OUP Public Law Update (Autumn 2019) – Brexit and the Constitution III

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Constitutional discourse continues to be dominated by all things Brexit. In view of this, there are several issues to discuss here, some of which pick up discussions from the Summer 2019 update. These are:

1. The developing parliamentary context, and its implications for the Johnson-led government's efforts in relation to Brexit, and, as sub-facets of this:
    a. Use of amendments to the Northern Ireland (Executive Formation etc.) Act 2019
    b. Use of the SO24 'Emergency Debates' parliamentary process:
        i. To pass the Benn-Burt Act 2019 which requires the Prime Minister to request an extension in certain circumstances (and the erosion of the government's parliamentary position following this).
        ii. To make a humble address to procure the release of the Yellowhammer documents and disclosure of communications regarding prorogation by government personnel.
        iii. To discuss the rule of law and compliance with the 'Benn-Burt' Act – the EU (Withdrawal) Act (No. 6) 2019.
2. No Confidence Votes, Early General Elections, and the Fixed Term Parliaments Act 2011
3. Resignation of the Speaker of the House of Commons
4. The decision in *Miller and Cherry* v *Prime Minister and Advocate General for Scotland* [2019] UKSC 41 – the prorogation case
5. The pending judgment in *Vince* v *Advocate General* [2019] CSIH 51 – the Benn-Burt Act letter case
6. What now, what next? Another prorogation, a new Queen's Speech, and a Brexit Deal?

As in previous updates, although there is some crossover between the different elements, it should be possible to read each element listed above in isolation.

1. The developing parliamentary context

In previous updates I have discussed how a government need not command a majority in the House of Commons to meet that essential criterion for the continuation of government – command of the *confidence* of the House of Commons. It is possible for a government to remain in office despite it not holding a majority of the seats in Parliament by a variety of more or less formal arrangements. It may make no formal arrangements yet be confident

that it will win key votes due to the balance of views in the House. It may make a formal 'confidence and supply' agreement with a smaller party in order to guarantee that, on confidence and supply (financing for the implementation of government policy) issues, that party will vote with the government, so giving it a majority on those crucial votes. These approaches, and other variants of them, normally necessitate conciliatory behaviour on the part of government, since its control over the House of Commons is by no means secure. We have seen in previous updates how, under Theresa May's minority premiership, the government struggled to win key votes notwithstanding the confidence and supply agreement in place with the Democratic Unionist Party. Under Boris Johnson's premiership, the situation has become more challenging still.

On the question of Brexit, Parliament is clearly not divided along party political lines. Both under May and Johnson there has remained a group of MPs on the government benches who are variously opposed to Brexit *per se*, or to a so-called 'No Deal' Brexit. The politics of these positions and of the government's position is not important in a constitutional context, but the consequences of the existence of this bloc has allowed for some unusual – but not necessarily improper – uses of Parliamentary procedure to legally restrict Johnson's stated policy aim of leaving the European Union come-what-may on 31 October 2019, and to acquire information about that policy. Space precludes a detailed treatment of each element, but a summary of each will give an indication of how legal and parliamentary rules have been deployed here.

1(a). *Northern Ireland (Executive Formation etc.) Act 2019*

First, the passage of the Northern Ireland (Executive Formation etc) Act 2019 in July 2019 afforded Parliament the opportunity to limit the practical scope of the prorogation power. At present, and for over 1,000 days, Northern Ireland has not had a functioning devolved executive. The 2019 Act was originally intended to provide a legal basis for the on-going management of this situation by the UK government. However, MPs used the ordinary legislative process to introduce amendments compelling government to provide a report to Parliament by 04 September 2019, and another report by 09 October 2019, and every 14 days thereafter (see 2019 Act ss.3(1), (2)(a), (5)). Further it compelled the government to move neutral motions in the House of Commons and a similar requirement to move motions in the House of Lords (see 2019 Act, ss.3(2) and 3(3)). These things would not be possible if Parliament had been prorogued, and so by s.3(4) of the Act the government is compelled to issue a proclamation recalling Parliament. By this measure, Parliament acted to place limits on the length of the prorogation, create opportunities to debate the Brexit/EU Withdrawal process, and, it was believed – though this remains untested – prevent a prorogation spanning the Brexit deadline.

Notwithstanding the Northern Ireland Act, MPs evidently remained concerned about the prorogation question, and about the advisability of a so-called 'No Deal' Brexit. This is evident from three uses of the Standing Order 24 – or SO24 – process in early September 2019. The first sought to take control of the order paper in order to pass legislation (what became the European Union (Withdrawal) (No. 2) Act 2019), the second to facilitate the making of a humble address, and the third to encourage the Prime Minister to observe the rule of law. I will deal with these each in turn.

1(b)(i) *The Benn-Burt Act, aka the European Union (Withdrawal) (No. 2) Act 2019*

On 03 September 2019 Oliver Letwin moved a motion under SO24 in order to allow the House of Commons to take control of the order paper on 04 September 2019.[1] In simple terms, the order paper, and the business motion which validates it, is the means by which the use of time is controlled, normally by the government, in the House of Commons (see also Standing Order 14(1)). If the government controls the order paper, it can prevent opposition to its parliamentary activities. In particular, it can limit scrutiny of its activity by Parliament. Conversely, if a group other than the government controls the order paper, it can use the time it controls to – among other things, as we shall see – clear the necessary stages of the legislative process to enact statute. This is an exceptional process. The government lost the motion (328:301[2]), and in consequence the House of Commons was able to wrest control of the order paper from the government on 04 September 2019.

The Bill brought by Hilary Benn and Alistair Burt as a consequence of Oliver Letwin's address on 03 September 2019 passed all of its House of Commons stages by 7:30pm on 04 September 2019 (327:299[3]) and proceeded to the House of Lords. The Bill cleared the House of Lords parliamentary stages on 06 September 2019.[4] It is worth noting that an attempt had been made by the government on 04 September 2019 to prevent the passage of the Bill through the Lords stages by filibustering.[5] Peers resisted this attempt, debating from 3:36pm until 1:29am. By the end of this lengthy debate government conceded that the use of a business motion to prevent the passage of the Bill was inappropriate.[6] HM The Queen signified her assent to the Bill on Monday 09 September 2019.[7]

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[1] See HC Deb 03 September 2019 vol 664 col 76; and later that same evening at col 81
[2] See HC Deb 03 September 2019 vol 664 cols 132-136 division 439
[3] See HC Deb 03 September 2019 vol 664 cols 286-290 division 442
[4] See HL Deb 06 September 2019 vol 799 cols 1275-1278
[5] For a definition of filibustering, see Parliament's glossary pages here.
[6] See HL Deb 04 September 2019 vol 799 from col 1010 through to col 1136
See also discussion of guillotine motions in the Lords here.
[7] See HC Deb 09 September 2019 vol 664 col 518 and HL Deb 09 September 2019 vol 799 col 1292.

Evidently a good deal of parliamentary energy went into the passage of this Act in a short space of time, but to what effect? What does the Act require? Graeme Cowie has written an excellent summary of the effect of the Act.[8] In brief, the Act compels the Prime Minister to seek an extension of the Article 50 Brexit / EU Withdrawal process if an agreement has not been reached by 19 October 2019, by sending a letter asking for such an extension to the European Council. This is a contentious requirement since Boris Johnson has indicated his political desire to leave the European Union on 31 October 2019 come-what-may. Nonetheless, the Act creates a *legal* requirement that the letter be sent. A case was subsequently brought before the Outer Court of Session in Scotland, and then appealed to the Inner Court of Session which sought to compel compliance with the Act. This case, *Vince*, is discussed below.

It should also be noted that, to secure the passage of the Act it was necessary for a number of Tory MPs to rebel against the government. The government withdrew the whip from the 21 MPs who voted against it – essentially rendering the MPs party-less in the House. These were not just junior back benchers, but also a number of former senior ministers. The effect of this move by the Prime Minister was to reduce his effective majority to minus-43. While on some issues Johnson could count on the votes of euro-sceptic MPs from the opposition benches, it places the government in a difficult position since it cannot expect to win any votes in Parliament if opposition MPs are able to coordinate their voting activity.

Although a minority government can maintain the confidence of the House of Commons and so continue to govern, such a situation normally necessitates a different approach to governing than would be the case for a government with a healthy majority. The usual arrangements, whereby the government dominates the legislature, and monopolises most of the time available within it, are not representative of the situation for minority governments. Nonetheless, the government's interpretation of the wider political context may necessitate a politically strident attitude towards Parliament and the conduct of government business even where the parliamentary arithmetic suggests such an approach is unlikely to prove successful. In this way, the directly elected democratic institution of Parliament is, especially where the government is pursuing a policy with mixed levels of support, capable of exercising a high degree of scrutiny, and of placing limits on the scope of government's power in line with its constitutional functions (see *Miller and Cherry*, below).

1(b)(ii) *Humble Address*

On the same day that the Benn-Burt Act received Royal Assent, 09 September 2019, Dominic Grieve utilised the SO24 process to make a humble address in order to obtain information

[8] See Graeme Cowie, 'The Benn-Burt Bill: Another Article 50 Extension?' (04 September 2019) available here, the Outer House of the Court of Session also provided a summary of the Act's effects in its judgment in *Vince* v *Johnson* [2019] CSOH 77, paras. 11-23

from the government.[9] The government narrowly lost the motion on the humble address 311:302.[10]

A humble address is a means by which Parliament can seek to compel a department, or indeed the government generally, to provide papers and other documentation that it might otherwise not provide to Parliament. You may recall that Parliament had used the humble address mechanism in 2018 to compel the government to release legal advice relating to the so-called 'Irish Backstop' in Theresa May's Brexit EU Withdrawal Agreement, and later held the government in contempt of Parliament when it refused to release the advice.[11]

The September 2019 humble address requested two things. First, the Yellowhammer documents. Operation Yellowhammer is one of the emergency planning processes that may need to be implemented in the event of a so-called No Deal Brexit. It deals with, *inter alia*, how to manage food, fuel, medicine and other essential item shortages.[12] The government largely acquiesced on this point, releasing an almost completely unredacted version of the Yellowhammer planning documents.[13] There was some discussion as to whether the title of these documents had been amended prior to their release. This discussion was based on versions of the documents which had previously been leaked to the press.[14]

The other element of the humble address asked for the following information:

> "… all correspondence and other communications (whether formal or informal, in both written and electronic form, including but not limited to messaging services including WhatsApp, Telegram, Signal, Facebook messenger, private email accounts both encrypted and unencrypted, text messaging and iMessage and the use of both official and personal mobile phones) to, from or within the present administration, since 23 July 2019 relating to the prorogation of Parliament sent or received by one or more of the following individuals…"[15]

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[9] see HC Deb 09 September 2019 vol 664 col 519 and col 522

[10] See HC Deb 09 September 2019 vol 664 col 555 division 444

[11] See Hansard, HC Deb 13 November 2018 vol. 649, as discussed in the Spring 2019 update.

[12] The call of the Yellowhammer bird (*Emeriza citrinella*) is said to sound like 'a little bit of bread and no cheese', listen for yourself here.

[13] See the government's response to the humble address, including the 'Operation Yellowhammer: HMG Reasonable Worst Case Planning Assumptions', here

[14] See original story in *The Sunday Times*, Rosamund Urwin and Caroline Wheeler, 'Operation Chaos: Whitehall's secret no-deal Brexit preparations leaked' (*The Sunday Times,* 18 August 2019), available (£££ paywalled) here; and see Rosamund Urwin commenting on the title change here (Twitter) and here (Twitter)

[15] HC Deb 09 September 2019 vol 664 col 522

Concerns were raised during the debate on the address by, among others, the Attorney General about the scope of the communications element of the request (see the interchange between the Attorney General and Dominic Grieve[16]). However, the argument that it does not matter upon which device, or by which means, a communication takes place if it constitutes a communication by government employees about their government work seems compelling. Nonetheless, in a letter sent to Dominic Grieve following the passage of the humble address motion by Michael Gove, Chancellor of the Duchy of Lancaster (a member of Cabinet), the government strongly resisted any attempt to fulfil this requirement of the humble address.[17] While this might have ultimately attracted a second contempt motion from Parliament (following that made in 2018), events moved on, rendering such a process unnecessary. Said events are discussed below in relation to the judgment in *Miller and Cherry*.

I(b)(iii) *The Prime Minister and the Rule of Law*

Also on 09 September 2019, following close on the heels of Dominic Grieve's SO24 motion, Jeremy Corbyn (Leader of HM Official Opposition) moved an SO24 motion concerning the importance of ministers observing the rule of law in complying with the Benn-Burt Act.[18] The constitutional significance of the debate which ensued lay more in what went unsaid than what was said.

The Leader of the Opposition, among others, sought to extract from the Prime Minister an unequivocal commitment that he would adhere to the terms of the Benn-Burt Act, and thus avoid a so-called 'No Deal' exit from the European Union. Conversely, the Prime Minister, who was absent from the House of Commons chamber, left it to the Foreign Secretary to put the government's position. In short, the government, finding itself in office but lacking control of a sufficient number of seats in Parliament to carry its business through (recall it has no majority), sought a General Election. This, the government said, could be contrasted with the House of Commons' position of wishing 'to delay [Brexit] again.'[19] There were thought to be numerous political advantages for the government if it could secure such an outcome, and equally manifold disadvantages to expressly giving the undertaking sought by the Leader of the Opposition.

Perhaps mindful of the political benefits which might accrue to the government in these circumstances, the House of Commons, where a majority appear to be opposed to a so-called 'No Deal' Brexit, were (and, it seems, still are) also opposed to a General Election. Their opposition, it is said, will persist for so long as what they see as the spectre of a so-

[16] HC Deb 09 September 2019 vol 664 col 530
[17] See the government's response to the humble address, including the letter to Dominic Grieve, here
[18] See HC Deb 09 September 2019 vol 664 col 521 and col 560
[19] HC Deb 09 September 2019 vol 664 col 581

called 'No Deal' outcome overshadows proceedings. Their particular fear was, and perhaps still is, that an election could be called and, while that process was being carried out, the United Kingdom would leave the European Union by automatic operation of the law as it currently stands in relation to exit day (31 October 2019), and Parliament would not be capable of preventing it. This is because Parliament is dissolved ahead of a General Election.

The Benn-Burt Act sought to legally tie the hands of the government and ensure that an extension was at least requested (the legal Act of a sovereign Parliament still being politically incapable of compelling a foreign power to do anything). Yet, at the same time the government expressed a view that there might be ways of lawfully frustrating the operation of the Benn-Burt Act. The Foreign Secretary put it in the following way during the SO24 debate:

> "This Government will always respect the rule of law. That has consistently been our clear position and, frankly, it is outrageous that it is even in doubt. *Of course, how the rule of law will be respected is normally straightforward, but sometimes it can be more complex* because there are conflicting laws or competing legal advice."[20]

It was the perception that the government perhaps believed it could comply with the letter of the law without necessarily adhering to its spirit – at least as that spirit was perceived by proponents of the Benn-Burt Act – that provoked Jeremy Corbyn's SO24 motion. This concern also manifested in the case of *Vince*, which I address below. For now it is sufficient to say that the government's stated political objective of leaving the EU on 31 October 2019, and to avoid acceding to the terms of the Benn-Burt Act, appears to be diametrically opposed to the requirements of the Benn-Burt Act, and to the undertakings given to the Scottish courts by the government to comply with the provisions of the Act (see *Vince*). At the time of writing it remains unclear to what extent political rhetoric and legal rule are in conflict since the 19 October deadline specified in the Benn-Burt Act has not yet passed.

2. Fixed Term Parliaments Act 2011 and an Early General Election

As I said above, the opposition parties are *presently* opposed to a General Election, while the government *currently* would like a General Election. The shifting political sands mean that either group could reverse its position if they thought it politically expedient. The government is keen to not be seen to have broken any pledges to bring about Brexit on 31 October 2019, and the opposition parties are keen to prevent a so-called 'No Deal' Brexit occurring on 31 October 2019 (or any other day).

[20] *Emphasis* added, HC Deb 09 September 2019 vol 664 col 579

This means that the opposition, especially HM Official Opposition, are in the curious position of not wanting to take up an opportunity to enter government. In normal times HM Official Opposition is thought of as a 'government in waiting', a 'shadow' government ready to step in at a moment's notice. In our present context, as I have explained above, the opposition have their reasons for being opposed to an election at the moment. These reasons are, however, political, just as the government's desire for a General Election is also political.

Yet there is a significant legal obstacle in the way of an early election, the Fixed Term Parliaments Act 2011 (FTPA 2011). The government requires the votes of two-thirds of the total number of seats in Parliament to secure an early general election (per ss.2(1)(a), 2(1)(b), and 2(2) of the FTPA 2011). Similarly, if the opposition parties wish to unseat the government via a Vote of No Confidence (VoNC) under the FTPA 2011, then they too require a two-thirds majority (per ss.2(3)(a) and 2(4)), along with satisfying other procedural requirements (see ss.2(3)(b) and 2(5) FTPA 2011). The government's lack of a majority and the political disagreement amongst the opposition parties makes the operation of this legal mechanism difficult. This much is clear from the Prime Minister's failed attempt to secure an early General Election under the terms of the FTPA 2011 shortly after the Benn-Burt Bill, as it then was, completed its passage through the Commons.[21]

As Robert Craig has put it, 'there are numerous swirling political factors'[22] here which make it difficult to briefly unpack what might drive one side or the other to seek, or seek to resist, any of the above processes. Craig has unpacked the procedural possibilities in the event of a successful VoNC,[23] and has also considered a third option that avoids the FTPA 2011 provisions – the resignation of the Prime Minister ahead of the 19 October 2019 deadline.[24] In addition to this, readers may also wish to consult Hazell and Roukhamieh-McKinna's blog detailing the current context and defending the provisions of the FTPA 2011.[25]

Since this matter remains unsettled at the time of writing, and because it is subject to both a variety of political factors and a possible appeal from the Inner House of Session to the Supreme Court, it is difficult to say more at this point.

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[21] See HC Deb 04 September 2019 vol 664 col 291 *et seq*

[22] Robert Craig, 'What happens after a Vote of No Confidence in the PM? A route map' (28 August 2019, LSE Brexit Blog, available at https://bit.ly/2HySBV7)

[23] Robert Craig, 'What happens after a Vote of No Confidence in the PM? A route map' (28 August 2019, LSE Brexit Blog, available at https://bit.ly/2HySBV7)

[24] Robert Craig, 'What Could Happen Next if the Government Resigns Rather than Send the Letter to the EU?' (11 September 2019, *UK Constitutional Law Association Blog*, available at https://bit.ly/33xlWaR)

[25] See Robert Hazell and Nabila Roukhamieh-McKinna, 'In defence of the Fixed-term Parliaments Act' (13 September 2019, UCL Constitution Unit Blog, available at https://bit.ly/31foOry).

3. Resignation of the Speaker of the House of Commons

As if early September 2019 had not been busy enough, the Speaker of the House of Commons, John Bercow, announced his intention to resign no later than 31 October 2019 after 10 years in office.[26] After the announcement MPs made the traditional 'points of order' to commend the Speaker for his service.[27]

An election will be held amongst MPs to select a successor. The *Institute for Government* has provided a full explainer as to how a new Speaker is selected, and so I will not repeat that here.[28] The victor in that election will be 'dragged' from their seat on the backbenches to the Speaker's chair.[29]

By convention, because the Speaker remains a constituency MP, and so must win their seat during general elections, none of the main political parties field candidates against the Speaker in their constituency.

The primary constitutional role of the Speaker is to represent Parliament and to defend its interests against encroachment. As part of this, the Speaker is responsible for providing authoritative rulings on parliamentary procedure, such as in relation to the proper use of the SO24 procedure.

4. *Miller and Cherry* v *Prime Minister and Advocate General for Scotland* [2019] UKSC 41

In the Summer 2019 update I discussed, among other things, questions around whether the Prime Minister could prorogue Parliament in the teeth of an impending Brexit deadline. In particular, I considered the discussion around whether the Prime Minister could prorogue Parliament *over the period of* the deadline itself – then, and at the time of writing the present update, still 31 October 2019. The scenario discussed in the Summer 2019 update did not play out, but something similar did, and was ultimately litigated before the Supreme Court.

I do not intend to reproduce a full case note here but will instead relay the salient procedural and substantive points. All references to paragraphs in this section relate to the Supreme Court's judgment unless otherwise stated.

On 28 August 2019 Jacob Rees-Mogg, Lord President of the Privy Council, travelled to Balmoral with two other Privy Counsellors to advise the Queen to make an Order in Council

[26] See HC Deb 09 September 2019 vol 664 col 497
[27] See HC Deb 09 September 2019 vol 664 cols 498-517
[28] Alice Lilly, 'How is the Speaker of the House of Commons elected?' (13 September 2019, Institute for Government, available here).
[29] You can watch a video of the current Speaker John Bercow being dragged to the chair here.

authorising the prorogation of Parliament. The Queen duly made the order, as she was bound to do (see para. 30), and assented to a prorogation of Parliament from a date starting on or between 09 September 2019 and 12 September 2019 to run until 14 October 2019 (para. 15).

Having had some sense that these actions would be taken, Joanna Cherry MP and numerous other MPs and interested parties brought an action before the Outer House of the Court of Session in Scotland on 30 July 2019 (para. 23). Although Lord Doherty declined any interim relief (see [2019] CSOH 68 on 30 August 2019), and later on found the issue non-justiciable (see [2019] CSOH 70), he did allow appeal to the Inner House. The Inner House of the Court of Session allowed Cherry's appeal, and ruled the prorogation unlawful (see [2019] CSIH 49). The government was permitted to appeal to the UK Supreme Court (para. 24).

Two days before Lord Doherty declined interim relief in the Outer House (28 August 2019) Gina Miller (of *Miller* v *SSEEU* [2017] UKSC 5 fame) brought a case before the Divisional Court of the Queen's Bench ([2019] EWHC 2381 (QB)). You will recall from earlier updates that a Divisional Court is a special sitting of the High Court convened to consider matters thought too important to be addressed by a single judge. The application was heard by the Lord Chief Justice, the Master of the Rolls, and the President of the Queen's Bench Division. The Divisional Court, like the Outer House, dismissed the application, but granted leap-frog permission to appeal to the UK Supreme Court (para. 25).[30] Numerous parties intervened at the UKSC hearing (see para. 26).

The UKSC was asked to consider the lawfulness of the prorogation advice given to HM The Queen (not the motive of the PM in giving it, see paras 54, 58). To do so it considered that it had to address four issues (see para. 27):

1. Is this use of the prorogation prerogative justiciable? (see paras. 35-37, 52)

   The UKSC concluded that it was justiciable.

2. If it is, what standards apply to any assessment of its legality? (see paras. 38-51 and 33)

   The court found two important standards applied in this context – Parliamentary sovereignty (paras. 41-45), and the accountability of government to Parliament (see paras. 33, 46-48). This led the Court to the following formulation on the limits of the prorogation power:

   'For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to

[30] Leapfrog appeals were dealt with in the December 2016 update.

prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.' (para. 50)

3. Against those standards, was the advice lawful? (see paras. 56-61)

   The Court was not convinced by the government's argument that the 5-week prorogation ordered was necessary to facilitate a Queen's Speech and bring a new legislative programme forward (see para. 59). Instead, the Court found that this prorogation frustrated the operation of responsible government, it was 'not a normal prorogation … It prevented Parliament from carrying out its constitutional role' (para. 56), in what the court described as 'quite exceptional' circumstances (para. 57)

4. If it was not lawful, what remedy is appropriate and what are the effects of that remedy? (see paras. 62-70)

   The prorogation having breached the principles noted above, and there being no reasonable justification for the government having taken this action (paras. 58, 61), the Court considered what action it should take. The Court reasoned as follows:

   '[…] The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect … It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.' (para. 69).

   In short, the advice and the subsequent Order being unlawful, they could never authorise lawful action, and so the prorogation never legally happened. Parliament, therefore, remained in session – as if it had never been suspended.

This decision resulted in the rapid recall of both Houses of Parliament. It also created an unusual situation with one Act (the Parliamentary Buildings (Restoration and Renewal) Act

2019) that had received the Royal Assent as part of the now-unlawful prorogation ceremony. The prorogation being unlawful, it was as if the Act had never received Assent, and so Assent had to be given afresh. This took place as part of a new prorogation ceremony on 08 October 2019.[31] Whether any ramifications will follow from the inadvertent undoing of the legality of a statutory enactment by court order remains to be seen.

5. Dale Vince v *Boris Johnson* [2019] CSOH 77 and [2019] CSIH 51

I have already discussed the provisions of the Benn-Burt Act above. As I said there, and in relation to the SO24 debate on the rule of law and compliance with the terms of that Act, there was some speculation as to whether the government would decline – in good faith or otherwise – to send the letter requesting an extension under the Article 50 Brexit/EU Withdrawal process. In consequence Dale Vince, along with Jolyon Maugham QC and Joanna Cherry QC MP made an application to the Outer House of the Court of Session ([2019] CSOH 77) to ensure compliance with the terms of the Act (see paras. 1 and 5-6, but note 24 of the CSOH judgment). The petitioners pointed to statements made by the Prime Minister that suggested he did not intend to comply (see paras. 25-31), although the government had given reassurances to the Court that it would (see paras. 34, 36-38).

The case was heard by the Outer House on 04 October 2019. Lord Pentland concluded that the orders requested by the petitioners should not be made because the government had given a legal undertaking to comply with the law (paras. 42-43). Lord Pentland distinguished these statements from the 'extra-judicial' comments made by the government, reasoning that they 'must be understood in the political context in which they were made; that is as expressions of the government's political policy' (para. 44). Given the undertakings made to the court, Lord Pentland was satisfied that the government understood the need for its political policy to comply with the legal requirements of the 2019 Act (para. 46). However, he did also note the tradition of trust and respect that exists between the Court and government vis-à-vis such reassurances in this regard, and the negative consequences which would flow from an abuse of that trust (para. 45).

The case was appealed to the Inner House of the Court of Session (see [2019] CSIH 51) alongside a directly presented petition requesting the court to invoke its *Nobile officium* (*n.o.*) jurisdiction (see para. 1 CSIH). In addition to challenging the decision of Lord Pentland not to make the orders requested in the original petition (and see also para. 5), the *n.o.* petition requested further orders

a) Preventing '…any action that would undermine or frustrate … the 2019 Act'

[31] See HL Deb 08 October 2019 vol 799 col 2074, Royal Assent

b) Requiring 'specific performance … under the 2019 Act'
c) 'Preventing the Government from withdrawing, cancelling or otherwise undermining the effect of any letter sent…' (see all in para. 4).

The CSIH agreed with Lord Pentland in the CSOH that it would be inappropriate to grant the requested orders at this stage. Since the government had given an undertaking to comply, and in view of the trust the court placed in government when making such official undertakings, there could be no 'reasonable grounds for apprehending that [they] will not comply…' (para. 8). In such circumstances, it would only be after non-compliance occurred that the court would be willing to intervene (para. 8). Given that the factual 'situation remains fluid' (para. 9) – it was not, for example, clear that a letter would ever need to be sent – the court also did not think it was timely to intervene (paras. 8-9), since there had not yet been any 'demonstrable unlawfulness' (para. 10). However, the court was mindful of the compressed timescales, and that there would 'be changes in circumstances over the next 10 days' (para. 11). In view of this, the court has held over its decision on the *n.o.* petition until Monday 21 October 2019, when the factual reality of compliance or otherwise, and of the need or not for compliance, with the Benn-Burt Act will be clear.

In closing, it is worth briefly noting the principle in *R v Minister of Agriculture and Fisheries ex parte Padfield* [1968] AC 977 as expressed by Lord Reid. In short, *Padfield* makes clear that a government minister, including the Prime Minister, cannot exercise any discretionary power they possess (e.g. a prerogative power relating to treaty negotiation or the wider conduct of foreign relations) 'to thwart or run counter to the policy and objects of [an] Act' (p.1030). In circumstances where a minister has frustrated the Act, Lord Reid said the following:

> 'If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act' (pp.1032-1033).

In view of this, it is difficult to see how, were there to be a breach of the terms of the 2019 Act, that any court in the United Kingdom would decline to intervene. In so intervening, the court would merely be acting to uphold the sovereignty of Parliament by compelling the government to comply with the stated will of the legislature expressed in statute.

6. What now, what next? Another prorogation, a new Queen's Speech, and a Brexit Deal?

At the time of writing there has just been a second prorogation, effective from 08 October 2019,[32] and Queen's Speech given on 14 October 2019.[33] The government is in on-going negotiations with the European Union, and Parliament may well exceptionally sit on Saturday 19 October.[34] Little can be said with any certainty about what will happen in the coming days. If nothing else, on 21 October 2019 we will hear from the CSIH, and soon after – depending on the factual situation – we may hear from the Supreme Court on the questions raised in *Vince*.

Many of these questions that remain unanswered are political, but it is clear from the above that the law is being deployed alongside these questions. Brexit exemplifies why it is important to try to maintain a separation in your own mind between political wishes and legal reality as a public lawyer. The law tells us the current framework within which those political wishes may be considered, and it provides the mechanism to legitimately change the parameters of that framework. The law contains certain expectations and assumptions about the behaviour of key constitutional actors, the relationships between institutions, and the rights of individual citizens, and it will act to implement and/or protect these without regard to the political un/popularity of a decision. Moreover, the law may implement political wishes, and interpret the terms of that implementation within this context, but it will not do so for political reasons. The courts have frequently demonstrated themselves to be mindful of the institutional limits of their power, and considerate of the value of democratically mandated constitutional development.

In the coming days and weeks there will, nonetheless, likely be a melding of the legal and the political in popular discourse, and as public lawyers we should attempt to disaggregate these components from one another to understand the constitutional position.

T E Webb, 2019

[32] HL Deb 08 October 2019 vol 799 cols 2074-2076

[33] See HL Deb 14 October 2019 vol 800 cols 2-4

[34] Though the parliamentary calendar currently states that 'The House of Commons does not sit at weekends' on the calendar for 19 October 2019, see here, last viewed 16 October 2019