Right.⁶⁴ Scotland in accepting the Union in 1707 remained a nation and as a result any sovereignty in the British parliament could not be national sovereignty. This has always been hard for the English to understand.”⁶⁵

4.3 In the 300 years of that 1707 Union, there is no doubt that that the English constitutional tradition has been the dominant and, at times, overwhelming influence. One recent academic commentator summarised the constitutional developments since 1707, at least as understood from the perspective of English lawyers, as follows (footnotes in original text):⁶⁶

“How could a “Union State” that was formed on the basis of two “Union Treaties” come to see its “constituting” treaties as “ordinary” legislation?

An excellent illustration of this process of “de-constitutionalisation” is the evolution of the 1707 Union Treaty between England and Scotland. The Treaty, it will be recalled, “incorporated” England and Scotland into a new kingdom; and while leaving the English and Scottish legal orders generally intact, it established the supremacy of the newly established Westminster Parliament.⁶⁷ And yet: the 1707 Union Treaty had made an express distinction between alterable and unalterable rights and decreed “that the Laws which concern publick Right, Policy, and Civil Government, may be made the same throughout the whole United Kingdom; *but that no Alteration be made in Laws which concern private Right, except for evident Utility of the Subjects within*

⁶⁴ In 1989, on the 300th anniversary of the Claim of Right 1689, the self-styled “Scottish Constitutional Convention”, a pressure group of Labour and Liberal politicians and sympathetic academics and other representatives of civil society seeking to further the cause of devolution to Scotland in the latter days of the Thatcher administration, produced a new Claim of Right 1989 which read:

“We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs, and do hereby declare and pledge that in all our actions and deliberations their interests shall be paramount. We further declare and pledge that our actions and deliberations shall be directed to the following ends: to agree a scheme for an Assembly or Parliament for Scotland; to mobilise Scottish opinion and ensure the approval of the Scottish people for that scheme; and to assert the right of the Scottish people to secure implementation of that scheme.”

⁶⁵ Conrad Russell, *James VI and I and his English Parliaments* (OUP, 2011), Ch. VII, “The Union”, pps. 126-7 (Tab 63/ MS 2997)

⁶⁶ Robert Schütze “The United Kingdom and the Federal Principle” in Schütze and Tierney (eds.) *The United Kingdom and the Federal Idea* (Hart Publishing, 2018) (Tab 68/ MS3095)

⁶⁷ 1707 Union Treaty, Article XXV (Tab 45/ MS2904):

“That all Laws and Statutes in either Kingdom, so far as they are contrary to, or inconsistent with the Terms of these Articles, or any of them, shall, from and after the Union cease and become void and shall be so declared to be, by the respective Parliaments of the said Kingdoms.”

Scotland.⁶⁸ What was the status of this entrenchment? For Daniel Defoe, the answer was clear:

“Since, as nothing is more plain than that the articles of the treaty, and consequently the great heads mentioned in the above address, cannot be touched by the Parliament of Britain; and that the moment they attempt it, they dissolve their own Constitution; so it is an Union upon no other terms, and is expressly stipulated what shall, and what shall not be alterable by the subsequent Parliaments. And as the Parliaments of Britain are founded, not upon the original right of the people, as the separate Parliaments of England and Scotland were before, but upon the treaty which is prior to the said Parliament, and consequently superior; so, for that reason it cannot have power to alter its own foundation, or aft against the power which formed it, since all constituted power is subordinate, and inferior to the power constituting.”⁶⁹

Traces of this “constitutional” interpretation could still be found, fifty years later, in the writings of Blackstone. The great English legal commentator also generally accepted that infringements of a ‘fundamental and essential condition of the union’ would dissolve the Union,⁷⁰ yet a major qualification was already added:

“It may justly be doubted whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a State, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an incorporate union (which is well distinguished by a very learned prelate from a foederate alliance, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside.”⁷¹

A hundred-twenty years later, the Blackstonian doubt had become a Diceyan certainty. For in the most influential textbook of twentieth century British (*sic*) constitutional law, we now read as follows:

“That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure. Of statutes intended to arrest the possible course of future legislation, the most noteworthy are the Acts which embody the treaties of Union with Scotland and Ireland. The legislators who passed these Acts assuredly intended to give to certain portions of them more than the ordinary effect of statutes. Yet the history of legislation in respect of these very Acts affords the strongest proof of the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body.

⁶⁸ *Ibid.*, Article XVIII (emphasis added).

⁶⁹ D. Defoe *History of the Union between England and Scotland* (Stockdale, 1786), 246.

⁷⁰ W. Blackstone *Commentaries on the Laws of England* (1765) (editor: T. M. Cooley, Callaghan, 1899) at 88:

“That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be “fundamental and essential conditions of the union’.”

⁷¹ *Ibid.*, 88.

...
The one fundamental dogma of *English (sic) constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution.*⁷²

The legal foundation of the Union between England and Scotland is here seen in the (English) Act of Union that – as Dicey famously claims – has the same legal status as the (British) “Dentists Act, 1878”.⁷³ This argument however simply assumed that the British Parliament was built on the *English* constitutional ideal of a sovereign parliament.⁷⁴ This was not a matter of logic; but only a few decades later, the Diceyan experience had become “the established doctrine”.⁷⁵

4.4 Yet a distinct Scottish constitutional tradition has never entirely been lost and may, indeed, be said to have been revived by the devolutionary settlement for Scotland. Dicey and Bagehot, Coke and Blackstone *may* well be reliable guides to the English constitutional tradition, but their views are *not* necessarily determinative or reflective of what the UK constitution now is.⁷⁶

⁷² A. V. Dicey *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) 21-22 and 78.

⁷³ *Ibid.*

⁷⁴ In the words of T.B. Smith “The Union of 1707 as Fundamental law” (1957) *Public Law* 110:

“Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new parliament of Great Britain must inherit all the peculiar characteristics of the English parliament but none of the Scottish Parliament[.]”

⁷⁵ F.M. Maitland *The Constitutional History of England* (Cambridge University Press, 1908), 332.

⁷⁶ See *Jackson v. Attorney General* [2006] 1 AC 262 per Lord Hope at page 303-4 (tab 29/ MS2177) §§ 104, 106:

“Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified ...

[E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: *Thoughts on the Scottish Union*, pp 252-253, quoted by Lord President Cooper in *MacCormick v. Lord Advocate*, 1953 SC 396, 412.

So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.”

4.5 Like the English common law, the Scots constitutional tradition is *not* an ossuary⁷⁷ nor a matter of purely antiquarian or historical interest with no contemporary constitutional resonance.⁷⁸ What is clear, however, is that, when this court has to speak of UK Constitutional law, it enters into perilous waters because the two constitutional narratives and traditions to which the UK is heir - the English historical myth emphasizing the sovereignty of the governing institutions of the State (the Crown, and the Crown in Parliament) and an unbroken continuity since *Magna Carta* in 1215 CE⁷⁹; and the Scottish tradition, since at least the *Declaration of Arbroath* of 1320

⁷⁷ *Kennedy v Charity Commission* [2014] UKSC 20 [2015] AC 455 per Lord Toulson at § 133:

“133 The analysis set out above is based on common law principles and not on article 10 ECHR, which in my view adds nothing to the common law in the present context. This is not surprising. What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II in response to the growth of bureaucratic powers on the part of the state and the creation of multitudinous administrative agencies affecting many aspects of the citizen’s daily life. The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.”

⁷⁸ In *MacCormick v. Lord Advocate*, 1953 SC 39 IH, Lord President Cooper observed:

“The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution*. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.”

⁷⁹ See Lord Sumption, “*Magna Carta* then and now” (9 March 2015) (Tab 65/ MS 3035) <https://www.supremecourt.uk/docs/speech-150309.pdf>:

“*Magna Carta* as we know it was reinvented in the early seventeenth century, largely by one man, the judge and politician Sir Edward Coke... Coke transformed *Magna Carta* from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution, *a status which it has enjoyed ever since among the large community of commentators who have never actually read it*. ... [W]hen we commemorate *Magna Carta*, perhaps the first question that we should ask ourselves is this: *do we really need the force of myth to sustain our belief in democracy?* Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.”

Sed contra Lord Neuberger “*Magna Carta* and the Holy Grail” 12 May 2015 (Tab 66/ MS 3053) <https://www.supremecourt.uk/docs/speech-150512.pdf> at § 26:

“*There can be little doubt that the ‘lawyer’s view’ of Magna Carta is partly mythical. Of course, there is nothing wrong with myth.* As the late Tom Bingham put it in *The Rule of Law* (2010): The

CE⁸⁰, of the sovereignty of the people limiting the powers and rights of the Crown – may pull in different directions, but yet have to be reconciled if this Union polity is to survive.

4.6 Unlike the situation in *v R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 (*Miller*) this case comes before this court directly on appeal from Scotland, from the Inner House of the Court of Session. In this appeal, then, this court is not faced with matters of purely English law. This Court is determining matters concerning the content and extent of the constitutional obligations imposed on the Executive, to show respect for those fundamental constitutional norms inherent in a democratic polity. Accordingly, the role of this Court is to be conscious of and take due account of these various narratives and sources for our multiple-texted constitution.⁸¹ And there can be no doubt that the (Scottish) Claim of Right of 1689 is *equally* a constitutional instrument for and within the UK. It is, after all, on the basis of the Claim of Right’s assertion

“that it is the right and privilege of the subjects to protest for remeed of law to the King and Parliament against Sentences pronounced by the lords of Session”

that this Court exercises its jurisdiction to hear appeals from the Court of Session.⁸²

significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. *Sometimes the myth is more important than the actuality.*”

⁸⁰ The Declaration of Arbroath 1320 makes two important constitutional claims about kingship and popular sovereignty in Scotland. First, it notes, that “it was the due consent and assent of us all have made Robert Bruce our Prince and King”. Secondly, it asserts that the continued kingship of Robert Bruce was conditional on his maintaining the integrity and independence of the Scottish nation, for

“[I]f he should give up what he has begun, and agree to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours and make some other man, who was well able to defend us, our King”.

These constitutional claims are prefigured in the 1317 CE *Remonstrance of the Irish Princes* also sent to Pope John XXII which takes a similarly negative view of the actions of the English Crown in Ireland, in noting:

“We call to our help and assistance Edward Bruce, illustrious earl of Carrick, brother of Robert Bruce by the grace of God most illustrious king of the Scots, who is sprung from our noblest ancestors. And as it is free to anyone to renounce his right and transfer it to another, all the right which is publicly known to pertain to us in the said kingdom as its true heirs, we have given and granted to him by our letters patent, and in order that he may do therein judgment and justice and equity which through default of the prince Edward II the King of England have utterly failed therein, we have unanimously established and set Edward Bruce up as our king and lord in our kingdom aforesaid.”

⁸¹ As was essayed in *R (Buckinghamshire County Council) v Secretary of State for Transport: re HS2* [2014] UKSC 3 [2014] 1 WLR 324 *per* Lord Neuberger and Lord Mance at §207 (emphasis added):

“The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (*in Scotland*) *the Claim of Right Act 1689*, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law.”

⁸² See *Lyal v Henderson* 1916 SC (HL) 167 (Tab 15/ MS 1537) *per* Lord Kinnear at pps.181–182:

4.7 Accordingly, the actions of the UK Government today can properly be measured and declared to be unlawful to the extent of its incompatibility with this Scottish constitutional tradition, on the basis that the Union preserves *both* constitutional traditions, and that the rule of law favours that tradition which offers the stronger protection for individual rights and for the constitutional tradition of a democratically accountable State governed and limited by the rule of law.⁸³

5. THE DISTINCTIVE SCOTTISH CONSTITUTIONAL TRADITION: THE EXECUTIVE LIMITED BY LAW AND ACCOUNTABLE TO THE COURTS

5.1 The mature Scottish constitutional principle insisting on the subordination of Government to the law can be traced back to the work of George Buchanan (1506–1582), the noted European humanist scholar and poet, citizen of the Republic of Letters, historian of Scotland, tutor to the young James VI and constitutionalist and reformer. In his dialogue written in 1567 and published in 1579 *De iure regni apud Scotos* (which might be translated as *On Constitutional Government in Scotland*), Buchanan insisted on the existence of an immemorial Scottish tradition to the effect that the power received by the kings of Scotland had, from the outset, been limited and restricted by the laws and

“[A]lthough there was at one time a somewhat violent controversy as to the existence of the right to appeal from the Court of Session to the Scottish Parliament, it was at an end before the Union; it had been finally established that an appeal lay to the Scottish Parliament, and *the right so to appeal is one of the rights maintained in the Claim of Right of 1689*. Then it is quite as clearly established that the right to appeal to the Scottish Parliament had been transferred to the Parliament of Great Britain after the Union. That the Parliament of Great Britain exercises its appellate jurisdiction through this House is again a matter as to the history of which it is unnecessary to inquire; it is absolutely established by a persistent practice of centuries. I think, further, that the series of enactments by which appeals from Scotland are regulated proceed upon the same assumption. They do not confer a right of appeal as if any intervention of Parliament were necessary for that purpose, but, assuming that the aggrieved suitor may appeal to this House *de jure*, they interpose to regulate or restrict that right in particular circumstances.

⁸³ See *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46 (Tab 33/ MS 2365) *per* Lord Reed at §§152-3:

“152... Lord Steyn said in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 at p 591:

Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.’

153 The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in *R v. HM Advocate*, 2004] SC (PC 21, §121, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, §11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted ‘bearing in mind the values which the constitutional provisions are intended to embody’. That is equally true of the Scotland Act. Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, *Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law...*”

customs of the people. The existence of such boundaries or limitation on power meant that the king could be *required as a matter of law* to act only in an *intra vires* manner. The law and customs of the Scots in relation to Kings was therefore said, by Buchanan, to be one of a limited constitutional monarchy involving subordination of the Crown to the law, the Crown's answerability before the courts, and ultimate sovereignty residing in the people. Thus, in response to the question "You do not think, then, that the king ought to possess complete power over all matters?"⁸⁴ he wrote:

"Not at all. For I recall that he is not only a king, but a human being as well, erring in many things through ignorance, often transgressing of his own will, often almost against his will, since *he is a creature readily changing with every breath of popularity or hatred*. This natural vice is only intensified as a magistrate, so much that here especially I find the famous aphorism of comedy to be true that 'everyone becomes worse if he is allowed to do as he pleases'. That is why *men of the greatest wisdom have proposed that the law should be yoked to the king to show him the way when he does not know it or lead him back to it when he wanders from it*. [...]

I want the people who have granted the king authority over themselves to be allowed to dictate to him the extent of his authority, and I require him to exercise as a king only such right as the people have granted him over them [...]

When our kings of Scots are publicly inaugurated, they give a solemn promise to the entire people that they will observe the laws, customs and ancient practices of our ancestors, and that they will adhere to the law which they have received from them. ... God set down this condition under which David and his descendants should reign: He promises that they will reign so long as they obey the laws ordained by him. These facts make it probable that the power received by our kings from our ancestors was not unbounded but was limited and restricted within fixed boundaries. [...]

It makes no difference to me whether the king himself appears in court or his procurator.⁸⁵ *In either event, the king will be at risk in litigation: any profit or loss arising from the result of the trial will fall to him, not to his procurator. In short the king himself is the defender, that is the person whose case is in dispute.*⁸⁶ There is no justification either for the complaint and protest of those who argue that it is neither proper nor just that a verdict on a king should be delivered by a man of lower rank.... For *no one who comes before a judge comes before an inferior, especially since God himself pays so much honour to the judicial order that He calls them not only judges but gods and, so far as this is possible, imparts to them His own dignity.*

The verdicts of judges are valid when pronounced in accordance with law, otherwise they are rescinded. ... *The judge has his authority from the law, not the law from the*

⁸⁴ Roger Mason and Martin Smith *A Dialogue on the law of kingship among the Scots – a critical edition and translation of George Buchanan's De iure regni apud Scotos dialogus* (Ashgate: Aldershot, 2004) (Tab 60/ MS 2970) at pages 33, 55, 133, 143

⁸⁵ Lord M'Laren dealt with the point in *Somerville v Lord Advocate* (1893) 20 R 1050, 1075:

'I do not think that it ever was doubted in Scotland that the Crown might be called as a defender in a proper action, either through the officers of state collectively, or through the King's advocate or other officer representing the Crown in the matter of the action; and the reported decision by Balfour which negatives the jurisdiction of the inferior judges also asserts inferentially that His Highness, or his advocate as representing the King, may be convened in the Court of Session in actions and pleas at the instance of any private person.'

⁸⁶ See generally JR Philip *The Crown as Litigant in Scotland* (1928) 40 *Juridical Review* 238

*judge ... and the lowly rank of the person pronouncing the verdict does not diminish the dignity of the law, but the dignity of the laws is always the same, whether it is a king, or a judge or a herald who pronounces the verdict. It seems therefore that when a king is condemned by a judge, he is condemned by the law.*⁸⁷

5.2 Such claims ran directly counter to the Stuart monarchs' absolutist claims - once they had left Scotland and acceded to the English throne in the course of the 17th century - to be monarch by "Divine Right". It was this theory of holding his office by divine right which led James VI and I to assert that:

"The King is above the law, as both the author and giver of strength thereto."⁸⁸

5.3 But such Divine Right claims were expressly rejected and never formed part of the received Scottish constitutional tradition such as was ultimately given form in the 1689 Claim of Right. That document instead followed and enacted into law the Buchananite tradition as taken up, by among others, the Scottish Presbyterian Divine Samuel Rutherford (c.1600 CE–1661 CE). In his work *Lex Rex*, Rutherford answers his Question XLIII on "*whether the King of Scotland be an absolute prince, having prerogatives above Parliament and laws: the negative is asserted by the laws of Scotland, the King's oath of coronation, the Confession of Faith etc.*" as follows:

"The kings of Scotland have not any prerogative distinct from supremacy above the laws. If the people must be governed by no laws but by the king's own laws, that is, the laws and statutes of the realm, acted in parliament under pain of disobedience, then must the king govern by no other laws, and so by no prerogative above law."

5.4 In seventeenth century Scotland, intellectual life remained strongly under the influence of Aristotelian thought and analysis. The philosophy of Aristotle was a compulsory part of the core curriculum in Scotland's four universities of the time: St. Andrews, Glasgow, Aberdeen and Edinburgh. As the political philosopher and historian of ideas, Alasdair MacIntyre notes:

"When ... Aristotelianism had a dramatic revival of fortune in the universities of the sixteenth century, it was Aristotle without Aquinas who partially dominated the intellectual scene. The *Nicomachean Ethics* and the *Politics* once again became key educational texts. ... [T]he Scottish blend of Calvinist Augustinianism and renaissance Aristotelianism informed the lives of congregations and kirk session, of law courts and universities."⁸⁹

⁸⁷ See H R Buchanan "Some aspects of the royal prerogative" (1923) 25 *JR* 49 at 53:

"It is doubtful whether prior to the Union of 1707 the common law of Scotland accorded any prerogative or privilege to the Crown, at any rate within the field of private law. And the terms of the Act of Union should have sufficed to prevent innovation on the common law of Scotland in this respect, apart, of course, from specific statutory enactment."

⁸⁸ King James VI and I, *Political Writings* (ed by J P Somerville, 1994) pp 63ff "The Trew Law of Free Monarchies or The Reciproock and mutuall duetie betwixt a free King and his naturall Subjects" at page 75

⁸⁹ Alasdair MacIntyre *Whose Justice ? Which Rationality ?* (Duckworth, London 1988) Chapters 11 and 18

5.5 Scottish political thinking of this period was therefore permeated by Aristotle's ideas who in *The Politics* speaks of three ideal forms of government to achieve the common good: monarchy or rule by one *man*; ⁹⁰ aristocracy, or "rule by the best", the able, the virtuous; and democracy, rule by the many. Aristotle expressed it thus:

"Of the forms of government in which one rules, we call that which regards the common interests, kingship or royalty. That in which more than one, but not many rule we call aristocracy; and it is so called either because the rulers are the best men or because they have at heart the best interests of the State and of its citizens. But when the citizens at large administer the State for the common interest the government is called by a generic name – a constitutional polity." ⁹¹

5.6 Expressing these constitutional models in 17th century ecclesiological terms, in Scotland at least, the term "*Papist*" translates into a believer in absolutist government; "*Episcopalian*" into a supporter of constitutionally limited Monarchy; while "*Presbyterians*" hold to a democratic model in which the ordinary members of the church, the Elect(ors), delegate defined and limited powers to those whom *they* appoint to hold office. ⁹² In "*The Crown Rights of the Redeemer: the Chalmers Lectures of 2007*", the Reverend Dr. Marjory MacLean summarises this Scottish constitutional tradition of popular sovereignty as follows:

⁹⁰ Women holding regal authority and exercising the power of government of a polity was contemporaneously described by John Knox as "monstrous". See his *The First Blast of the Trumpet Against the Monstrous Regiment of Women* (1558).

⁹¹ Aristotle *Politics* as translated by Benjamin Jowett (Batoche Books, Kitchener, 1999) Part VII page 61

⁹² In his work of 1324 CE, *Defensor Pacis* ("Defender of the Peace"), Marsilius of Padua relied on Aristotle's *Politics* to reclaim a view which saw political power and authority as being conferred from the bottom up, by and from the people. Among the conclusions reached by Marsilius - in Statements 6, 8, 9, 11, 13 from Marsilius of Padua, *Defensor Pacis*, Part III, ch. ii; in Goldet, *Monarchia Sancti Romani Imperii*, 11, pp. 309 ff., translated in Oliver J. Thatcher, and Edgar Holmes McNeal, eds., *A Source Book for Medieval History*, (New York: Scribners, 1905), pp. 317-324 - were that:

- "the whole body of citizens or its majority alone is the human 'legislator'";
- "the 'legislator' alone or the one who rules by its authority has the power to dispense with human laws";
- "the elective principality or other office derives its authority from the election of the body having the right to elect, and not from the confirmation or approval of any other power";
- "there can be only one supreme ruling power in a State or kingdom"; and that
- "no prince, still more, no partial council or single person of any position, has full authority and control over other persons, laymen or clergy, without the authorization of the 'legislator'".

In reaching these conclusions, among other, Marsilius ran wholly counter to the prevailing theologically driven "top-down" debates which focused instead on the supposed details of the authority and power which had been granted by God to ecclesiastical and secular rulers. In so re-positioning the debate away from God and on to the people, Marsilius anticipated and became, in a sense, the father of modern democratic political thought. The focus which Marsilius put on the sovereignty of the people would prove in time to be just as potentially revolutionary for kings as it was for Popes. Since if the political claims of the Popes could be questioned in the name of the people, so too, in time, might the claims of their secular rulers come to be challenged on the same basis.

“Turning from the question of what defines sovereignty to the question of what its source is, we find that the characteristically Scottish Reformed approach developed through the thinking of John Knox, George Buchanan, Samuel Rutherford and the framers of the National Covenant of 1638. There are several elements in this Scottish tradition.

First, at its root is a belief in popular sovereignty, by which is normally understood the self-determination of the whole people in the context of their relationship (individual and corporate) with God. In the immediate post-Reformation literature it is difficult to find a clear description of how an articulate and identifiable process of self-determination works, though the process of bonding or banding brought together people of like minds into groups strong enough to effect political and constitutional change.

The second element in the Scottish model is ‘fiduciary dominion’, the ruler’s power (*dominium*) to govern given by the people, who offer their trust (*fides*) but not their sovereignty, which according to the theory remains with them. The ruling power is therefore supreme but constitutionally bound, and cannot arbitrarily change the bounds of its authority or the constraints under which it is obliged to operate.

The third element of the Scottish model is the presence of such constraints on the sovereign people and the holder of fiduciary dominion alike: these have normally been Natural Law and Divine Law, as understood from time to time, and the rule of law.”⁹³

5.7 Because of the problem of what Aristotle called *akrasia*, weakness of the Will or lack of self-control, knowing the right thing to do for the common good but nonetheless doing the wrong thing in the selfish interests of the holder of power (what Augustine of Hippo called original sin), monarchy can readily degenerate into despotism; aristocratic rule into oligarchy or plutocracy of a hereditary class; democracy into mob rule of the tyranny of the majority oppressive of and lacking respect for anyone in the minority. Aristotle put it thus in *The Politics*:

“The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether to the one, or the few, or of the many, are perversions. For the members of the State, if they are truly citizens, ought to participate in its advantages. Tyranny is a kind of monarchy which has in view the interest of the monarch only; oligarchy has in view the interest of the wealthy; democracy, of the needy: none of them the common good of all.”⁹⁴

5.8 Clearly, to avoid this degeneration, we need checks and balances on power. That is what constitutions are for. That is what the law and politics does. It sets legal limits on the power of the ruler and calls them to account for their abuse of power.

5.9 This tradition of the subordination of executive power to the *law* within the Scottish constitution reached its apotheosis with the decision by the Scottish Parliament in 1689 to find that James VII:

⁹³ Reverend Dr. Marjory MacLean *The Crown Rights of the Redeemer: the Chalmers Lectures of 2007* (Saint Andrew Press, Edinburgh, 2009) (Tab 62/ MS 2995) at p.198.

⁹⁴ Aristotle *Politics* as translated by Benjamin Jowett (Batoche Books, Kitchener, 1999) Part VII page 61

“Did By the advyce of wicked and evill Counsellers Invade the fundamentall Constitution of this Kingdome And altered it from a legall limited monarchy to ane Arbitrary Despotick power ... to the violation of the lawes and liberties of the Kingdome”

and consequently to declare that he had *forfeited* the Crown on the basis of his over-reaching the limits placed by law on his executive power and its exercise.⁹⁵ The use of the word ‘forfeited’ was of particular significance because it was consistent with the terms of the Declaration of Arbroath of 1320 CE,⁹⁶ as well as with the constitutional writings of George Buchanan and Samuel Rutherford.

5.10 The problem for those in England who espoused the high doctrine of Divine Right, of the Crown being above the law, is that the only check on the monarch abusing his powers was revolution and his deposition, or more likely the killing of the king on a claim of justified

⁹⁵ On the accession of Queen Anne to the Scottish throne in March 1702 the legitimacy of the 1689 settlement was reaffirmed in three Acts of 1703 of the Scottish Parliament: an Act Asserting and Recognizing her Majesties Authority; and Act for Secureing the true Protestant Religion and Presbyterian Government, and an Act Ratifying the turning the meeting of the Estates in the year 1689 into a Parliament. This last Act provided as follows:

“Our sovereign lady, with advice and consent of the estates of parliament, ratifies, approves and *perpetually confirms* the first act of King William and Queen Mary’s parliament, dated 5 June 1689, entitled act declaring the meeting of the estates to be a parliament, and of new enacts and declares that the three estates then met together the said 5 June 1689, consisting of noblemen, barons and burghs, were a lawful and free parliament, and it is declared that it shall be high treason for any person to disown, quarrel or impugn the dignity and authority of the said parliament. And further, the queen's majesty, with consent foresaid, statutes and declares that *it shall be high treason in any of the subjects of this kingdom to quarrel, impugn or endeavour by writing, malicious and advised speaking, or other open act or deed, to alter or innovate the Claim of Right or any article thereof.*”

Dr. Karin Bowie “A Legal Limited Monarchy - Scottish Constitutionalism in the Union of Crowns 1603-1707” (Tab 72/ MS 3141) notes as follows:

“Following Anne’s accession in 1702, Parliament confirmed that the queen had taken the Scottish ‘coronation oath conforming to the said Claim of Right’. When Anne indicated sympathy for the toleration of Episcopalian worship in 1703, Presbyterian pamphleteers cited the Claim of Right as a constitutional barrier to any act of toleration. Fearing a Jacobite revival under Anne, writers warned against any undermining of the Claim of Right and its article on prelacy. Scottish Episcopalians in turn made great efforts to attack the Claim of Right. Far from being a fundamental limitation, it was argued, the Claim of Right was a mere statute which could be overturned by a new law. In response, a Presbyterian majority in the 1703 parliamentary session passed an act making it ‘high treason’ for any subject to ‘quarrell, impugne or endeavour by writeing, malicious and advised speaking, or other open act or deed, to alter or innovat the Claim of Right or any article thereof.’”

⁹⁶ William Ferguson *The identity of the Scottish Nation: an historic quest* (Edinburgh: Edinburgh University Press, 1998) at p.42:

“[T]he Declaration [of Arbroath]... has had a chequered history. Known only in some manuscript versions of the *Scottichronicon* it became lost to sight. *It was for example, unknown to George Buchanan, whose political theory it would have confirmed.* It did not surface again until the late seventeenth century, when it was first printed by Sir George Mackenzie of Rosehaugh, the eminent lawyer and antiquarian. Not surprisingly an English translation of the declaration was published at the Revolution of 1688 to support those who opposed the divine right theory of kingship.”

and necessary tyrannicide. These are not recipes for stable governance. Yet in the course of just 100 years the English State had executed two monarchs (Mary Queen of Scots and her grandson Charles I) and engineered the overthrow of a third, James II and permanently excluded his Catholic heirs from the line of succession to the throne.⁹⁷ In the calamitous seventeenth century, England, for want of a constitution, had become a land of revolutions and king slayers. Ultimately, the English Bill of Rights 1688 attempted to bring a form of constitutional order by setting out legal limits on the powers claimed by the Divine Right Executive in declaring that:

“the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal”.

This is echoed in the Claim of Right’s declaration that:

“That all Proclamations asserting an absolute power to Cass [*anglice* Quash] annul and Disable laws... are contrary to Law”.

5.11 But the Scottish constitutional tradition of popular sovereignty which the Claim of Right 1689 was articulating may be *contrasted* with the (English) Bill of Rights tradition where, as Conrad Russell notes, the prevailing “*theory of legitimacy*” was one “*where authority, however much it might feel the need for consent, was ultimately descending*”.⁹⁸ Accordingly, rather than speaking of the king being deposed in the Glorious Revolution, the English Bill of Rights employed the legal fiction that the king, in fleeing to France, had chosen to “*abdicate*” his throne, thereby preserving the fiction that the existing constitutional order in England continued. The English Declaration and Bill of Rights 1688 are also to be contrasted with the Scottish Claim of Right 1689 in that the English document makes no reference to James II’s oath on entering government that he will “*rule the people according to the laudable laws*”. Nor does the English document claim that James II had expressly breached any of the terms of his (English Coronation) oath. And the English document similarly makes no reference - unlike the Scottish text - to James II and VII invading the “*fundamental Constitution of the Kingdom*”

⁹⁷ The Act of Settlement 1701 originally provided that:

“all Papists and persons marrying Papists, shall be excluded from and forever incapable to inherit possess or enjoy the Imperial Crown of Great Britain and the Dominions thereunto belonging or any part thereof”.

This provision was passed against a background that the post-1603 Stuart kings (James VI and I, Charles I, Charles II and James VII and II) all had Catholic mothers and all had Catholic wives. By contrast the two reigning Stuart queens (Mary II and Anne) both married Protestants and their mother was Protestant. With effect from 26 March 2015, the prohibition against any member of the Royal family succeeding to, or holding, the Crown for “*marrying a person of the Roman Catholic faith*” was repealed with the bringing into force of section 2 of the Succession to the Crown Act 2013, but the prohibition against “*Papists*” inheriting the throne remains.

⁹⁸ Conrad Russell, *James VI and I and his English Parliaments* (OUP, 2011), Ch. VIII, “Religion and Political Ideas”, (Tab63/ MS 2997) p.143

and of that constitution properly being understood as a “*legally limited monarchy*”. Nor do the English, in terms, accuse the James II of attempting to subvert the constitution that he was in office to uphold, complaining instead only of specific acts of “*arbitrary power*” (namely “*prosecutions in the Court of King’s Bench for Matters and Causes cognizable only in Parliament and by diverse other Arbitrary and Illegal Courses*”), rather than the root and branch corruption of power which the Scottish Claim of Right of 1689 had identified.

5.12 The Scottish Claim of Right 1689 now reads to modern eyes as a profoundly sectarian and intolerant document.⁹⁹ James VII’s greatest offence appears to have been the fact that he was publicly Catholic (“being a professed papist”) - though the case was certainly made against him that the political theology and constitutional theory which then passed for orthodoxy in the Catholic church was one which committed him to an absolutist theocratic model, wholly inimical to the idea of civil society, which was founded upon open and public dissent from the doctrines and practices of the Roman Church.¹⁰⁰ But, as we have

⁹⁹ The provision against toleration of Catholics and Catholicism in the Claim of Right 1689 include the following declarations:

“That by the law of this Kingdom no papist can be King or Queen of this realm nor bear any office whatsoever therein nor can any protestant successor exercise the regal power until he or she swear the Coronation Oath

That all Proclamations asserting an absolute power to Cass annul and Disable laws The Erecting Schools and Colleges for Jesuits The Inverting protestant Chapels and Churches to public Mass houses and the allowing Mass to be said are Contrary to Law

That the allowing Popish books to be printed and Dispersed is Contrary to law

That the taking the children of Noblemen Gentlemen and others sending and Keeping them abroad to be bred papists The making funds and Donations to popish schools and Colleges The Bestowing pensions on priests and the perverting protestants from their religion by offers of places preferments and pensions are Contrary to law

That the Disarming of protestants and Employing papists in the places of greatest trust both Civil and military the thrusting out protestants to make room for papists and the intrusting papists with the forts and magazines of the Kingdome are Contrary to Law”

¹⁰⁰ See for example John Locke “A Letter concerning toleration” (1689) (as translated by William Popple):

“That Church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby ipso facto deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country and suffer his own people to be listed, as it were, for soldiers against his own Government. Nor does the frivolous and fallacious distinction between the Court and the Church afford any remedy to this inconvenience; especially when both the one and the other are equally subject to the absolute authority of the same person, who has not only power to persuade the members of his Church to whatsoever he lists, either as purely religious, or in order thereunto, but can also enjoin it them on pain of eternal fire.”

seen, in this early modern period, *politics* is expressed in terms of *ecclesiology*. The *religious* is *political* precisely because in defining the terms of the Church settlement in a territory you define the source and extent of power of the State.¹⁰¹ Papists were thought to believe in absolute political power resting wholly and completely in an individual monarch, with no checks and balances, no accountability (except ultimately to God).¹⁰² Examples of such absolute rule were to be seen in the constitution of France under the rule of Louis XIV¹⁰³ and in the pretensions of the Stuart kings (encouraged it is whispered by the behind the scenes petticoat rule of their invariably Catholic wives and mothers - from Mary Queen of Scots, Queen Anne of Denmark, Queen Henrietta Maria, Queen Catherine of Braganza to Queen Mary of Modena). Absolutism is excoriated by all as incompatible with respect for ancient liberties and law. Only an unequivocally Protestant monarch, it was said, could be trusted to honour the laws and liberties of the Kingdom and to respect the fundamental constitution of the Kingdom as one of a legally limited monarchy.¹⁰⁴

¹⁰¹ The first Supremacy Act 1534 explicitly tied the office of head of the English church to the English imperial crown, stating that the king and his successors

“shall be taken, accepted and reputed *the only supreme head in earth of the Church of England called Anglicana Ecclesia... annexed and united to the imperial crown of this realm*”.

This position was confirmed in *R v Dibdin* [1910] P 57 per Darling J at 78:

“[T]he Church of England [is] a reformed Church acknowledging the King as being in all causes, ecclesiastical as well as civil, within his dominions supreme, and the King rules by and in accordance with statutes of the realm.”

The decision of the Court of Appeal was upheld by the House of Lords in a decision reported as *Thompson v Dibdin* [1912] AC 533. See, for remarks to similar effect, Sir John Laws LJ “A judicial perspective on the sacred in society” (2004) 34 *Ecclesiastical Law Journal* 317 at 324-5:

“[T]he established Church, its acts and its forms of worship, are subject to the law of the land as it is administered in the Queen’s courts, which of course include the ecclesiastical courts. This is the Church’s virtue: it means that the Christian faith is mediated or offered to the people on a universal and compulsory basis which transcends the doctrinal, liturgical or other predilections of individual priests or prelates. Their voices are put in their proper place, which is under the law. ... The priest has no other legitimate space for conscientious objection. If he is driven by such an objection, then his place is in a sect, or a congregational church where no general law prescribes the duties of the ministers.”

¹⁰² Professor J. H. Kurtz *Church History* (London: Hodder and Stoughton, Second Edition 1893) Vol. III at page 341 the following is noted of the conduct of Pope Pius IX during the First Vatican Council in 1870:

“Urged by the Jesuits, he confidently declared that it was notorious that the whole church at all times taught the absolute infallibility of the pope; and on another occasion he silenced a modest doubt as to a sure tradition with the dictatorial words, *La tradizione sono io*, adding the assurance, ‘As Abbate Mastai I believe in infallibility, as pope I have experienced it.’”

¹⁰³ The possibly apocryphal phrase “*l’Etat c’est moi*” was attributed to Louis XIV and said to have been a retort by him at a meeting of the *Parlement de Paris* on 13 April 1655 before. It was intended and understood to be an assertion of the primacy and absolute nature of royal authority in France in the context of a dispute before the *Parlement*, which had purported to contest the lawfulness of certain Royal edicts adopted on 20 March 1655.

¹⁰⁴ See Diarmaid MacCulloch *Silence: a Christian history* (2013) at 163, 174-5, 176-7:

“[G]roups which represented the ‘Other’ ... have repeatedly made themselves invisible in order to survive: they have become what John Calvin in the 16th century contemptuously called

5.13 As Linda Colley ably illustrated in her seminal work *Britons: Forging the Nation 1707-1837* (2nd edn, 2005) the Union between Scotland and England was underpinned by a new patriotism built on maritime prowess, the Protestantism of its peoples and a Parliamentary heritage, which betokened such fundamental constitutional principles as a legislature consisting in elected representatives of the people, limited monarchy, separation of powers and respect for the fundamental rights and liberties of the individual subject.¹⁰⁵ In all these things, Great Britain (including its colonies in North America) was contrasted with the regimes of other rival powers of Continental Europe, notably the

‘Nicodemites’, in allusion to Jesus’ timorous disciple who according to John’s Gospel (John 3: 1-2) would only visit his Lord at nightElizabeth [Tudor’s] religious settlement of 1559 [was] something unprecedented in Europe. It was planned and executed by former Nicodemites, Protestants who had nevertheless conformed outwardly to the Roman Church from the moment Mary [Tudor] had secured her throne. Foremost among this group was the Queen [Elizabeth Tudor] herself [M]any leaders of the established Church [of England] not least its Nicodemite Queen [Elizabeth Tudor], were happy to tolerate merely formal adherence from equivocators.”

Contrast with John Calvin’s pamphlet of 1544, *Excuse à messieurs les Nicodémistes sur la complainte qu’ils font de sa trop rigueur* in which the Frenchman Calvin condemns, from the security of his exile in Swiss Geneva, those of his compatriots of reformed Protestant sympathy who remained in France and who outwardly conformed to and attended Catholic worship

¹⁰⁵ See too Linda Colley “Empires of Writing: Britain, America and Constitutions, 1776–1848” (2014) 32 *Law and History Review* 237-66 at 241-2 (internal footnote references omitted):

“It is sometimes assumed that written constitutions appeared immediately and self-evidently alien in Britain because of the grip there of notions of parliamentary sovereignty. However, although assertions of Westminster’s sovereignty certainly became more developed and more strident during the eighteenth century, there was still no consensus in 1776, even at elite level, about how far such claims were, or were not, compatible with external limitations on executive power. In part, precisely because no *single* text was in existence that supposedly encompassed the British Constitution, interpretations and understandings of the latter always remained fluid and contested. “Who hath the right, and the means, to resist the supreme; legislative power,” wrote the onetime Tory minister Henry St. John, Viscount Bolingbroke, in the 1730s: “I answer the whole nation hath the right, and a people, who deserve to enjoy liberty, will find the means.” Radicals and reformers such as John Wilkes, James Burgh, and Richard Price advanced similar claims and questions in the 1770s and 1780s, as did many much later political and legal commentators.

Even William Blackstone, whose *Commentaries on the Laws of England* (1765-69) was widely interpreted in the new United States as an unambiguous celebration of Parliament’s ‘transcendent and uncontrollable’ power, occasionally appeared to send out mixed messages. In one of Blackstone’s earlier publications, *The Great Charter* (1759), a scholarly investigation into the Magna Carta of 1215, and a neglected work, the great jurist repeatedly gloats over the appearance, and especially the dimensions, of the parchment versions of the charter he has been able to uncover in the archives. At times, Blackstone also seems to endorse a right to resistance. One of the texts he has discovered linked to Magna Carta, he remarks in this book, gives “liberty to the king’s subjects to rise against and distrain him to the utmost of their power, notwithstanding the allegiance which they owed him, in case he should transgress the conditions therein agreed on.”

French and Spanish, whose constitutions were seen as embodying everything that was un-British: Popery, arbitrary and despotic Government and servility.

5.14 Linda Colley is correct to note that there was an ideology of a shared *Protestantism* between an England and Scotland now united against the Papist common enemy which cemented the new British Union. But it should be borne in mind that the established Protestantisms of England and Scotland had quite different sixteenth century roots. While the English King Henry VII was in the 1530s was engineering a breach with the Roman Church and a royal annexation of the *Ecclesia Anglicana*, his nephew James V, the King of Scots, was, instead, consolidating Scotland's connections with the Roman See - notably by obtaining Papal Bulls from the Medici Pope Clement VII allowing for the re-foundation of the Court of Session as a College of Justice, now paid for in large part from the grant to the king of church revenues and with at least half its judges (now styled Senators) being churchmen. The Protestant Reformation and the official break from Rome took place in Scotland in 1560, almost thirty years after that of England, and resulted in an immediate far more radical and revolutionary turn than the earlier English Reformation. It was an ideological reformation inspired by the teaching of the French lawyer and Genevan exile, John Calvin and, in contrast to England, unequivocally broke from and repudiated the forms of worship and many of the doctrines of the unreformed Roman Church. Against that background all attempts in the seventeenth century at establishing a form of Church settlement common to Scotland and England failed - whether that be the attempts to impose Royally appointed Bishops on the reformed Church of Scotland (on the principle as pithily expressed by James VI and I that "nae Bishops, nae King") sparking Scotland's "Bishops Wars", or the Ordinance of the Lords and Commons assembled in Parliament in 1643 in the middle of the English Civil War for the calling of an Assembly of learned and godly Divines for the settling of the government and liturgy of the Church of England along Calvinist/Presbyterian lines and which resulted in the Westminster Confession of Faith 1647.

5.15 Ultimately, from an internal British constitutional perspective, there was maintained as between Scotland and England two quite different (ideal) types of official State Protestantism. Scotland's ecclesiastical settlement following the 1689 Glorious revolution settlement was Presbyterian, republican and Calvinist.¹⁰⁶ England's was Episcopal,

¹⁰⁶ The *Stair Memorial Encyclopaedia (reissue)* on "Constitutional law: 12. Church and State (1) Historical Introduction to Church and State" summarises the position in Scotland at § 622 as follows:

"The seventeenth-century Church.

monarchical and Erastian. The Anglican approach may be best captured up in the phrase: *rex in regno suo imperator est* - the king wielded supreme imperial authority within his own realm.¹⁰⁷ The Scottish Presbyterian tradition is best captured by the words of the leading second-generation reformer, Andrew Melville, in 1596, that the King of Scots:

“was God’s silly vassal ... and that there are two kings and two kingdoms in Scotland. There is Christ Jesus the King, and His kingdom the Church, whose subject King James VI is - and of whose kingdom, not a king, nor a lord, nor a head, but a member he was.”¹⁰⁸

5.16 The Church of England settlement initiated by Henry VIII had provided for royal control over the Church by bishops appointed by the Crown. This kind of continuing, unchecked royal dominance was termed Erastianism or “Prelacy”. It was seen by many radical

By the Bishops Act 1606 (c 2) a serious attempt to restore episcopacy began by returning Church land to the bishops. The Commissariots Act 1609 (c 8) restored to them jurisdiction in ecclesiastical and commissary matters. These Acts were followed by the Acts of Assembly Act 1612 (c 1), which provided that the sovereign should be head of the Church and that bishops should be moderators of the presbytery in every diocese. The General Assembly, meeting in Glasgow, had already accepted these changes. They clearly affected the General Assembly Act 1592 (c 8). It was repealed and set aside under the Religion Act 1633 (c 4), which ratified the original reformed Presbyterian establishment without repealing the 1612 Act. In 1639 the latter Act was formally repealed¹ and the 1592 Act was fully revived, again following a meeting of the General Assembly in Glasgow.

During the following decade, when the established Church in England as well as in Scotland was committed to Presbyterian doctrine, an important statement of protestant faith was adopted in both countries. This was the Westminster Confession of Faith. The General Assembly accepted it in 1647 and it was enacted by the Parliament of Scotland in 1649². At the revolution settlement of 1689 this confession of faith was embodied in the Confession of Faith Ratification Act 1690 (c 7). It was incorporated by reference in the Union Agreement of 1707, and is accepted today as the principal subordinate standard of the Church of Scotland. ...

After the Restoration the Bishops in Parliament Act 1662 (c 1) provided that bishops should again form a constituent estate of Parliament, so reviving the three Estates of Parliament. Presbytery was once more ousted from exclusive control of the Church by the Re-establishment of Prelacy Act 1662 (c 3), which purported to revive 'the ancient government of the Church by archbishops and bishops'. However, at the revolution settlement the Claim of Right 1689, followed by the Claim of Right Act 1689 (c 28), finally ended episcopacy in the Church of Scotland. The Confession of Faith Ratification Act 1690 again ratified and confirmed the Presbyterian establishment of 1592. Both Acts were retrospectively affirmed in 1703, this time with full royal assent, by the Act for securing the true Protestant Religion and Presbyterian Government (the 'Act of Security') (c 2), passed on 16 September 1703 along with the Parliament of 1689 Act 1703 (c 3) which ratified the turning of the meeting of the Estates in 1689 into a Parliament.”

¹⁰⁷ The Restraint of Appeal Act 1533 - which sought to end the Canon law right of appeal from the church courts in England to the Roman Rota - stated that

“here by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that *this realm of England is an Empire*, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the *Imperial Crown* of the same”.

¹⁰⁸ The exchange is captured, in its original Scots, Andrew Melville’s nephew James in *The Autobiography and Diary of James Melvill, with a Continuation of the Diary* (R Pitcairn ed, 1842)

English Protestants of the period (Baptists, Congregationalists, Presbyterians and Puritans) as ungodly, indeed little better than papist absolutism. But, for High Tory Anglicans, the primary concern was to maintain the established order, conserve the traditional episcopal institutions and models of governance, and avoid revolution.¹⁰⁹ So when the crunch came in 1688 with the birth of a Catholic male heir to an already openly-Catholic king (secretly in hock to the French king) in James II and VII in his son James (latterly dubbed the Old Pretender) a revolution was backed and effected in England by an uneasy if not unholy alliance between High Tory Anglicans and low church Whigs, dissenters and nonconformists. The ambiguous language of the Bill of Rights 1688 is testament to that uneasy compromise of a revolution masked in plausible deniability. Thus, in England, James II abdicates the throne for his own reason of wanting to spend more time with his family.

5.17 By contrast the Claim of Right 1689 has no such compromises. The language used is clear and unequivocal because the radicals in Scotland won. Presbyterianism triumphed. The Episcopalian order was overthrown in the following terms: “That Prelacy and the superiority of any office in the Church above presbyters is and hath been a great and insupportable greivance and trouble to this Nation and contrary to the Inclinationes of the generality of the people ever since the reformatione (they haveing reformed from popery by presbyters) and therfor ought to be abolished.” Prelacy was abolished because the king had forfeited his throne by overstepping the limits on his powers, including crucially the power to prorogue Parliament. That is the (Scottish) tradition to which we are also now all heir and which this court is bound by its very nature, by its own emblem, to protect.

5.18 The whole point about the 1707 Union is that it constitutionally entrenched the distinct Scottish and English constitutional traditions as embodied in the two nations’ separate ecclesiastical settlements. Thus, the “*securing of the Protestant Religion and Presbyterian Church Government within the Kingdom of Scotland*” was expressly declared to be “*a fundamental and essential Condition of the said Treaty or Union in all times coming.*”¹¹⁰ And it was similarly declared by the English Parliament that the preservation of the Anglican settlement in England also be made “*a Fundamental and Essential part of any Treaty of Union*”¹¹¹ with Scotland. In the United Kingdom, then, we have inherited and maintained two and wholly distinct

¹⁰⁹ The Act of Uniformity 1662 purged the Church of England of those who dissented from the Erastian settlement and, in so doing, gave birth to the Nonconformist church traditions in England.

¹¹⁰ Article XXV of the Union with England Act 1707 (Tab 45/ MS2904).

¹¹¹ Article XXV of the Union with Scotland Act 1706.

political theologies which each reflect quite different visions of the State and the role and rule of law over the Executive. This is not antiquarianism or misplaced originalism. The accession oath which was sworn by Elizabeth II before the Accession Privy Council on the day immediately after her accession, and which is renewed by her each year (whether in writing or in person) before the General Assembly of the Church of Scotland is in the following terms:

“I, Elizabeth the Second by the Grace of God of Great Britain, Ireland and the British dominions beyond the seas, Queen, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the True Protestant Religion as *established by the laws of Scotland in prosecution of the Claim of Right* and particularly an Act entitled an Act for the Securing the Protestant Religion and Presbyterian Church Government and *by the Acts passed in both Kingdoms for the Union of the two Kingdoms*, together with the Government, Worship, Discipline, Rights and Privileges of the Church of Scotland. So help me God.” (emphasis added)

5.19 What this means is that this distinctive Scottish constitutional tradition embodied in the Claim of Right - of the Crown holding power from and in trust for the people assembled “*in a full and free representative of this Nation*”, with the Crown bound by the constitution to honour the terms and limits of the sovereign people’s grant of that power, and with both the people and the Crown subject to a duty to respect fundamental rights and the rule of law - not only survived the 1707 Union, but was expressly preserved by it and is reaffirmed by the Crown *in personam* every year of her reign.

5.20 Consistently with this tradition, the English law doctrine that the Crown cannot be impeached before the courts has never formed part of Scots law. The subjects in Scotland are entitled to go to the courts in Scotland against the Crown as *of right*, and do not need the permission or consent of the sovereign or his officers.¹¹² In Scots law, the Crown in Scotland *could* do wrong. And if and insofar as it did wrong it may be called to account before the courts in Scotland, even in relation to actions outside Scotland.¹¹³ And, in further contrast to the position in English law,¹¹⁴ it was always considered possible in Scots law to obtain interdict directly against the Crown¹¹⁵ at least prior to the passing of the Crown Proceedings Act 1947 which sought make it easier and not more difficult for

¹¹² *A v B* (1534) Mor. 7321; *Somerville v Lord Advocate* (1893) 20 R 1050 per Lord M'Laren at 1075.

¹¹³ See *Burmah Oil v. Lord Advocate*, 1964 SC (HL) 117 (Tab 19/ MS 1671) and *Tehrani v. Secretary of State for the Home Department* [2006] WLR 699, HL, per Lord Rodger of Earlsferry at 725-6

¹¹⁴ cf. *Entick v Carrington* (1765) 19 STR 1030; *R v Lords of the Treasury* (1872) LR 7 QB 387 per Lord Blackburn at 398, *R v Nathan* (1884) 12 QBD 461 at 472.

¹¹⁵ Fraser, *Constitutional Law* (2nd edn) at p 165; *BMA v Greater Glasgow Health Board* 1989 SC (HL) 17 per Lord Jauncey of Tullichettle at 94; *McDonald v Secretary of State for Scotland* per the Lord Justice Clerk (Ross) at p 238.

individuals to bring proceedings and obtain relief against the Government,¹¹⁶ and to harmonise the position of Scotland and England on this point.¹¹⁷ The Treaty and Acts of Union in 1707 allowed for, but did not themselves *effect*, any harmonisation of the systems of public law as between Scotland and England.¹¹⁸ Nor has there ever been any presumption that the powers and prerogatives of the Crown as recognised in English law were automatically received, or are otherwise to be recognised and applied, in a post-Union Scotland. Thus, in *Glasgow Corporation v. Central Land Board*, 1956 SC (HL) 1 Viscount Simonds observed (at pp. 9-10, 11):

“[T]he common law of Scotland differs from that of England in regard to the liability of the Crown to be sued and has developed independently in regard to the right of discovery or recovery of documents in possession of the Crown, and that, desirable though it may be that in matters of constitutional importance the law of the two countries should not differ, yet it would be clearly improper for this House to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries. ... Next, therefore, I ask what is the law of Scotland upon this matter, on the assumption that *Duncan v. Cammell Laird & Co.* [1942] AC 624 did not determine it. In the course of the present appeal we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the Court to

¹¹⁶ *British Medical Association v. Greater Glasgow Health Board*, 1989 SC (HL) 65 Lord Jauncey at page 95:

“[T]he general purpose of the Crown Proceedings Act 1947 was to make it easier rather than more difficult for a subject to sue the Crown. To hold that the Act had clothed with immunity from prohibitory proceedings a body which prior to its passing would have enjoyed no such immunity would be to run wholly counter to its spirit. Furthermore, neither principle nor logic would appear to require that a body such as a health board should be granted such a privilege.”

¹¹⁷ See *Davidson v. Scottish Ministers*, 2006 SC (HL) 41 (Tab 30/ MS 2243) per Lord Rodger at 57:

“There is at least some authority to suggest that in Scotland interdict against the Crown was competent before the 1947 Act. But Burn-Murdoch, *Interdict in the Law of Scotland* (p 66), is anything but enthusiastic:

‘Although sheriffs, and public officials, such as even a Secretary of State, are sometimes made respondents to interdicts of procedure, this is rarely appropriate or necessary.’

He rather gives the impression that it was not regarded as good form to seek interdict in such cases.”

¹¹⁸ Article 18 of the Treaty of Union (Tab 45/ MS 2904) is in the following terms:

“(1) That the laws concerning regulation of trade, customs and such excises to which Scotland is by virtue of this Treaty to be liable be the same in Scotland, from and after the union, as in England; and

(2) That all other laws in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain, with this difference betwixt the laws concerning public right, policy and civil government and those which concern private right:

- (i) That the laws concerning public right, policy and civil government may be made the same throughout the whole United Kingdom; but
- (ii) That no alteration may be made in laws which concern private right except for evident utility of the subjects within Scotland” (numbering added).

override the Crown's objection to produce documents on the ground that it would injure the public interest to do so. ...*It may be that the existence of an inherent power in the Court of Scotland provides an ultimate safeguard of justice in that country which is denied to a litigant in England. If so, this House sitting as the final Court of Appeal from the Courts of Scotland will be jealous to preserve it.*" (emphasis added).

5.21 On the position of the Crown in Scotland being subject to the court's ordinary jurisdiction Lord President Hope noted in *Edwards v Cruickshank* (1840) 3 D 282 (Tab 1/ MS 1260) at pps.306–307:

"With regard to our jurisdiction [in Scotland], and the jurisdiction of the supreme courts in every civilized country with which I am acquainted, I have no doubt. They have power to compel every person to perform their duty – persons whether single or corporate; and, *in our noble constitution, I maintain – though at first sight it may appear to be a startling proposition – the law can compel the Sovereign himself to do his duty, ay, or restrain him from exceeding his duty.* Your Lordships know that the Sovereign never acts by himself, but only through the medium of his ministers or executive servants; and if any duty is refused to be done by any minister in the department over which he presides, or *if he exceed his duty to the injury of the subjects, the law gives redress.* In England the court would proceed, according to the nature of the case, by injunction or mandamus, or a writ of *quo warranto*. In this country [Scotland] a person would proceed by action or by petition; and, if he was right, a decree would be passed and would be enforced by ordinary process of law. *If it be necessary for a man to declare his rights against the Crown, he brings his action against the Officers of State representing the Crown; for there is no officer, be he high or low, civil or ecclesiastical, that the law will not compel to do that duty which the law imposes upon him.*" (emphasis added).

5.22 In *R (Bancourt) v Foreign Secretary (No 2)* [2008] UKHL 61 [2009] 1 AC 453 (Tab 32/ MS 2282) Lord Rodger of Earlsferry, after quoting from this passage from *Edwards v Cruickshank*, observed (at § 106):

"Admittedly, the Lord President's understanding of the position of the English courts turned out to be unduly optimistic. But, on Scots Law, on general principle, and on the substance of the matter, he was surely absolutely right."

5.23 Further, the constitutional role and status of the Union Parliament are now rooted in democratic principles ¹¹⁹ and defined by the constitutional traditions of each of the constituent nations of the United Kingdom, notably the Scottish and English constitutional traditions which merged together with the creation of the Union Parliament with the Treaty and Acts of Union of 1707. As Lord Hope has noted:

¹¹⁹ In 2014, giving the judgement of the majority in *Moohan v Lord Advocate* [2014] UKSC 67, [2015] 1 A.C. 901 (Tab 36/ MS 2499), Lord Hodge said:

"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by the curtailment of the franchise or similar device, the common law, *informed by the principles of democracy and the rule of law* and international norms, would be able to declare such legislation unlawful."

“Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the *English* principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

[...]

[E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: Thoughts on the Scottish Union, pp 252-253, quoted by Lord President Cooper in *MacCormick's* case 1953 SC 396, 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.

...

It must never be forgotten that this rule [of recognition] ... depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty... is built upon the assumption that Parliament represents the people whom it exists to serve.”¹²⁰

The dispositive application of this history and its continued relevance to this Appeal

5.24 The contemporary significance, resonance and relevance of this Scottish constitutional tradition - which emphasises that decisions of the Crown are justiciable, that the Crown is subject to the jurisdiction of the court and that if the Crown “*exceed his duty to the injury of the subjects, the law gives redress*” - is obvious to the present Appeal. The Scottish constitutional tradition is that the Crown, and hence the Government, only has such powers as have been granted to it, expressly or by necessary implication, by the people gathered together in a representative assembly, which is to say in this case the Union Parliament.

5.25 But one clear example of an abuse of the limited powers allowed by law to the Crown is an interference in the ability of Parliament to sit to carry out its proper constitutional role. The Claim of Right notes as follows (emphasis added):

“That for redress of all greivances and for the amending strenthneing and preserveing of the lawes Parliaments ought to be frequently called *and allowed to sit* and the freedom of speech and debate secured to the members”.

5.26 So the Claim of Right 1689 makes it *explicit* – as the parallel provision in the English Bill of Rights 1688 does not ¹²¹ - not only that Parliament are to be frequently called but

¹²⁰ *Jackson v. Attorney General* [2006] 1 AC 262 (Tab 29/ MS2177) per Lord Hope at page 303-4 §§ 104, 106

¹²¹ The Bill of Rights Act 1688 (Tab 43/ MS 2891) declares:

once called are not to be impeded by the Crown from *continuing to sit* in order to carry out their business of redressing of all grievances and for the amending strengthening and preserving of the laws.

5.27 By virtue of this fundamental right preserved within the Scottish constitutional tradition, any advice tendered by the Prime Minister to the Queen to prorogue Parliament, with a view to denying before exit day proper Parliamentary consideration of the withdrawal of the United Kingdom from the European Union, is both unconstitutional and unlawful. Parliament exercises authority on behalf of the people. The United Kingdom Government is subject to Parliament. It is well established that it is, therefore, unlawful for the executive branch to take an action that would frustrate an Act of Parliament: *Craig v Advocate General for Scotland* [2018] CSOH 117, 2019 SC 230. It is equally unlawful for the executive to prevent Parliament from acting on an issue of national and/or constitutional importance. The harm in both sets of circumstances is the same: the executive has usurped authority that properly belongs to the people and is properly exercised by parliament.

5.28 To purport to advise the Queen to prorogue parliament in advance of exit day, with a view to denying before exit day any further Parliamentary consideration of the withdrawal of the United Kingdom from the EU, would prevent Parliament from carrying out its proper constitutional function in relation to the terms of exit. The terms of exit are a question of national and constitutional importance. It matters not how Parliament may choose to act in relation to those questions. What is important is that Parliament not be prevented from acting. An executive that prevents Parliament from acting in relation to a matter of national or constitutional importance acts itself without regard for the fundamental basis of authority in the constitution. It is excluding the electorate from control over the government. This cannot be lawful or constitutional.

6. RESPONDENT’S RESPONSE TO THE APPELLANT’S CASE ON NON-JUSTICIABILITY

6.1 When considering justiciability, the court should in principle ask itself two questions:

- (1) Should the court consider this matter (i.e. does it fall into the class of matters that it is constitutionally appropriate for the court to review)?; and

“And that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently”.

- (2) Can the court consider this matter (i.e. does the court have the practical tools at its disposal to answer the question put to it)?

6.2 In the instant matter both questions should be answered in the affirmative.

6.3 This is undoubtedly a matter that the court should consider. Contrary to the Appellant's submissions, prorogation is clearly not a matter of "high policy". The power to prorogue parliament is an administrative power that is properly (and regularly) used for the purely administrative purpose of ending one session of parliament and beginning another. While it is understood that the executive may choose to exercise this power at the most politically advantageous time (the same could be said about almost any administrative power), this does not elevate it to the realm of "high policy".

6.4 The instant matter does not involve the competition for political power or creation of public policy. Rather it is about the exercise of executive power to (whether intentionally or not) alter the balance of power between the executive and the legislature. The prorogation in question prevents the legislature from holding the executive to account in relation to an issue of national and constitutional importance. It is immaterial (at this stage at least) whether that was the intended effect. It is enough that it is the actual effect. It is thus an abuse of an administrative power and clearly, therefore, falls into the class of acts that the courts should review. Indeed, the instant matter falls squarely within the supervisory jurisdiction in that the court is asked to consider the legality of the decision not its merits.

There is no bright line between that which is justiciable and that which is non-justiciable

6.5 The Appellant seeks to draw a bright line between actions of the executive that are justiciable and those which are not. This approach runs counter to both the Scottish and English authorities. The correct approach is that justiciability is a spectrum and is context dependent. This is clear from Lord Roskill's speech in *Council of Civil Service Unions et al v Minister for the Civil Service ("GCHQ")* [1985] AC 374 (Tab 20/ MS 1735). In setting out the classes of executive action that, he said, stood outside the reach of judicial review, Lord Roskill explicitly stated (at page 418) that his list was based on how he was "at present advised". It is evident from passages in the authorities cited by the appellant in the courts below that many of the matters thought by Lord Roskill not to be likely to be subject to the intervention of the courts are now readily regarded as legal matters into which the courts may intervene. The passage from Lord Roskill does not then help the appellant's argument. Indeed, earlier in his speech, he noted that judicial review of executive action is a branch

of public law that has “evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue” (page 414). It is notable (and was noted by the Lord Chief Justice, Master of the Rolls, and president of the Queen’s bench Division in their joint judgement in *R (Miller) et al v the Prime Minister* [2019] EWHC 2381 (QB) at §36) that courts have accepted the justiciability of decisions of the executive relating to the grant of pardons, foreign affairs and national security, all areas in which, when Lord Roskill gave his speech, were considered non-justiciable.

6.6 The scalar nature of the courts’ jurisdiction was made explicit by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at §29:

“As will become apparent, I do not accept the full breadth of the Attorney General’s argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called relative institutional competence. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.”

Lord Bingham’s analysis suggests that the court is entitled to take the justiciability of a question in the round and balance the factors weighing in favour of justiciability against those weighing against.

6.7 The question of whether this matter is justiciable goes to the heart of the constitutional role of the courts as one of the three pillars of government. What, then, is that role? Lord Drummond Young in the Inner House correctly encapsulated the role of the courts as follows:

“The maintenance of the rule of law – determining what the law is and ensuring that it is consistently applied and necessarily enforced – is a primary function of the judiciary.”¹²²

Similarly, Lord President Carloway in *Wightman v The Advocate General for Scotland* found that:

¹²² *Cherry v The Advocate General for Scotland* [2019] CSIH 49 at §101 (Tab 39/ MS1186)

“The courts exist as one of the three pillars of the state to provide rulings on what the law is and how it should be applied. That is their fundamental function.”¹²³

6.8 The appellant seeks to elide the two stages of the exercise of the prerogative power in an improper manner in an attempt to persuade this court that these matters are matters with which this court is ill-equipped to deal. The provision of advice to the Queen and the exercise by the Queen of the power on the basis of that advice are separate. The United Kingdom Government – and indeed the Privy Council – is not the Monarch. The petitioners do not seek to challenge the power of the Queen to prorogue Parliament. The petitioners challenge the lawfulness of the advice given to the Queen by the United Kingdom Government. Such a challenge is entirely justiciable.¹²⁴

6.9 The Queen acts in her constitutional capacity upon her consideration of the advice or recommendation of Ministers of the Crown in right of the United Kingdom, including in particular the Prime Minister. Ministers of the Crown in right of the United Kingdom are, in principle, politically answerable to Parliament as regards the terms of such advice or recommendations.

6.10 But the provision of such advice, or the making of such recommendations, to the Queen by Ministers of the Crown in right of the United Kingdom – and indeed the exercise of any power by the Queen consequent on this advice or recommendation – also remains subject to the restrictions imposed by *law* on the basis that, as we have already noted in the words of the Claim of Right 1689, “the fundamentall Constitution of the Kingdome” is one of a “legall limited monarchy” in which “the Regall power” may not be exercised in “violation of the lawes and liberties of the Kingdome” and which constitution may not be altered into “ane arbitrary despotick power” “by the advyce of Evill and wicked Counsellors”.

6.11 It is clear that the provision of any advice or recommendations to the Queen by Ministers of the Crown in right of the United Kingdom - and the exercise of these powers of the Crown in right of the United Kingdom - may only be carried out in accordance with the laws and with the constitution of the United Kingdom.

6.12 The appellant also seeks to suggest that, because there are seemingly no “judicial or manageable standards”, the entire issue set out in the petition is non-justiciable. The thrust of the argument from the Advocate General appears to be that the government can

¹²³ *Wightman v The Advocate General for Scotland*, 2019 SC 111 (Tab 7. MS 1379) § 21

¹²⁴ *R (Barclay) v Lord Chancellor (No 2)* [2014] UKSC 41 [2015] AC 276 (Tab 34/ MS 2452)

advise the Queen to prorogue Parliament for any purpose and, because there is no benchmark, there is nothing anyone can do about it. Frankly, that is an unsustainable and undemocratic argument. Courts are routinely asked to apply “reasonable” and “objective” and “proportionate” standards. To suggest that, because there is no number of days or other benchmark standard available to the court, the court cannot entertain the idea of determining whether it is lawful for the executive branch unilaterally to shut down the Westminster Parliament to prevent Parliament from holding the United Kingdom Government to account is an argument without any foundation in law, constitutional or otherwise.

6.13 The case law is clear that the lawfulness of advice which given to the Sovereign by Ministers of the Crown and/or Privy Councillors resulting in legal acts by the Sovereign is in principle reviewable by the courts. There is full discussion of this in *R (Barclay) v Lord Chancellor (No 2)* [2014] UKSC 41 [2015] AC 276 (Tab 34/ MS 2452) where the substance of the challenge was to the Convention compatibility of a Channel Islands law.¹²⁵ There is clear precedent for the review of ministerial advice which underpinned a completed Crown prerogative act. It is clear that a prerogative decision may be subject to judicial review¹²⁶ and the ultimate determination will depend on the subject matter.¹²⁷

6.14 Further the decision in *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458 (Tab 18/ MS 1652) is clear precedent to the effect that an effective remedy available to the court in such circumstances is for the courts to order Ministers to give properly-founded legal advice to the sovereign so that the Crown will produce in the exercise of its prerogative the necessary amended decision.¹²⁸

¹²⁵ *R (Barclay) v Lord Chancellor (No 2)* [2014] UKSC 41 [2015] AC 276 (Tab 34/ MS 2452) per Lady Hale at § 58:

“58 As a general proposition, to which there may well be exceptions, I would hold that the courts of the United Kingdom do have jurisdiction judicially to review an Order in Council which is made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom. Hence the Administrative Court did have jurisdiction to entertain this claim.”

¹²⁶ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453 (Tab 32/ MS 2282) at § 106

¹²⁷ *Council of Civil Service Unions v Minister for the Civil Service: re GCHQ* [2015] AC 374 (Tab 20/ MS 1735)

¹²⁸ In *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458 (Tab 18/ MS 1652) Lord Diplock giving the judgment of the Board notes at 473:

“Section 47 (2) expressly provides that a security area proclamation ‘shall remain in force until it is revoked by His Majesty the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament: ...’ The revocation of a security area proclamation is, like its issue,

Distinguishing the authorities on which the appellant relies

6.15 In support of his argument, the appellant relies on a number of authorities – none of which is directly relevant to the matter at hand.

6.16 In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham, held that the government’s decision to that there was a “public emergency threatening the life of the nation”, such as to engage Article 15 ECHR, was a political decision and therefore immune from judicial review. Lord Bingham set out (at §29) why he considered the decision “political”:

“I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen.”

6.17 In *Gibson v Lord Advocate* 1975 SC 136 Lord Keith found that the question of whether a particular Act of the Westminster Parliament conformed to the requirements of the Treaty of Union in being “for the evident utility of the subjects within Scotland” was “a political

a matter that is left by the section to the discretion of His Majesty the Yang di-Pertuan Agong acting in accordance with the advice of the cabinet. In their Lordships' view, however, the discretion whether and when to revoke a security area proclamation is not entirely unfettered. The proclamation is lawful because it is considered by His Majesty the Yang di-Pertuan Agong to be necessary to make an area a security area for the purpose, not of suppressing violence by individuals generally but of suppressing existing or threatened organised violence of the kind described in the section. Once he no longer considers it necessary for that particular purpose it would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain the proclamation in force for some different purpose.

This, however, does not mean, as the defendant would have it, that the security area proclamation can be treated by the court as having lapsed *ipso facto* as soon as there are no longer any grounds for considering it still to be necessary for the particular purpose described in section 47 for which it was originally made. Apart from annulment by resolutions of both Houses of Parliament it can be brought to an end only by revocation by His Majesty the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead.

This, however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32 (1) of the Constitution makes His Majesty the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the cabinet, mandamus could, in their Lordships' view, be sought against the members of the cabinet requiring them to advise His Majesty the Yang di-Pertuan Agong to revoke the proclamation.”

matter” and therefore “no part of the function of the Court (page 144). This was, of course a decision made before the court’s increasing familiarity and use, both within the context of EU law and ECHR law, of the concept of the proportionality of legislation. So this is a decision which might best be understood as confined to its particular time and place.

6.18 In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 (Tab 25/ MS 1950) Lord Bingham noted that the UK constitution contains a degree of flexibility “where constitutional arrangements retain scope for the exercise of political judgement they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude.” This dicta should not be seen, however, as supporting the doctrine of a “free hand” for the executive in certain spheres. First, Lord Bingham described the constitution as “flexible”, not “unlimited”. Second, Lord Bingham did, in fact, go on to rule on the limits of the Secretary of State’s powers in *Robinson*. It is no part of the Petitioners’ case that the executive is rigidly bound in its exercise of the power to prorogue, rather that it is a power that must be exercised within certain limits. In this way, the Petitioners’ case is entirely consistent with *Robinson*.

6.19 The appellant seeks, in particular, to pray in aid the case of *Shergill v Khaira* [2015] AC 359 (Tab 37/ MS 2530). This case is a decision about the appointment of trustees to a religious charity. Its factual context could scarcely be further from the circumstances which required this petition to be brought. Beyond that, the passage cited in authority by the respondent in the courts below is a comment on the United States Supreme Court’s approach to what is justiciable. It needs hardly to be said that the constitutional tradition and the form of government in the United States is worlds apart from the constitutional tradition and form of government in the United Kingdom. What the federal courts in a country ruled by a federal constitution view as being justiciable has very little (if anything) to do with this case. Far from being an authority for the proposition proffered by the respondent, it is – when properly read – an entirely irrelevant comment. *Shergill* should be given no weight by the court in reaching its determination. In *Shergill v Khaira* [2015] A.C. 359, Lords Neuberger, Sumption, and Hodge (in a joint judgement) set out two classes of matter that are non-justiciable:

“The first category comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. Cases in this category are rare, and rightly so, for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The paradigm cases are the non-justiciability of certain transactions of foreign states and of proceedings in Parliament.

- The first is based in part on the constitutional limits of the court's competence as against that of the executive in matters directly affecting the United Kingdom's relations with foreign states. So far as it was based on the separation of powers, *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 935—937 is the leading case in this category, although the boundaries of the category of states which will engage the doctrine now are a good deal less clear today than they seemed to be 40 years ago.
- The second is based on the constitutional limits of the court's competence as against that of Parliament: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321. The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable. Where the non-justiciable issue inhibits the defence of a claim, this may make it necessary to strike out an otherwise justiciable claim on the ground that it cannot fairly be tried: *Hamilton v Al Fayed* [2001] 1 AC 395.

The basis of the second category of non-justiciable cases is quite different. It comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Examples include

- domestic disputes;
- transactions not intended by the participants to affect their legal relations;
- and issues of international law which engage no private right of the claimant or reviewable question of public law.

Some issues might well be non-justiciable in this sense if the court were asked to decide them *in the abstract*. But they must nevertheless be resolved if their resolution is necessary in order to decide some other issue which is in itself justiciable. The best-known examples are in the domain of public law. Thus, when the court declines to adjudicate on the international acts of foreign sovereign states or to review the exercise of the Crown's prerogative in the conduct of foreign affairs, it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). As Cranston J put it in the latter case, at para 60, there is no domestic foothold. *But the court does adjudicate on these matters if a justiciable legitimate expectation or a Convention right depends on it: R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76. The same would apply if a private law liability was asserted which depended on such a matter. As Lord Bingham of Cornhill observed in *R (Gentle) v Prime Minister* [2008] AC 1356, para 8,

‘there are issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it. The defendants accept that if the claimants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude.’

But the circumstances of this petition fall into neither of the *Shergill* categories. Therefore, not only is the section of the decision that is relied upon by the respondent not authority for the proposition offered by him, the two categories (albeit under English law)

of matters said to be the two categories of non-justiciable matters do not in either case encompass the matters set out in the petition.

6.20 In *Wheeler v Office of the Prime Minister* [2008] EWHC 1409 (Admin) (Tab 12/ MS 1460), the Divisional Court considered whether the prime minister's promise to hold a referendum on the EU Constitutional Treaty generated a reasonable expectation that a referendum would be held on the Lisbon Treaty. The case turned, in part, on whether those two agreements were materially the same. The court found that it could rule on the factual differences between those two treaties. It could not, however, rule on the materiality of those factual differences because the relative importance of these differences was a political rather than legal judgment.

6.21 Reference has also been made by the Appellant to *McClellan v First Secretary of State* [2017] EWHC 3174 (Tab 14/ MS 1510). In that case Sales LJ refused permission for judicial review because the "political context" of the agreement meant that no standard could be applied to the actions of the parties. *McClellan* is not on point in the instant matter at all because it did not concern the exercise of executive power. It was an agreement between two parties in the House of Commons to cooperate so that they may be in a position to exercise executive power. The act under review was, therefore, prior to any of the actors ever having the opportunity to wield executive power. In any case, it was an agreement to act within the confines of Parliament and, therefore, subject to parliamentary privilege. The instant matter concerns the exercise of executive power by an executive in situ. This is an entirely different situation to that considered in *McClellan*.

6.22 All of these cases involved the competition for power and the exercise of power (i.e. public policy) and, in all of these cases, Parliament was both the primary forum for competition for power (even during a general election the aim is to win the most seats in parliament) and on hand to hold the executive to account for in its exercise of power. By contrast, in cases that involve the misuse of power fall within the courts' jurisdiction

6.23 As Lord Roskill put it in *GCHQ (Tab 20/ MS 1735)*, judicial review is for "the purpose of controlling what would otherwise be unfettered executive action whether of central or local government." (p. 414). The courts on both sides of the border have been clear that, where one branch of government is attempts to exercise its power to alter the balance between itself and the other branches of government, the courts are entitled to determine the lawfulness of that act. In *R(Jackson) v Attorney General* [2006] 1 A.C. 262 (Tab 29/ MS 2177) [§102], Lord Steyn considered the role of the courts if parliament was to step beyond its constitutional boundaries:

“If the Attorney General is right the Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we may have to come back to the point about the supremacy of Parliament.

We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame* decision made that clear. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998, created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction.

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.”

6.24 In *Moohan v Lord Advocate* [2014] UKSC 67 (Tab 36/ MS 2499) [§35] Lord Hodge, with whom Lord Neuberger PSC, Lady Hale DPSC, Lord Clark, and Lord Reed agreed) said:

“I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by curtailment of the franchise or similar device, the common law, informed by the principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful.”

6.25 While the instant matter concerns an overreach by the executive, rather than Parliament (as was considered in *Jackson* and *Moohan*), the same principles must apply (it cannot be right that the courts will apply a more stringent scrutiny to parliament than the executive, to do so would run contrary to the principle of democracy). There is no fetter on the prerogative to prorogue parliament (the matter of the NIFEA will be dealt with below). The government has used this unfettered power to give itself further unfettered power by unchaining itself from the scrutiny of parliament during the final stages of negotiation with the EU. While in the cases above, there has been no need for the court to intervene because parliament was there to hold the executive to account for public policy matters, in this case parliament will not be able to hold the executive to account because parliament will not be sitting.

6.26 The appellant essentially seeks to rely on his own misfeasance in pleading this case on justiciability. Public policy is not justiciable because the executive is held to account by parliament. By its very nature, this prorogation limits (indeed almost eliminates) parliament's ability to hold the executive to account. Yet the executive still seeks to benefit from the freedom from judicial scrutiny that it would enjoy were parliament sitting. The only result of the Respondent's case is that the executive will have carved out for itself a significant sphere in which it can act without accountability. If the executive can use the prorogation power to carve out for itself scrutiny free windows, and do so without any accountability, then the balance of power between the three branches of government is fundamentally altered.

6.27 The appellant then seeks to rely on the *GCHQ* case¹²⁹. It seeks to do so under the same mischaracterisation discussed above – namely that the petitioners are seeking to challenge the use by the Queen of a prerogative. The petitioners seek to do no such thing. Lord Diplock does not say that there are no such circumstances in which the advice given to the Queen in anticipation of the exercise of a prerogative power and, in any event, he is discussing the English tradition of judicial review and says nothing about the scope of judicial review in Scotland. After the permission decision of the Inner House in *Wightman (No. 1)*,¹³⁰ it is not at all clear that the words of Lord Diplock in *GCHQ* bear any weight whatsoever in Scotland and still less in circumstances such as these where the executive seeks to abuse the power in its hands to advise the Queen in order to strip the legislature of its constitutional role of holding the executive to account.

6.28 But in *A v Secretary of State for the Home Department* [2005] AC 68 at § 42 Lord Bingham of Cornhill in the House of Lords says this:

“It follows from this analysis that ... the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts.

¹²⁹ *Council of Civil Service Unions v Minister for the Civil Service: re GCHQ* [1985] AC 374 (Tab 20/MS1735)

¹³⁰ *Wightman v The Advocate General for Scotland* [2018] CSIH 18, 2018 SC 388 per Lord President Carloway at §30:

“Whether such guidance falls within the proper scope of judicial review raises yet another issue. However, that scope is wide and, returning to the cautionary words in *EY v Secretary of State for the Home Department*, 2011 SC 388, the law is always developing and, in certain areas, it can do so quickly and dramatically. The scope of judicial review of Government policy may be one such area, at least where no issue of questioning what is said in Parliament arises.”

It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.

The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. ... As Professor Jowell has put it in "Judicial Deference: servility, civility or institutional capacity?" [2003] *Public Law* 592, 597

‘The courts are charged by Parliament with delineating the boundaries of a rights-based democracy’

What is meant by “political”?

6.29 The Appellant seeks to portray a “political” issue as anything to do with politics.

This is clearly the wrong approach. Almost any decision of the Executive will have a political hue and the decisions of the courts in the sphere of public law will, to a greater or lesser extent, often have political impacts. It is trite law that this is acceptable. The correct reading of the authorities on justiciability is that matters of political policy are non-justiciable where they require the court to determine matters of involving the competition for political power or the making of public policy. Constitutional conventions fall into this class because they are, in essence, the agreements made between the competing parties. The court is, for obvious reasons, not equipped to make decisions about public policy, that is the proper role of the executive as held to account by the legislature. By contrast, the court is equipped to determine whether power, once won, is exercised properly. The instances in which the courts have declined to review a “political” issue all fall into the former class.

6.30 This petition is not about public policy; it is about the distinct roles and balance between the three arms of government in the United Kingdom. It is about the separation of powers. The executive’s actions that brought about this petition sought unlawfully to place the executive above the legislature. The three arms of government exist in order to hold one another to account. In these circumstances, as set out in the petition, it is for the courts, as the master of the law, legally to hold to account the executive and tell it where the limits of its power lie. It is the very essence of the rule of law, the preservation of which is the principal constitutional role of the courts.

6.31 Separately, in the cases cited by the appellant, the suggested “more appropriate” way of determining the issues is by the debate of the issues in Parliament. The petitioners could not agree more and seek only to have this court perform its constitutional role to allow

such debate to be possible and therefore agree with the decision of the Inner House. Parliamentary debate is not possible if the executive is permitted to advise the Queen to shut it down whenever it suspects that it will not like the outcome of the debate. As the appellant was at pains to say in the courts below, Parliament is the master of its own proceedings and it should be given the opportunity to master those proceedings instead of having that opportunity removed from it by the executive for the purpose of avoiding political accountability. The petition does not seek the intervention of this court in determining *what* Parliament should decide; it seeks only that Parliament be given the opportunity *to* decide. The respondent seeks to argue at the same time that (i) the courts cannot intervene because it is political and (ii) the executive is permitted with impunity to eliminate political accountability. The executive seeks to exercise unlimited power without any accountability or sense of responsibility. That is not democracy. The exercise of power must be carried out lawfully. It is not for one branch of government to seek to game the system to gain an advantage in the competition for power. If and when it seeks to do so – as the executive seeks to do here – the courts must intervene. In the absence of political accountability from Parliament, the courts must hold the executive legally accountable, the courts must preserve the rule of law and the courts must redress the balance of power among the branches of government.

6.32 In the courts below, the Appellant argued that

“within this sphere or jurisdiction over which Parliament has control of the executive to the exclusion of the courts fall matters such as the dissolution and prorogation of Parliament”.

No authority is cited for such a proposition and that is notable, given the tangentially relevant authorities (incorrectly) cited for other propositions. It is not for the courts to prorogue Parliament; nobody is arguing that. But it absolutely is for the courts to set the legal limits within which the power to prorogue Parliament may lawfully be exercised.

Improper Purpose/Bad Faith

6.33 While it is more difficult for the courts to determine the intended purpose of prerogative powers than in the case of statutory powers, for the reasons set out above, it is not possible that any form of power may be exercised for a purpose that runs contrary to constitutional principle. In *Miller (No. 1)* (Tab 39/ MS 2596), for example, it was held at §45:

“The Crown’s administrative powers are now exercised by the executive, *i.e.* by ministers who are answerable to the UK Parliament. However, consistently with the

principles established in the 17th century, *the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do.*"

6.34 Further, where the executive's purpose in exercising a power is something other than the public good then the act will be unlawful. As Lord Denning MR held in *Laker Airways v Department of Trade* [1977] QB 643 at §705, albeit within the context of the English constitutional tradition:

Much of the modern thinking on the prerogative power of the executive stems from John Locke's treatise on the *True End of Civil Government*, which I have read again with much profit, especially chapter 14, "Of Prerogative" (1764 ed.), pp. 239-348. It was the source from which Sir William Blackstone drew in his *Commentaries*, vol. I, 8th ed. (1778), p. 252; and on which Viscount Radcliffe based his opinion in *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] A.C. 75, 117-118.

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

'For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.'

6.35 In *R (C) v Secretary of State for Communities and Local Government* [2000] 1 FCR 471, Hale LJ (as she then was) cited with approval (§23) Professor Wade's analysis:

"These considerations call to mind some further words of Professor Wade, cited by Laws J. in *Fewings Case*:

'The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish ... This is unfettered discretion. But a public authority may do none of those things unless it acts reasonably and in good faith and on lawful and relevant grounds of public interest... The whole conception of an unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.'

6.36 Where the power may have been exercised for more than one purpose the correct approach is to determine the dominant purpose (sometimes referred to as the "main

purpose” or “primary object”) (*Westminster Corporation v London and North Western Railway Co.* [1905] A.C. 426, HL, p. 433; *R (Richards) v Pembrokeshire County Council* [2004] EWCA Civ 100, [2005] LGR 105, §44). Similarly, prerogative powers must be exercised in “good faith” (*R(C)*, above).

6.37 In this Appeal, the Appellant contends that the Inner House erred in law in:

- (1) Having regard to the reasons for which the Prime Minister advised that the Order in Council of 28 August 2019 be made;
- (2) Alternatively, in concluding that the reasons:
 - (i) Were not based on legitimate political considerations;
 - (ii) Stymied political debate to an unlawful extent;
 - (iii) And that, during recess, parliament could reconvene at any time.

6.38 The first ground is easily disposed of. It is clear from the above that the court was entitled to take the reasons for the Prime Minister’s decision into account. If courts cannot take the reasons for decisions into account, then they cannot rule on whether a power has been used for a proper purpose or in good faith.

6.39 As to the second, all three judges of the Inner House found that the dominant purpose of prorogation was to prevent parliament from holding the government to account at a crucial time for the following reasons:

- The prorogation was sought “in a clandestine manner” at a time at which the litigation seeking to determine the legality of prorogation was extant.
- Prorogation was sought in the context of a discourse, in which it was suggested that parliament, which might otherwise seek to prevent a “no deal” Brexit, might be stymied in that attempt by simply allowing time to run out (and the operation of Article 50 TEU to take effect).
- There was “remarkable little” said about the reasons for prorogation in the executive’s pleadings. Although the court did not require an affidavit, it would expect averments.
- There was no practical justification for the extraordinary length of the prorogation.

6.40 The Inner House's conclusion was clearly right. The documents disclosed by the government were of little value in determining the reasons for prorogation. The documents dated 23 August 2019 and 28 August 2019 both record information generated well after the decision to prorogue parliament had been taken. They discuss purely presentational matters.

6.41 The document dated 15 August 2019 gives only the reason that "The current session is the longest since records began, and all the bills announced as part of the last Queen's Speech have now received Royal Assent, or are paused awaiting carry over into the next session: this makes it increasingly difficult to fill parliamentary time with anything other than general debates." The Prime Minister has since said that the intention behind prorogation was to facilitate a new Queen's Speech to begin the government's new legislative agenda. None of these reasons withstand scrutiny:

- The fact that this session has lasted a considerable amount of time is neither here nor there. There is no formal requirement to begin new sessions regularly, it is mere tradition.
- Neither is it necessary to hold a Queen's Speech to begin a new legislative agenda. The government is not prohibited from introducing bills that were not in the Queen's Speech and there were a number of other opportunities, such as the Chancellor's Autumn Statement, which could have served the purpose of announcing a legislative agenda.
- A significant number of important bills did not become law as a direct result of prorogation. These included the Domestic Violence Bill and the Immigration Bill. It was misleading, therefore, to suggest that the government did not have any legislation with which to fill parliamentary time.
- Even the fact that the session would, at some point, need to be prorogued does not justify prorogation at this time. Prorogation is within the gift of the government. There is no reason that the government could not have delayed prorogation so as to ensure that its legislative programme reached the statute book.

6.42 Even if prorogation was necessary for any of the government's stated objectives, the same effect could have been achieved with a prorogation lasting a matter of days (as is usual practice). The government has not adduced any justification for a prorogation of the length of the instant prorogation. This should be set against the

evidence that points to the conclusion that the real reason behind the government's action is to avoid the scrutiny of parliament:

- Several members of the government have, before this prorogation, publicly discussed the utility of proroguing parliament so as to prevent it from holding the government accountable for its conduct of Brexit negotiations.
- The Prime Minister, when asked, on several occasions, to rule out proroguing parliament to prevent MPs from holding the government accountable, refused to do so.
- The length of prorogation is only of utility if the government's aim is to prevent parliament from holding it accountable during a crucial period of Brexit negotiations.

6.43 Although parliament was able, in the short time left to it, to pass some legislation with the aim of avoiding a “no-deal” Brexit, it has nonetheless been stymied from holding the government to account since prorogation. The practical effect of prorogation has been to prevent parliament from holding the government to account for its conduct of Brexit negotiations.

6.44 The Appellant's grounds are further problematic in that :

- (1) They set up a straw man in suggesting that the Inner House made its decision on the basis that prorogation would stymie political debate. This is not correct. The conclusion was reached because prorogation has stymied parliamentary scrutiny and accountability.
- (2) They further suggest that there is somehow a “lawful extent” to which the government is entitled to use its powers to stymie parliament. This is clearly wrong. Any use of the government's powers with the purpose of undermining parliamentary sovereignty, accountability, and the rule of law would be unlawful.
- (3) They wrongly suggest that parliament cannot choose whether it goes into recess over the conference period. This is a matter of fact.

Parliamentary Sovereignty

6.45 It is a matter of fact that the practical impact of proroguing parliament is to prevent it from scrutinising the work of the executive and legislating during the period of

prorogation. During the period of the instant prorogation, the government will conduct negotiations with the EU as to the terms of the UK's exit from the EU. As international and EU law currently stands, the UK will leave the EU on 31 October 2019 by operation of law. Once the UK has left the EU it cannot be re-admitted save as a new member. Parliament cannot legislate to alter these facts after the UK leaves the EU.

6.46 The practical effect of the government's action is, therefore, to create a 5-week "accountability free" period for itself. During this period, it will take decisions which will have irreversible constitutional implications. While parliament will return before 31 October, this will be for a short period (much of which will be taken up with the Queen's Speech and accompanying formalities and debates). Even in the best-case scenario, therefore, the effect of this prorogation is to curtail parliament's ability to scrutinise the executive. The court is not asked to find that there is some "appropriate period" for which parliament can be prorogued. It is asked to find that (a) the period for which it has been prorogued has the effect of limiting its ability to hold the executive to account, and (b) there is no rational justification for a prorogation for this length of time (submissions on which below). If the court finds both propositions, then it cannot be lawful for the executive to avoid scrutiny in this way.

6.47 It has been suggested that the court may wish to reason backwards from the hypothetical questions of whether a prorogation lasting two years would be lawful. While no point is taken against such an approach, it is unnecessary. The Appellant's case is that the executive should be able to prorogue parliament, whenever it wants, without accountability to the courts. Even if the Appellant's case was limited to periods of prorogation lasting no more than five weeks, this would still be unconstitutional and unlawful. If the power of the executive extends to proroguing parliament for periods of five-week periods, whenever it desires, then the executive can simply send parliament away whenever it becomes inconvenient. This means that parliamentary sovereignty is subject to the executive permitting parliament to sit and exercise that sovereignty. Such an interpretation runs absolutely counter to the established principles of the constitution.

6.48 It is no answer for the Appellant to say, as he did in the Inner House, that the fact that parliament passed the European Union (Withdrawal) (No. 2) Act 2019. As Lord Brodie pointed out in the Inner House "even if Parliament is to be given the opportunity to "make clear its views" that does not mean that it is intended that it should have the opportunity to do anything about them" (Tab 39/ MS 1186) [§89].

6.49 Similarly, it is no answer to say that "parliament has the power to regulate when it sits". First, this is a misstatement of the situation. Parliament has the power to regulate when

it goes into recess. Prorogation is a prerogative power exercised by the government. Second, parliament cannot legislate its way out of prorogation if it is already prorogued. Even if one takes the view that parliament could have legislated to avoid prorogation in the four days in which it sat between the announcement of prorogation and prorogation itself, then it must still be accepted that the actions of the government made it significantly more difficult for parliament to do so than it would otherwise have been.

6.50 The Inner House judgment accurately notes a significant concession made to it on behalf of the Appellant in the course of the oral submission in response to questioning from the courts. As Lord Drummond Young at § 103

“103. When pressed on the meaning of the expression ‘non-justiciable’, counsel for the respondent conceded that in some circumstances the court might hold that the power to prorogue Parliament had not been validly exercised: for example, if Parliament were prorogued for two years, or if the governing party lost its majority at a general election and immediately thereafter attempted to prorogue Parliament. In my opinion that concession was properly made. What the concession acknowledges, however, is that the power to prorogue Parliament is subject to judicial review by the courts....”

6.51 Given that it is common ground that the courts have power to intervene in those circumstances, then the matter cannot be non-justiciable as the Advocate General seeks to argue. Rather, the matter is clearly – and necessarily – justiciable as part of the overarching constitutional role of the courts in the United Kingdom of preserving the rule of law. Lord Drummond Young in the Inner House was equally correct to find as follows (at §102):

“The rule of law requires that any act of the executive, or any other public institution, must be liable to judicial scrutiny to ensure that it is within the scope of the legal power under which it is exercised. The boundaries of any legal power are necessarily a matter for the courts, and the courts must have jurisdiction to determine what those boundaries are and whether they have been exceeded. That jurisdiction is constitutionally important, and in my opinion the courts should not shrink from exercising it. Consequently, if the expression “non-justiciable” means that the courts have no jurisdiction to consider whether a power has been lawfully exercised, it is a concept that is incompatible with the rule of law and contrary to fundamental features of the constitution of the United Kingdom.”

6.52 It is too broad and too blunt a proposition to say that any matter that has a political consequence must, as a result, lie outwith the competence of judges.¹³¹ Yet that is exactly what the Appellant now seeks to argue. The scope of justiciability is moveable, moving and amenable to change over time. There is a sliding scale in which the cogency of the justification

¹³¹ Cf: *Justiciability*, Lord Mance, 40th Annual FA Mann Lecture at Middle Temple Hall, London, 27th November 2017 (Tab 67/ MS 3073)

required for interfering with a right will be proportionate to its perceived importance and the extent of the interference.¹³² Matters should be determined on a case by case basis. It is not the nature of an action that the court is interested in, it is its intended effect. Where the intended effect of an action by the executive is to silence political accountability by shutting down parliament so as to upset the balance of power, the courts should – and must – be interested. This is an egregious case where there is a clear failure to comply with generally accepted standards of behaviour of public authorities.¹³³

6.53 There is in any event a clear standard by which the actions of the government are to be legally judged: do the actions of the government undermine the sovereignty of Parliament? If the answer to that question is yes, the government has acted unlawfully, it has overstepped its powers and it is for the courts to intervene, to inform the government of the limits to its power and place it back on the right side of the line by the pronouncing of an effective remedy.

This appeal is taken under and governed by Scots law

6.54 This is a judicial review brought in Scotland under Scots constitutional law and subject to the scope of the supervisory jurisdiction of the Scottish Courts. The scope and availability of judicial review in England & Wales is of little assistance to this court in determining whether this application ought to be heard. A Scottish court determining matters according to Scots law, and indeed this court determining appeals coming from Scotland, is bound to decide matters by reference to relevant Scottish precedent and principle in determining the scope of its supervisory jurisdiction and not prefer authorities and textbooks from other jurisdictions in our Union polity. This of course was precisely what Parliament intended when it enacting the provisions of Section 41(1) and(2) of the Constitutional Reform Act 2005 in the following terms:

“41 Relation to other courts etc.

(1) Nothing in this Part is to affect the distinctions between the separate legal systems of the parts of the United Kingdom.

¹³² *Pham v Secretary of State* [2015] UKSC 19 [2015] 1 WLR 1591 (Tab 38/ MS2556) at §§105-106

¹³³ Cf: Wilberg & Elliott, *The Scope and Intensity of Substantive Review* (Hart, 2015), chapter 14: *Crown Powers, the Royal Prerogative and Fundamental Rights* per Sales LJ (as he then was)

(2) A decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom.”

6.55 This is a matter of sufficient constitutional importance that it falls within the supervisory jurisdiction. In Scots law the proper starting point for the court is not “does this matter, prima facie, fall within the supervisory jurisdiction” but rather, “does the court’s constitutional role, as the guardian of the rule of law, require it to exercise its supervisory jurisdiction in this matter?” [*Wightman*, §67; *Taylor*, §15, *Moohan*, §35]. Given that the instant matter goes to the heart of the constitutional balance between the executive and legislature, Lord Drummond-Young, in the Inner House, was right to conclude [§§104-105]:

“104. ... Nevertheless, standards of review are flexible, and in appropriate circumstances it would be possible for a court to hold that a decision by the executive to exercise a prerogative power is one that no reasonable person in that position could exercise: see, for example, *Pham v Home Secretary* [2015] 1 WLR 1591, in particular at paragraphs [105]-[107]. For present purposes, it is not necessary to go so far; it is sufficient to hold that the court has jurisdiction to consider whether the exercise of a power, including a prerogative power, is ultra vires, or whether such a power is used for a purpose that is objectively outwith its intended scope.

105. Counsel for the respondent submitted that the court should not interfere with the present decision to prorogue Parliament on the ground that it amounted to “high policy”. The expression “high policy” has not, so far as I am aware, been judicially defined; it has been used in a number of cases, but generally as a convenient label in a case where the court considers that the executive decision in question is too political for the court to interfere with. The court must not stray into the political aspects of any executive decision, especially one in exercise of the prerogative, but in my opinion, it must still apply legal standards in the manner described in the last paragraph.”

6.56 The instant matter also falls within the class of matters that the courts *can* review. The Appellants claim that the Inner House erred in finding that “there were judicial and manageable standards by reference to which the court could review the exercise of the prerogative to prorogue parliament”. This is clearly wrong. The Inner House identified clear judicial standards by which to judge the executive’s actions and those standards are clearly supported in law:

- The Lord President applied “the principles of democracy and the rule of law” which flow from the common law [§51]
- Lord Brodie similarly applied a common law standard, asking himself whether the instant matter fell into the class of “egregious cases where there is a clear failure to comply with the generally accepted behaviour of public authorities” and whether

the power had been used for a proper purpose [§91]. Lord Brodie further held that the question of whether an administrative act fell into the class of “egregious” required the court to balance the strength of the justification for the executive’s action against the impact of that action. While Lord Brodie quoted Lord Sumption’s formulation of a balance between “justification” and “rights” (*Pham v Secretary of State* [2015] UKSC 19 (Tab 38/ MS 2556), §§105-106) with approval, the balance that he applied was between justification and interference with constitutional principle.

- Lord Drummond-Young similarly asked himself whether the exercise of the power to prorogue was one that no reasonable person could exercise, and whether it had been exercised for a proper purpose [§104]

6.57 The Inner House applied traditional public law standards of review by reference to constitutional principles. The court was clearly entitled to reach this conclusion. Contrary to what has been argued, it is not necessary for the courts to determine the length of time necessary for parliament to hold the government to account. It is sufficient for the courts to conclude that the prerogative power was either exercised for an improper purpose, in bad faith, or achieved an unlawful effect. Given the arguments before the Inner House, it would also have been entitled to conclude that prorogation frustrated the intention of parliament as expressed in section 13 of the 2018 Act and/or the consent of parliament is required if the UK is to leave the EU without a withdrawal agreement.

6.58 It is no answer to say that, because Parliament has the power to legislate with regard to prorogation, the court cannot have jurisdiction. First, this is a patently absurd argument because parliament has the power to legislate for whatever it wishes. The logical conclusion of the argument is to eliminate the court’s public law jurisdiction. Second, the fact that parliament has legislated, in the Northern Ireland (Executive Formation) Act 2019, to return on certain dates has no bearing on the instant matter. That Act is relevant only to consideration of attempts to form an executive in Northern Ireland, is has no relevance to parliament’s ability to hold the government to account beyond that.

6.59 The right approach to justiciability is to ask whether the action of the executive undermines fundamental constitutional principles. If that question is answered in the affirmative, then the court will consider how best to exercise its supervisory jurisdiction in that context. The Inner House was right to conclude that this brought the instant matter within the realm of justiciability. Lord Carloway, for example, was right to conclude [§51]:

“The contention is that the reasons which have been proffered by the PM in public (to prepare for a new legislative programme and to cover the period of the party conferences) are not the true ones. The real reason, it is said, is to stymie Parliamentary scrutiny of Government action. Since such scrutiny is a central pillar of the good governance principle, which is enshrined in the constitution, the decision cannot be seen as a matter of high policy or politics. It is one which attempts to undermine that pillar. As such, if demonstrated to be true, it would be unlawful. This is not because of the terms of the Claim of Right 1689 or of any speciality of Scots constitutional law, it follows from the application of the common law, informed by applying “the principles of democracy and the rule of law” (*Moohan v Lord Advocate*, 2015 SC (UKSC) 1, Lord Hodge at para [35]).”

6.60 In the instant matter the effect of the government’s action is to prevent or limit parliament in scrutinising the actions of the executive at a time of crucial importance for the country. This runs contrary to both the sovereignty of parliament and the rule of law and it is therefore appropriate for the court to exercise its supervisory jurisdiction.

6.61 The fact that the power to prorogue is a prerogative nominally exercised by the monarch is of no consequence in Scots law. Ultimately, this is a Scottish petition that has been determined by a Scottish court, seeking to apply Scottish precedent and constitutional tradition. It was quite clearly and properly observed in the First Division’s judgment in *Wightman v The Advocate General for Scotland* that

“Frequently the answers to legal questions may have political consequences, but that fact cannot absolve the court from its duty to consider and, if possible, answer those legal questions”.¹³⁴

It cannot properly be said that a determination of the scope and purpose of a power entrusted to a branch of government is anything other than a legal question and therefore entirely, squarely and undoubtedly within the jurisdiction of this court. A matter having a political consequence is not the same as a matter being political. It is a false equivalence to suggest otherwise.

6.62 The Advocate General argued in the courts below that it would be “astonishingly inconvenient” if Scots law were to be different from English law. This is in itself an astonishing claim for anyone to make in Scottish litigation. We are dealing with distinct jurisdictions and, inconvenient as it may be, sometimes the laws in those jurisdictions differ resulting in different legal treatments north and south of the border. The United Kingdom is not a unified single jurisdiction with harmonised laws. Where those laws

¹³⁴ *Wightman v The Advocate General for Scotland (No. 2)*, 2019 SC 111 (Tab 7/ MS 1379) per Lord Menzies at §41

diverge – as often they do – those differences must be respected. Common principles are not the same as legal harmonisation.

6.63 All three judges in the Inner House found the issues raised by the petition to be justiciable in accordance with Scots law. They were correct to do so. Their unanimous reasoning is legally sound and there is no basis on which to argue that they have erred in reaching the determination that they reached. The issues raised by the petition are justiciable, and the appeal insofar as suggesting otherwise should be refused.

European Union (Withdrawal) Act 2018

6.64 Had the Inner House not found that the prorogation was unlawful on the petitioners' first ground, it would have been entitled to reach the same conclusion on the second and third grounds. As to the second ground:

- The prorogation of the Westminster Parliament in advance of Exit Day would frustrate the will of the Westminster Parliament as expressed by sections 13 and 20 of the European Union (Withdrawal) Act 2018.

6.65 Section 13 of the 2018 Act requires that, before any agreement on the terms of the United Kingdom's exit from the European Union can be ratified, (i) the agreement must be placed before both Houses of Parliament, (ii) the agreement must be approved by a resolution of the House of Commons and debated by the House of Lords, and (iii) a further Act of Parliament must be passed which provides for the implementation of the agreement.

6.66 Section 20 of the 2018 Act permits a Minister of the Crown to amend the date of Exit Day by regulation. Any such regulation is subject to annulment by resolution by either the House of Commons or the House of Lords (2018 Act, schedule 7, para 14).

6.67 Accordingly, sections 13 and 20 expressly require the scrutiny of the Westminster Parliament of the terms and timing of the exit of the United Kingdom from the European Union. Any advice from any Minister of the Crown to Her Majesty the Queen to prorogue the Westminster Parliament in advance of Exit Day would frustrate this intention. In such circumstances, the terms of section 13 of the 2018 Act could not be fulfilled. Parliament would not be able to consider the terms of any agreement with the European Union. Parliament's intention, as expressed by section 13, would accordingly be irreversibly frustrated. In such circumstances, the terms of section 20 of the 2018 Act would also be frustrated. It is possible for a Minister of the Crown to make regulations during a period

of prorogation. Any such regulations would be laid before the Westminster Parliament when it returns after the period of prorogation. If Exit Day were to be moved to a date during a period of prorogation, the regulation would not be laid before the Westminster Parliament until such time as Exit Day had passed and the matter, as a *fait accompli*, would be irreversible. Parliament's intention that the regulation should be subject to the scrutiny of the Westminster Parliament would accordingly be frustrated.

6.68 Any action by the executive branch that frustrates the will of Parliament is unlawful (*R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61 (Tab 39/ MS 2596)). The prorogation of the Westminster Parliament or any attempt to do so in advance of Exit Day would clearly frustrate the will of Parliament as expressed by sections 13 and 20 of the 2018 Act as set out above. It would, therefore, be unlawful.

Parliament's Consent Required for "No Deal" Brexit

6.69 The Executive's exercise of the power of prorogation in the present case is vitiated by error in law, because it is wrongly predicated on the idea that the Executive has the authority to cause or allow the United Kingdom to leave the European Union on the basis of no deal.

6.70 As a matter of *UK constitutional law*, *Miller I* before this court (correctly) determined that

- (i) EU law could be regarded as a direct source of individuals' rights, whether or not mediated through national primary or secondary legislation
- (ii) the Crown has no inherent power to diminish or attenuate or remove the substantive rights of individuals.
- (iii) if individuals EU law derived rights were to be removed or altered or diminished by Crown action (or omission) this could only be done lawfully and constitutionally if the Crown was expressly authorised/empowered by Parliament by enacting a statute to this effect.

6.71 The majority of this court in *Miller I* however proceeded on the misapprehension (because it was the joint position of the parties) that *as a matter of EU law* the act of notification by a Member State under Article 50(2) TEU of its intention to withdraw was an irrevocable act and therefore could be treated for the purposes of UK law as the

commencement of a process which would inevitably lead to the loss of individuals' EU law rights. It was on that basis that the majority concluded that a statute was necessary as a matter of UK law to authorise notification as a matter of EU law. They were wrong on that. Lord Carnwath in the minority in *Miller I* had the better and correct analysis on this point, namely that there was nothing inevitable re diminution of rights following from notification since there would be up to 2 years of negotiations before one actually knew what the specific consequences of withdrawal would be for individuals EU law rights.

6.72 *Wightman* in the CJEU (Tab 41/ MS 2761) confirmed Lord Carnwath's analysis in the minority judgment in *Miller I* – in particular his skepticism of the accuracy or usefulness of the analogy that notification under Article 50 TEU was the equivalent of pressing the trigger on a gun and releasing a bullet - to be the more soundly based in its holding that there was nothing irrevocable or inevitable re its effect on individuals' rights about the Article 50 notification which could be unilaterally withdrawn at any time while the UK remained a member State.

6.73 Applying the CJEU *Wightman* analysis to the proper interpretation of the EU (Notification of Withdrawal) Act 2017 that Act can now be seen as doing nothing more than authorising the Crown to open negotiations for withdrawal. What it did not authorise was the Crown to diminish or take away individuals EU law rights. No blank cheque - indeed no cheque of any sort - was given by Parliament to the Executive in passing the 2017 Act with the wording it did.

6.74 And nothing in of the European Union (Withdrawal) Act 2018 gives the necessary legislative authority for any no deal Brexit. All that Section 1 says is that Parliament intends to repeal the European Communities Act 1972. What it will replace it with is a matter for Parliament once it knows the terms of any proposed withdrawal agreement of the United Kingdom from the European Union.

6.75 Even more explicitly the provisions of both European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No. 2) Act 2019 make Parliament's intention clear beyond peradventure that it has not authorised the UK Government to allow the United Kingdom to leave the European Union without a deal. When and if no deal is in prospect the Executive has twice been required by Parliament to seek an extension of the withdrawal period so that a withdrawal agreement may be negotiated or other steps taken that will rule out the need for a withdrawal agreement because the United Kingdom has decided to remain as a member State of the European Union on its current terms.

6.76 The *Miller* majority analysis remains good however in confirming that as a matter of UK constitutional law the Crown/Executive has no power - whether by its action or inaction - to deprive individuals of their EU law derived rights other than with express statutory authorisation to do so.

6.77 If the UK were to leave the EU without any withdrawal agreement having been concluded this would involve a massive alteration in the EU law derived rights of individuals. What this means is that as a matter of UK constitutional law HMG cannot allow for a no deal Brexit without explicit statutory authorisation to this express effect. No such statutory authorisation exists.

6.78 What this means is that if current Prime Minister's policy is indeed one which encompasses a no deal Brexit, the Executive cannot properly or lawfully use the power of prorogation of Parliament as if to further that policy. It would in fact defeat it as if Parliament is prorogued the relevant and necessary no deal authorisation legislation will not be able to be passed in time for exit day.

6.79 In the circumstances in which we now found ourselves however - the power of prorogation having been used - the only relevant active constitutional actor are the courts which, in order to preserve individuals' EU law derived rights from the inevitable substantial diminution and/removal which would necessarily result from the Executive's action or inaction in failing or refusing to conclude a withdrawal agreement with the EU would have to pronounce a mandatory order ordaining the UK Government to exercise the United Kingdom's power as a still sovereign State under EU law power to revoke the previously given Article 50 notification.

6.80 In a representative constitutional democracy however it is far better - far more constitutionally appropriate, for the legislature rather than the courts to make any such decision to keep the Government within lawful and constitutional bounds.

6.81 In sum, the respondents say that not only is it clearly the intention of Parliament that it be sitting to determine what options it will authorise the Executive to pursue in the run up to exit day (which is a day determined by EU law not by any decision of the UK), but that the whole dynamics of the constitution require that prorogation power not be used before there has been clear statutory authority given by Parliament to the Executive re just how to proceed in the face of Exit day; whether that be to seek a further extension of exit day, revoke the Article 50 TEU notification altogether, or expressly allow for a no deal exit.

7. *MILLER I* ON THE UNENFORCEABILITY OF CONSTITUTIONAL CONVENTIONS

Constitutional Convention

- 7.1 The Appellant's position that constitutional conventions may not be subject to challenge is one that simply carries no weight in a constitutional democracy based on the rule of law. The Executive is not above the law and nor is it above political accountability from Parliament. Neither the existence of a convention nor indeed an Act of Parliament displaces the sovereignty of Parliament.
- 7.2 It is no answer at all to say simply that something is protected by constitutional convention and therefore one's power and authority are unlimited, not subject to review and for all practical purposes are exercisable with impunity. Parliament is sovereign and it must be permitted to carry out its constitutional function of holding the government to account. The powers of the executive are powers allowed to it by the constitution; they are not powers vested in it by a divine right. It is not for the executive to hide behind the Queen, claiming that the courts cannot see it as a result.
- 7.3 It is also clear - both from the terms of the Appellant's Case and, more generally, from the manner in which the UK Government under the current Prime Minister has purported to exercise its powers, notably in relation to the present prorogation of Parliament - that because this Court in *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 (Tab 39/ MS 2596) ("*Miller I*") said that constitutional convention are not enforceable as a matter of law, then for this Government thinks that gives them a licence to ignore, defy or contravene any constitutional conventions, however hallowed or long established, if they get in the way of their immediate political ends. Indeed, breaking constitutional convention seems to be a positive tactic used by this Government to wrong-foot and discomfit their political opponents and to show the country who's Boss.
- 7.4 This court in *Miller I* dismissed unanimously, as inconsistent with its vision and version of the untrammelled sovereignty of the United Kingdom Parliament, the Scottish and Welsh Governments' arguments that the statutory requirement for the United Kingdom Parliament to seek the consent of the devolved legislatures when legislating with regard to devolved matters could *ever* be legally enforceable, let alone enforceable with regard to any legislation concerning the withdrawal of the United Kingdom from the European Union.

7.5 The paradox of such a doctrine of untrammelled sovereignty is that it means that the otherwise unlimited Westminster Parliament has no *Kompetenz-Kompetenz* – it cannot bind its successors. How then does the Supreme Court account for those Westminster enactments which appear to do just that? Examples of statutory provisions which look, on their face, to be creating new constitutional rules which future United Kingdom Parliaments are *legally obliged* to respect within the context of a devolved United Kingdom include:

- Section 63A(1) of the Scotland Act 1998 (SA) which states that
“The Scottish Parliament and the Scottish Government are a *permanent* part of the United Kingdom's constitutional arrangements”.
- Section 63A(3) SA which states that
“it is declared that the Scottish Parliament and the Scottish Government *are not to be abolished except* on the basis of a *decision of the people of Scotland* voting in a referendum.”
- Section 1(1) of the Northern Ireland Act 1998 (NIA) which provides
“It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a *majority of the people of Northern Ireland* voting in a poll
- Section 28(8) SA which provides that
“But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

The Wales Act 2017 contains, in Sections 1 and 2, substantially identical provisions to Sections 28(8) SA and 63A SA. These clauses speak of the National Assembly for Wales and the Welsh Government “as a permanent part of the United Kingdom’s constitutional arrangements not to be abolished except on the basis of a decision of the people of Wales voting in a referendum” and also confirm that that “the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [Welsh] Assembly”.

7.6 These references to the *permanence* of the devolved institutions and to the United Kingdom Parliament being unable to abolish them without the consent of the relevant *demos* - whether “*the people of Scotland*”, “*a majority of the people of Northern Ireland*” or “*the people of Wales*” - expressed through a referendum, rather looks like a recognition within the United Kingdom constitution of popular sovereignty, at least within the Celtic fringe.

7.7 Yet, in his oral submissions before this court in *Miller I*, Lord Keen then as now Advocate-General for Scotland (who presented argument on all the devolution aspects in *Miller, McCord and Agnew* on behalf of the United Kingdom government) dismissed these statutory provisions as no more than “self-denying *ordinances*” which did not token any binding of future United Kingdom Parliaments. On this court’s analysis in *Miller 1*, however, they are not even that. Relying on past case law concerning constitutional conventions which had *not* been expressed in statutory form this court stated (in its majority judgment (at § 144) that “It is well established that the courts of law cannot enforce a political convention” and declares (at § 146) that “judges therefore are neither the parents nor the guardians of political conventions; they are merely observers.” And it makes no difference to this court that, in the devolution context, conventions have been written into statute. This is said in the judgment (at § 144) to constitute no more than “*legislative* [i.e. *not* legal] recognition” of a “*political* convention” which “operates as a *political* restriction on the activity of the UK Parliament”. At §149, this Court says that “the purpose of the legislative recognition of the convention was to *entrench* it as a convention.” This, however, makes no sense. There can be no “entrenchment” of any form, whether as law or convention, if the only constitutional rule which the Supreme Court is prepared to recognise is that the United Kingdom Parliament cannot bind its successors.

7.8 So, we have another paradox that when the United Kingdom Parliament appears (not least by the plain and unequivocal language in the devolution statutes) to create constitutional rules which will bind future Westminster Parliaments, the Supreme Court denies it. In defence of its constitutional vision of the *untrammelled* sovereignty of the United Kingdom Parliament, the Supreme Court claims a right effectively to override, or set at naught, such legislation of the United Kingdom Parliament by “reading down” its clear legal provisions so that they are said, by the court, to be no more than expressions of legally *unenforceable* political aspirations.

7.9 Having downgraded these statutory provisions to the status of “not law”, the court then concludes (at § 151) that the policing of its scope and the manner of operation of political conventions, even those expressed in statute, “does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.” On this court’s analysis, the United Kingdom’s constitution exists in a perpetual present. It has no past, and no future. Ultimately the United Kingdom constitution can, for this court, be nothing more

than a *description* of whatever United Kingdom Parliament does, or allows for, on any particular day.

7.10 *Miller* was essentially a case which was argued before, and decided by, the court on the basis of the *English Imperial* constitutional tradition forged in the Victorian and Edwardian age on the basis of solely English constitutional tradition and

history.¹³⁵ This court's repeated references in its judgment to Dicey make this plain.¹³⁶ And this notwithstanding that Dicey in other writings later modified his insistence on the

¹³⁵ See e.g. Dylan Lino "Albert Venn Dicey and the Constitutional Theory of Empire" (2016) 36 *Oxford Journal of Legal Studies* 751–80 at 763, 764:

"Maintaining Britain's imperial greatness represented, in Dicey's view, a dutiful continuation of its historical trajectory and fulfilment of its destiny. This notion was especially manifest in Dicey's repudiation of Irish Home Rule: it presaged the diminution of the Empire and thus 'a deliberate and complete surrender of the objects at which English statesmanship has, under one form or another, aimed for centuries': AV Dicey, 'Home Rule from an English Point of View' (1882) 42 *Contemporary Review* 66, 68.

Moreover, though Dicey liked to style himself as a 'sane' or 'stern' imperialist, he was not immune from appreciating the patriotic spirit of British imperialism. As he explained in *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan & Co 1905) at 454-5,

'[i]mperialism is to all who share it a form of passionate feeling', 'a political religion', 'a form of patriotism which has a high absolute worth of its own, and is both excited and justified by the lessons of history', which taught of English greatness.

And as the 20th century wore on, with renewed threats to the Empire from Home Rule and German aggression, Dicey participated in the fervour, insisting in his *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912* (John Murray 1913) at 24 that

'I yield to no man in my passion for the greatness, the strength, the glory, and the moral unity of the British Empire'.

All of these justifications for imperialism - self-preservation, securing the blessings of English liberty, order and peace throughout the world, and nationalistic sentiment—came together in the extraordinary closing passages of his 1915 edition of his *Introduction to the Study of the Law of the Constitution* 1915 Introduction. Normally adopting at least the façade of objectivity in his academic works, an octogenarian Dicey, with the war weighing heavily on his mind, dropped any pretence of disinterest:

'The whole of a kingdom, or rather of an Empire, united for once in spirit, has entered with enthusiasm upon an arduous conflict with a nation possessed of the largest and the most highly trained army which the modern world can produce. ... England and the whole British Empire with her have taken up the sword and thereby have risked the loss of wealth, of prosperity, and even of political existence. And England, with the fervent consent of the people of every land subject to the rule of our King, has thus exchanged the prosperity of peace for the dangers and labours of war, not for the sake of acquiring new territory or of gaining additional military glory, for of these things she has enough and more than enough already, but for the sake of enforcing the plainest rules of international justice and the plainest dictates of common humanity. This is a matter of good omen for the happy development of popular government and for the progress, slow though it be, of mankind along the path of true fortitude and of real righteousness.'

...
The 'spirit of legalism', he wrote in 'England and America' (1898) 82 *Atlantic Monthly* 441, 444.

'is the main point on which the Anglo-Saxon race has reached a stage of civilisation to which other nations have hardly attained'.

The greatest difference was between civilised and uncivilised societies, the latter basically being everywhere that was not Europe. The foremost examples of uncivilised peoples for Dicey were found in 'the East', which included India and the Middle East. These societies were far behind Europe in their processes of historical progress. In reflecting on the propriety of British imperialism in Egypt after the 1882 British intervention, Dicey confidently pronounced in 'English Popular Opinion About Egypt' (1882) 35 *Nation* 418, 419 that

'European notions of fairness and humanity are far in advance of the moral conceptions prevalent in the East. Civilisation is, after all, not a mere name.'

untrammelled sovereignty of the Union Parliament when it became a politically inexpedient and analytically unsustainable against the prospect of the Union Parliament granted “Home Rule” to Ireland.¹³⁷ In any event, Dicey did not live to see the European Union, the European Convention on Human Rights, the Nuremberg Trials, the devolution of political and legislative power within the Union, the enactment of the Equality Act 2010. Times have changed and it is time for this court to move on from its all too ready reliance upon Dicey.

For Dicey, Ireland was also low in the stages of civilisational advancement, including in its people’s preference for Catholicism: see, e.g., AV Dicey, ‘England and Ireland’ 35 *Nation* 267 (1882); AV Dicey, ‘Imperial Rule in India—I’ *The Spectator* (London, 26 August 1899) 14.”

¹³⁶ See *Miller I* (Tab 39/ MS 2596) at §43:

“Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para. 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has “the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament”.”

¹³⁷ See, e.g., C Harvie, ‘Ideology and Home Rule: James Bryce, AV Dicey and Ireland, 1880–1887’ (1976) 91 *English Historical Review* 298 at 307-8, 309:

“In September 1882, reviewing *England and Ireland* by C. G. Walpole, Dicey had condemned the Union of 1801 as perpetuating the underprivileged condition of the mass of the Irish people. A social revolution, even one accompanied by violence, was necessary to correct the imbalances in Irish society but it had been denied: instead of being allowed to work out their own stability, the Irish had been given a purely nominal representation at Westminster, and subjected to a parliamentary despotism - worse than a royal despotism as it lowered the character of the House and prejudiced the Irish against it. Agitation for repeal was therefore legitimate. The alternative, *Dicey suggested in a letter to Bryce a couple of months later, might have to be a radical change in the constitution which, as it stood, was ‘a thoroughly bad arrangement for governing countries which actually or virtually are not represented in it’. Such a change meant a type of government Dicey later referred to as ‘the Continental system’, a wide exercise of prerogative on the part of the executive, inevitably subject to the restraint of a written Constitution and a Supreme Court.* In the years 1885-6 this option continued to surface from time to time: its framework offered the only opening, in Dicey’s political theorizing, to home rule, as opposed to separatism. In a series of articles late in 1885 and early in 1886 he addressed himself to recent endorsements of American federal government by British conservative theorists, notably Sir Henry Maine in *Popular Government* (1885) he concluded that such a system, although difficult to achieve, *might well prove necessary both to check the power of party majorities in parliament and, conceivably, to provide a framework for a federal government. Home rule was the test, the nemesis of parliamentary sovereignty. Were parliament to abrogate its own authority by passing it, then wholesale constitutional reform would have to follow.*

...
In an article of November 1882, ‘Home Rule from an English Point of View’, Dicey had been reasonably sympathetic to separatism. Although he asserted that an independent Ireland would be ‘an impossibility’ in an age of large and powerful states he countervailed this argument - not altogether consistently - by arguing that perhaps an alliance between two independent states might be better than a continuation of the existing arrangement. Between then and 1886, however, the balance of this argument altered; by the latter date Dicey’s arguments had taken on a pronounced English nationalist air. He was as willing - if not more willing - than before to accept ‘fair nationalism’ as legitimate, but the welfare of the mass of the British population had now taken precedence over the welfare of Ireland as the criterion against which any proposal for secession was to be judged.”

7.11 In the Scottish constitutional tradition, previous case law is said to be binding not, as in English law, by reason of its authority, but because of the authority of its reasoning. *Miller* on the unenforceability of constitutional conventions simply does not stand up to scrutiny on this standard. There are far richer and deeper versions of constitutionalism which this court ignore at its, and the country's peril. It should take an opportunity in this case properly to grapple with them because the Government's action in this instance shows, if this court does not set out clear and fundamental limits on what the Executive can do as a matter of enforceable legal norms (rather than assuming it will show good form in honouring past or present conventions of good and proper behaviour in office) this Government will use its powers without regard to proper constitutional and democratic governance.

8. REDACTED DOCUMENTS

8.1 As is recorded at §§9-17 of the Lord President's decision in the Inner House, the Advocate General produced at 10.55pm the night before the Outer House hearing a number of documents. The documents had not previously been mentioned by the Advocate General, and the petitioners certainly had no knowledge of their existence prior to that time.

8.2 The documents (Tab 13/ MS 244) were (i) a memorandum dated 15th August 2019 from Nikki Da Costa, the Director of Legislative Affairs within the Prime Minister's office, (ii) handwritten note from the Prime Minister, (iii) a memorandum dated 23rd August 2019 from Nicky Da Costa, and (iv) a redacted Cabinet Minute. All four documents are to some extent redacted. All four documents appear to have been appended to an affidavit, but the affidavit was not lodged in the Court of Session. The documents were presented without any explanation.

8.3 The petitioners objected to the documents being allowed to be entered into process before the Lord Ordinary, noting in oral submission as follows:

“[T]hese documents are sought to be introduced by the other side in order presumably to bolster a case which says that this is non-justiciable, but they are doing it on the basis that they will seek to be relying on evidence which will not be able to be tested as to its veracity. ...[T]hat is prejudicial to us, because *what we are getting is unsworn evidence, without an affidavit, which is presumably partial - we don't know if this is the complete matter. They haven't disclosed everything. This is what they have chosen to give us to suit their case.*

I have no idea who penned these documents, when they were penned, whether it was after this case was raised. It seems it must have been, but whether it was after they

realised that the prorogation, actual prorogation as set out on Wednesday, was going to be challenged. ...

[T]his was a decision by an individual, the Prime Minister, *who refuses to give an affidavit setting out on oath his true and clear and unequivocal and complete reasons for carrying out this action of proroguing Parliament.*

....

[T]hese documents come in contravention of this court's timetable, with no explanation, justification or apology given to this court for their lateness. The documents bear on their terms to be dated 15, 16, 23 and 28 August. They could and should have been produced earlier, if they were to be being relied upon. If they are to be relied upon, this being a final hearing, it is not a matter for submissions of counsel on documents, but for proving them as to their truth, their tenor and completeness by the lodging of an affidavit. *The author of these documents in part, from the handwritten notes, is the Prime Minister. The Prime Minister has refused to put in an affidavit. There is no supporting affidavit on these documents. The evidence is therefore inadmissible.*

8.4 The Lord Ordinary repelled that objection in the following terms:

“It also appears to me to be regrettable that the documents referred to were not produced before last night. However, in my view it would be highly artificial for this court to proceed on a basis which was different on possibly material matters from the basis upon which the High Court in London will be asked to proceed and consider matters. The regard and the weight, if any, which the court should give to the documents produced is a matter for submission, it seems to me. If the petitioners are of the view that no regard should be had to them or no weight should be given to them, then it is open to them to seek to persuade the court that that is the course that the court should follow. So I am going to allow the argument and the documents to be received. Mr O’Neill, I am sympathetic to your position if you say you require an adjournment, but I appreciate there are constraints.

MR O’NEILL: There are constraints. I am not going to ask for an adjournment, my Lord. This is too important for that. I have been ambushed and I will deal with it.”

8.5 Before the Inner House the petitioners renewed their objection to the fact that the Advocate General was permitted to rely on the documents which had unilaterally been edited down and redacted by him in a procedurally irregular manner without any court involvement or authorisation, it appears the better to suit his case. This raised fundamental questions of fairness to the petitioners and more generally of justice being seen to be done in these proceedings by the public at large. The Inner House was reminded of the decision in *Scottish Lion Insurance co v Goodrich Corporation*, [2011] CSIH 18, 2011 SC 534 in which the opinion of the Court was delivered by Lord Reed holding, among other things as follows:

“[W]here a party to legal proceedings seeks to rely upon part of a confidential document (or sequence of related documents), but asserts privilege so as to prevent disclosure of the remainder.

In such a case, the privilege may be taken to have been waived on the basis that ‘a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result’ (*Paragon Finance plc (formerly National Home Loans Corp) v Freshfields* [1999] 1 WLR 1183, per Lord Bingham of Cornhill CJ, p 1188).

As these *dicta* indicate, where proceedings require to be conducted fairly, considerations of fairness may bear on an assessment of whether a person’s conduct in relation to those proceedings has been inconsistent with the maintenance of confidentiality, and whether he must therefore be taken to have waived privilege.”

8.6 The Inner House refused the petitioners application that the documents should be produced in unredacted form to the court, but simply failed to deal with the basis upon which the application was made, namely fairness to the petitioners, ensuring that justice was seen to be done and waiver. Instead the Lord President stated:

26. In a reclaiming motion, it is normal for the court to proceed on the basis of the same documents as were provided to the Lord Ordinary (*Scotch Whisky Association v Lord Advocate* 2017 SC 465, LP (Carloway), delivering the opinion of the court, at §109), although it can look at new material if it is satisfied that it is in the interests of justice to do so. Even in a case of urgency, as the present proceedings undoubtedly are, the court would not expect to be considering an application of this nature, which could have been made to the Lord Ordinary, at the stage of the Summar Roll hearing.”

8.7 The fact is that the objections to the fairness of allowing the Advocate General to lodge and rely upon incomplete and wholly unvouched documents were made before the Lord Ordinary and renewed before the Division. Those courts should have upheld the petitioners’ application but failed without any good reason to do so. Fairness demands that this court should order the release of the unredacted documents as part of its determination of the matters raised by the petition.

8.8 Counsel for the Appellant submitted before the Inner House that it would be detrimental to good government if the UK government were required to put in full unredacted copies. The answer to that is that, if they had followed due procedure by lodging these documents on time, with proper notice and after making an application to the court for their redaction, then good government would be protected. They cannot however rely on their own procedural failings in this regard.

8.9 Further, senior counsel for the Appellant told the Inner House that he had himself seen the unredacted documents and was satisfied that the redactions had been properly made on grounds of excluding irrelevant material or material covered by legal advice privilege or the Law Officers convention. But, as was pointed out by Lord Rodger in *Somerville v. Scottish Minister*, on a point on which the Appellate Committee was unanimous, fairness requires in matters of this sort that justice be seen to be done and a fair and open

procedure followed.¹³⁸ No such procedure was followed here such that the public and the petitioners can be confident that the redaction were indeed properly and justifiably made.

8.10 Of course, subsequent to this discussion before the court, the Government then chose, again selectively, to leak to Sky News elements of what was previously redacted – namely the “by that girly swot Cameron”. That redaction cannot properly have been claimed on the basis of being covered by legal advice privilege, Law Officers convention, or lack of relevance. The use of that phrase is indeed relevant to establishing the true reasons for this prorogation. It now appears to be in part a means of continuing what seems to be a continuing personal quarrel with a predecessor in office. Using the powers accruing to the office of Prime Minister to continue a personal vendetta in this way simply highlights the manner in which power is being abused. We cannot therefore take on trust the Appellant’s claims that the remaining redactions are indeed justified.

8.11 In any event, as we have noted, having lodged and relied upon before the court parts of what are said to be confidential documents, the UK Government has waived any claim to privilege in the remainder of it. A party may not waive privilege in a partial and selective manner precisely because it lead to at least the appearance of unfairness and prejudice to the other part deprived of sight of the full terms of the documentation which the Appellant

¹³⁸ *Somerville v Scottish Ministers* [2007] UKHL 44, 2008 SC (HL) 45 per Lord Rodger of Earlsferry at §§ 155-156:

155. ... [W]here the holder of documents objected to producing them on the ground of confidentiality, it would be the duty of the judge to read them and decide whether disclosure of the contents was necessary for the fair disposal of the case.

156. The procedure which should be followed was outlined recently by Lord Brown of Eaton-under-Heywood in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, a judicial review case where issues of proportionality were in play. He said (p 674, para 58)

[T]he judge should receive from the respondent and inspect the full text of the disputed documents (consistently with the practice laid down by the House of Lords in *Science Research Council v Nassé* [1980] AC 1028 p 1085F-H); if he concludes that realistically their disclosure could not affect the outcome of the proportionality challenge he will dismiss the appellant's application for inspection; if, however, he reaches the contrary conclusion he will need to consider (with counsel's assistance) the question of redaction; only then may he still need to determine the respondent's public interest immunity claim.'

Similar guidance is to be found in the speech of Lord Bingham (p 656, para 5). If the Lord Ordinary reaches the stage when she has to determine the public immunity claim, then, as laid down in *Science Research Council v Nassé*, the test to be applied is whether production of the full version of the document to the petitioners is necessary for disposing fairly of the proceedings.

would partially rely on. In these circumstances the Lord Ordinary and the First Division were wrong to permit the Appellant to rely in court on documents redacted on his own authority. Fairness demands that this court should now order the release to the respondents of the unredacted documents so that the respondents may, if so advised, rely upon these in making its case to this court for this appeal to be refused.

9. CONCLUSION

- 9.1 The respondents submits that the First Division reached the correct decision in law and correctly drew adverse inferences of fact from the Executive's conduct of and in this litigation.
- 9.2 Since, in accord with Scottish constitutional law and tradition, which may be said now to have been received into and become the common constitutional tradition of the Union, the Executive use in the circumstances of this case of its power to prorogue Parliament at this time, for this period and in these circumstances would be wholly unlawful and unconstitutional as found by the judges of the Inner House, the Appeal must be refused, and the decision of the First Division of the Court of Session upheld.
- 9.3 This will allow Parliament, if so advised, to decide when and whether to reconvene to sit and hold the Government to account in this period of deep political controversy and profound constitutional change which would result should the United Kingdom leave the European Union.

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